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# CORPORATE & COMMERCIAL ALERT

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### Are mandatory offers always mandatory?

The acquisition of a beneficial interest in securities of 35% or more in a regulated company, as contemplated by section 123(2) of the Companies Act 71 of 2008 (Companies Act), triggers a mandatory offer by the person or persons in whom the beneficial interest vests, to the holders of the remaining securities in that regulated company. While it is fairly straightforward to determine indirect share transactions when a mandatory offer is triggered, the scenario of indirect acquisitions of control is unclear.

## Are mandatory offers always mandatory?

Whilst the position in respect of an acquisition of direct control in a regulated company seems to be quite clear, a murky and uncertain one exists in respect of an acquisition of indirect control in a regulated company.

The acquisition of a beneficial interest in securities of 35% or more in a regulated company, as contemplated by section 123(2) of the Companies Act 71 of 2008 (Companies Act), triggers a mandatory offer by the person or persons in whom the beneficial interest vests, to the holders of the remaining securities in that regulated company. While it is fairly straightforward to determine indirect share transactions when a mandatory offer is triggered, the scenario of indirect acquisitions of control is unclear.

For example, assume Company A has a controlling interest in Listco B. Company C then acquires all the shares in Company A (but acquires no shares directly in Listco B). Assume too that for various reasons a mandatory offer is not triggered under the related party rules in regulation 83 of the Companies Regulations nor under the pyramid rules in regulation 85 of the Companies Regulations.

Section 123 applies where:

"(2) ...

(a) either—

(i) ...; or

(ii) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired a beneficial interest in voting rights attached to any securities issued by a regulated company;

(b) ...; and

(c) as a result of that acquisition, together with any other securities of the company already held by the person or persons contemplated in paragraph (a) (ii), they are able to exercise at least the prescribed percentage of all the voting rights attached to securities of that company."

Company C will not acquire a direct interest in Listco B as a result of the transaction. Instead, Company C will acquire an indirect controlling interest in Listco B, as a result of acquiring 100% of Company A. Whilst the position in respect of an acquisition of direct control in a regulated company seems to be quite clear, a murky and uncertain one exists in respect of an acquisition of indirect control in a regulated company.

A key question is whether post the implementation of the transaction, Company C (as the new sole shareholder of Company A) will hold a "beneficial interest" in Listco B for the purpose of section 123.

"Beneficial interest" is defined in section 1 of the Companies Act as:

"when used in relation to a company's securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

(d) receive or participate in any distribution in respect of the company's securities;

## Are mandatory offers always mandatory?...continued

Other jurisdictions, such as the UK, have specific guidance on this aspect of indirect acquisitions of control, where it is referred to and dealt with as the "chain principle".

- (e) *exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or*
- (f) *dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities..."*

It is clear that after the transaction, Company A will remain the registered and beneficial owner of the Listco B shares, and the holder of the voting rights attached thereto.

There are cogent arguments that could be made in support of a contention that for purposes of section 123, Company C should be considered to hold a beneficial interest in the Listco B shares held by Company A – mainly in that effectively, Company C has the same level of control as a direct shareholder. However, there are also cogent arguments to the contrary – that Company C should not for purposes of section 123 be considered to have a

"beneficial interest" in the Listco B shares, merely by virtue of the fact that Company A is its wholly-owned subsidiary and that it is therefore able to control the constitution of its board. After all, Company A is a separate juristic person and its board must act in the best interests of Company A when exercising the voting rights attached to the Listco B shares.

In any event, even if Company C was considered to hold such a beneficial interest in Listco B, such beneficial interest should not confer on Company C the actual legal ability to exercise the voting rights attaching to the Listco B shares, as envisaged in section 123(2)(a)(c).

Other jurisdictions, such as the UK, have specific guidance on this aspect of indirect acquisitions of control, where it is referred to and dealt with as the "chain principle". It is hoped that clarity will be brought to the situation in our takeover law by future amendment to the Companies Act and/or the regulations thereunder.

*Yaniv Kleitman, Boipelo Diale and Murendeni Mashige*

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## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselning**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselning@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Roelf Horn**  
Director  
T +27 (0)21 405 6036  
M +27 (0)82 458 3293  
E roelf.horn@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jerain Naidoo**  
Director  
T +27 11 562 1214  
M +27 (0)82 788 5533  
E jerain.naidoo@cdhlegal.com

**Jo Nesper**  
Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E jo.nesper@cdhlegal.com



CLIFFE DEKKER HOFMEYR

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Francis Newham

Executive Consultant  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

### Allan Reid

Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

### Megan Rodgers

Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E megan.rodgers@cdhlegal.com

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

### Chart Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E chart.williams@cdhlegal.com

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### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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