



# CORPORATE & COMMERCIAL ALERT

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### DEAL OR NO DEAL? 9 QUESTIONS TO ASK WHEN DOING AN M&A DEAL

In South Africa's highly regulated corporate environment, anyone wanting to implement a transaction will have to keep their wits about them in making sure that all the relevant legal requirements are met. To help you do just that, we have compiled a list of some of the important legal questions you should be asking before "sealing the deal".

# DEAL OR NO DEAL? 9 QUESTIONS TO ASK WHEN DOING AN M&A DEAL

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This list is certainly not exhaustive and is not intended to be a detailed explanation of each item, but we do hope it makes you look smarter and scores you some points in the boardroom.

#### **Is the transaction subject to takeover law?**

For takeover law to be applicable, two requirements must be met. Firstly, the transaction must constitute an "affected transaction" and secondly, the company in question must be a "regulated company".

Affected transactions are listed in s117(1)(c) of the Companies Act, No 71 of 2008 (Companies Act) and include, amongst others, all "fundamental transactions" (more on this in question 3).

The definition of a "regulated company" can be found in s118(1) of the Companies Act. While all public and state-owned companies (subject to a few exceptions) are automatically regulated companies, a private company is currently only regulated if it specifically elects to comply

with takeover law in its memorandum of incorporation or if more than 10% of its securities have been transferred in the last 24 months (unless those transfers were between related persons, as defined in s2 of the Companies Act).

#### **Does the transaction trigger any regulatory approvals, consents and/or registrations?**

The transaction may require the approval of the relevant South African competition authorities, without which it cannot be implemented.

Other regulatory requirements may also be triggered, such as exchange control approval by the South African Reserve Bank, a regulator having to consent to a change of control of an entity involved in the transaction or a licence having to be transferred to a different entity pursuant to the implementation of the transaction. Listed entities will also need to be mindful of any requirements imposed by the JSE Listings Requirements.

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Although not strictly a pre-implementation requirement, the transaction may need to be registered with the Broad-Based Black Economic Empowerment Commission as a "major B-BBEE transaction" under the Broad-Based Black Economic Empowerment Act, No 53 of 2003.

#### **Is the transaction a "fundamental transaction" in terms of the Companies Act?**

The Companies Act imposes special requirements where companies enter into "fundamental transactions", namely:

(i) the disposal by a company of all or a greater part of its assets or undertaking; (ii) amalgamations or mergers; and (iii) schemes of arrangement (in terms of sections 112 to 115 of the Companies Act). For example, all fundamental transactions must be approved by special resolution at a duly constituted meeting of the shareholders.

#### **Does the transaction involve a share repurchase?**

If a company buys back any of its securities, the payment of the repurchase consideration by the company to its shareholder (the seller) requires compliance with the usual requirements for a distribution, including the application by the board of the solvency and liquidity test (as required by s48 read with s46 of the Companies Act).

Certain repurchase transactions attract additional requirements in terms of s48(8) of the Companies Act. For instance, if a repurchase of securities, alone or as part of a series of integrated transactions, constitutes an acquisition by the company of more than 5% of the issued shares

of a particular class, compliance with the requirements of sections 114 and 115 of the Companies Act is required. This entails, amongst other things, the circulation of an independent expert report to the shareholders of the company and the approval of the repurchase transaction by special resolution at a duly constituted meeting of the shareholders.

#### **Does any aspect of the transaction constitute "financial assistance" in terms of the Companies Act?**

If a company wishes to provide financial assistance (for example, by advancing a loan) to: (i) any person, for purposes of the acquisition of securities in that company; or (ii) any related person, for any reason whatsoever, such financial assistance cannot be given until the shareholders have approved it by special resolution and the board has successfully applied the solvency and liquidity test set out in s4 of the Companies Act.

#### **Does the transaction trigger any pre-emptive or similar rights?**

Most companies have pre-emptive and/or similar rights in their memoranda of incorporation which restrict the disposal of issued shares in that company. In other words, a transferee may be obliged to offer its shares to the other shareholders before being allowed to transfer those shares to a third party on the same terms and conditions.

The Companies Act also affords existing shareholders a right of pre-emption in respect of any new shares which a private company proposes to issue (in terms of s39(2)).

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CONTINUED

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## **Does the transaction involve a share subscription?**

Shares must always be issued for "adequate consideration", as resolved by the board in terms of s40(1)(a) of the Companies Act.

Shareholder approval may also be required where a company issues shares. For instance, let's say Company A has 100 class A shares in issue, each entitling the holder to 1 vote (Existing Shares). Company A wishes to issue a further 35 class A shares (New Shares). The voting power of the New Shares constitute 30% or more of the voting power of the Existing Shares, which triggers the requirement to obtain approval of shareholders of Company A on the issuance of the New Shares by special resolution (in terms of s41(3) of the Companies Act).

## **Does any director of any company involved in the transaction have a personal financial interest in the transaction?**

If a director has a personal financial interest in the transaction, that director must declare the nature of that personal

financial interest to the remaining members of the board, following which that director must recuse himself from any decision pertaining to the transaction.

If a director with a personal financial interest in the transaction does not disclose such interest and does vote on a decision pertaining to the transaction, the shareholders may ratify that director's vote by way of ordinary resolution.

## **Does the transaction trigger any third party consents?**

A company may have entered into a contract with a third party in terms of which, for instance, a change of control of the company or the assignment by the company of its rights and obligations under the contract to a different entity, is prohibited. If this is the case, appropriate steps will have to be taken, depending on the exact language of the contract. For example, the counterparty to the contract may have to give written consent to the transaction before it can be implemented.

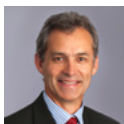
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