Competition Law

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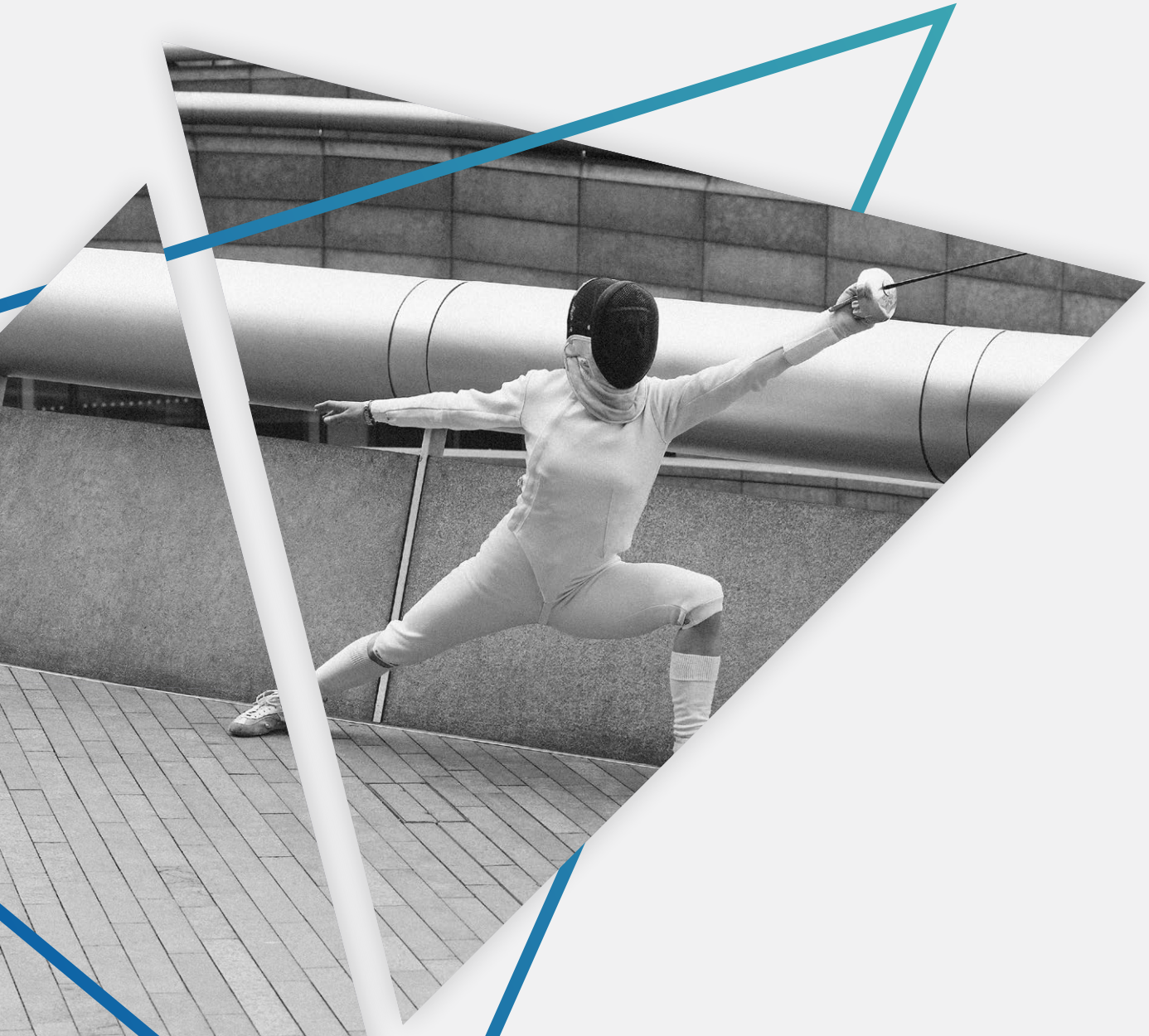

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COMPETITION LAW ALERT

When does an internal restructure need approval from the competition authorities? The Competition Commission provides its views in its draft guidelines

On 24 January 2025, the Competition Commission (Commission) published its draft guidelines on internal restructuring (Draft Guidelines). These Draft Guidelines, although not final, set out for the first time the Commission's position as to when an internal restructure requires merger control approval before implementation. This is of particular relevance to firms that hold equity investments in other businesses and which may be looking to restructure those interests in the future. The position that the Commission ultimately adopts could have an impact on business' ability to structure their groups with(out) regulatory oversight.

In describing the aim of the Draft Guidelines, the Commission states that:

> *"These guidelines have been prepared in order to provide guidance to parties on what the Commission is likely to determine to be a transaction which constitutes an internal restructuring which does not require notification to the Commission and the limited and narrow circumstances when a merger notification may be required."*

The Draft Guidelines represent a welcome step by the Commission to attempt to clarify and record certain conventions that have developed in relation to the need to obtain merger approval for internal restructurings. The Draft Guidelines are of particular interest to private equity firms and businesses involved in balance sheet investments seeking to alter their shareholding in future.

What the Commission views as an internal restructure

In its Draft Guidelines, the Commission has provided a broad description of an internal restructure as referring to *"transactions within a group of firms"*.

The notion of *"a group of firms"* is not a term found in the Competition Act 89 of 1998 (Act) and does not carry a single clear meaning. In certain circumstances there may be deviations between what the Act would consider to be firms falling within the same control structure, and the somewhat looser notion of entities *"in a group"* in general parlance.

Based on current practice, an uncontroversial example of an internal restructure would be the transferring of a 100% interest in a firm from one wholly-owned subsidiary to another. In such an instance, there is no change in market structure, the transferred firm remains under the control, albeit indirect, of its parent company and there is no substantive acquisition of control by a third party outside of even a narrow definition of the *"group"*. In other words, despite the direct acquisition of control that arises when the firm is transferred to a sister subsidiary, the lack of structural change is recognised and no notification is expected by the Commission.

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When will the Commission (not) require notification of an internal restructure?

The Draft Guidelines seek to clarify or expand on the basis for the convention described above. The Draft Guidelines state that, in general, an intra-group transaction will only be notifiable where it changes the control rights of external minority shareholders. The precise meaning of *"external"* is not reflected in the Draft Guidelines, but according to the Commission, such external shareholders are usually minority shareholders who have negative control rights in one or more firms within a group of companies (classically through the ability to veto certain control-relevant special resolutions). According to the Draft Guidelines, where an intra-group transaction does not affect the control rights of such external minority shareholders, it will not be notifiable to the Commission.

The specific guidance provided by the Commission to assess whether a transaction constitutes an internal restructuring reflects this focus on the rights of minority shareholders as follows:

> *"where the proposed restructuring would amount to a change or an acquisition of control in line with the instances listed in section 12(2)(a)–(g) of the Act and thus changing the control rights of external minority shareholders;*
>
> *where the proposed restructuring results in a loss or gain of any form of negative control by a shareholder that is not part of the group of companies; and*
>
> *where there is an external shareholder who has minority rights conferring control, for example through veto rights in one or more firms within a group of companies, whose control rights will be changed by the transaction."*

The Draft Guidelines helpfully clarify that the Commission considers the minority rights conferring control to be the expected and accepted suite of rights, such as vetoes over the approval of annual budgets and business plans and the appointment or removal of executives.

The guidance provided by the Commission is a mixed bag. Where it clarifies and records existing practice through some relatively uncontroversial principles, it is to be welcomed. For example, it is clear that new acquisitions of control by minority shareholders should be viewed as mergers. In this sense, it seems to recognise the practical challenge that there is often an over-emphasis on the question of whether ultimate control continues to reside with a majoritarian *"ultimate controller"*, which risks missing important substantive increases in rights for minority shareholders.

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Possible unintended consequences flowing from the Draft Guidelines

The Draft Guidelines do raise some interesting questions that may go further than the current merger control case law. For instance:

- Do the Draft Guidelines consider a transaction to be an internal restructure in circumstances where a firm in an intra-group transaction acquires a different form of control in terms of section 12(2) of the Act? The Draft Guidelines often refer to the notion of a "*change*" in control rights – whereas the Act itself is very clear when it defines a merger as arising only where a firm "*acquires*" or "*establishes*" control.
- The Draft Guidelines suggest that a falling away of control on the part of a minority shareholder might render a transaction a merger without enquiring whether there has been a concomitant establishment or acquisition of control. Would the Commission still require merging parties to notify an intra-group transaction in circumstances where an external shareholder loses control but where there are still multiple other remaining external shareholder controllers?
- Would the Commission require merging parties to notify an intra-group transaction where an external shareholder loses control but the control structure has been notified to and assessed by the competition authorities previously?

In terms of the Act, the Draft Guidelines, when finalised, are not binding but would need to be taken into consideration when applying the Act. Comments on the Draft Guidelines are open until 21 February 2025 and can be accessed here.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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