

**ACTING IN CONCERT
AND COLLABORATIVE
SHAREHOLDER
ENGAGEMENT,
SOUTH AFRICA**





Introduction

Principle 2 of the Principles for Responsible Investment (PRI) encourages signatories to be active owners and to incorporate environmental, social and governance (ESG) issues into their ownership policies and practices. Principle 5 states: "We will work together to enhance our effectiveness in implementing the Principles".

One of the ways that PRI signatories may wish to implement the principles set out above is through collaborative engagement, which involves groups of investors working together to influence the ESG practices and/ or improve ESG disclosure of investee companies. This sort of collaborative engagement often helps institutional investors combine their knowledge and resources, reduce engagement costs and maximise the possibility that the company will engage with them constructively.

In South Africa, stewardship and collaborative engagement is a particularly important mechanism for responsible investors to influence companies to more effectively manage ESG risks.

Regulation 28 of the Pensions Fund Act 1956 states that a fund and its board must consider any factor which may materially affect the sustainable long-term performance of the asset, including, but not limited to, those of an environmental, social and governance character.

In 2019, the Financial Sector Conduct Authority issued a Guidance Note to provide clarity on compliance with Regulation 28. This guidance note highlights that a 'fund should reflect in its investment policy statement how its general investment philosophy and objectives seek to ensure the sustainability of its assets'. This appears to give significant flexibility to funds and their boards as to how they consider ESG factors. Stewardship and collaborative engagement on ESG issues may be one way for funds to consider and ensure the sustainability of assets.

In addition, the Code for Responsible Investing in South Africa (CRISA) was launched in 2011 to guide institutional investors on how to incorporate ESG considerations into investment analysis and activities. The purpose of CRISA is to form part of an effective governance framework in South Africa.

Recent corporate failures and governance scandals in South Africa have highlighted the importance of CRISA and the role of institutional investors in actively engaging with investee companies and being effective stewards of capital.

Principle 3 of CRISA states, 'Where appropriate, institutional investors should consider a collaborative approach to promote acceptance and implementation of the principles of CRISA.' However, in many jurisdictions, certain types of collaboration or co-ordination by shareholders in a company may trigger regulatory requirements. It is therefore important for institutional investors who wish to participate in collaborative engagement to have a clear understanding of what regulatory outcomes their collaborative efforts may trigger.

An important consideration when developing a strategy for collaborative engagement among institutional investors is whether the proposed actions may be deemed to constitute acting in concert and thus result in certain regulatory requirements being triggered, including, for instance, the requirement for the institutional investors involved to make a mandatory offer to acquire the shares of the remaining shareholders of the investee company.

Indeed, CRISA also states that ‘parties should be aware of the consequence of acting in concert in terms of applicable legislation’.

In 2010, the PRI produced guidance to provide greater clarity to institutional investors on the regulatory environment for collaborative engagement, particularly in relation to the takeover provisions of the South African Companies Act. This was produced following discussions between the PRI South Africa Network Engagement Working Group and the Takeover Regulation Panel.

The expression to ‘act in concert’ is defined in the South African Companies Act ‘as any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer’.

While the South African Companies Act has historically been the key area of investors’ concerns when engaging collaboratively on ESG issues, there are other areas where acting in concert or similar behaviour could trigger regulatory requirements including disclosures required under the listing rules or the regulations to the Companies Act; regulations against market abuse; competition/ anti-trust rules; and rules aimed at preventing asset stripping. These are discussed in detail below.

In many cases, collaborative engagement on ESG issues by shareholders is unlikely to trigger regulatory requirements.

The following sections cover the key regulations regarding collaborative engagement and acting in concert/ market abuse. Requirements with more limited application, such as free float listing rules, are not covered.



DISCLOSURE RULES

Disclosure rules that apply to certain regulated companies (including public listed companies) often require that shareholdings over a certain level are disclosed to the company and/ or the market. Where this is the case, the shareholdings of two or more shareholders may be aggregated where, for example, they agree to co-ordinate the use of their voting power in the company. The rationale for this requirement is that a proper functioning market should include transparency about share ownership so that no one can gain an advantage by having selective access to this information. It is also aimed at ensuring the ownership/ control of public companies is not disguised.

MARKET ABUSE RULES

Trading on the basis of knowledge of others' voting/ trading intentions where this amounts to inside information could amount to market abuse under the South African Financial Markets Act. While this is not necessarily a bar to effective collaborative engagement in practice, it is important appropriate safeguards for managing inside information are in place. The rationale for restrictions on trading of inside information is that in order to maintain the integrity of the market, participants in the market should, as far as reasonably possible, have parity of information. To promote fair and effective markets, participants in the market must trade based on information accessible to the whole market.

Any person guilty of an insider trading offence in terms of section 78(1), (2) or (3) of the Financial Markets Act is liable to pay an administrative sanction not exceeding:

- the equivalent of the profit that the person, such other person or such insider, as the case may be, made or would have made if he or she had sold the securities at any stage, or the loss avoided through such dealing;
- an amount of up to ZAR 1 million, which amount is subject to an annual adjustment to reflect the consumer price index, plus three times the amount referred to in the first point above;
- interest on the above amount; and
- the costs of the regulators in bringing enforcement action, including investigation costs.

TAKEOVER MANDATORY OFFER RULES

The takeover provisions of the South African Companies Act (read with the regulations to it) provide that should a person (or persons acting in concert) acquire a certain percentage of a firm's shareholdings, they are required to make an offer for the purchase of the other shares in the company. These provisions ensure equal treatment of shareholders and in particular the protection of minority shareholders by ensuring they receive the benefit of offers made to controlling or majority shareholders. Similar to the other rules described above, where persons are acting in concert their shareholding may be aggregated for the purposes of calculating whether a mandatory offer is required to be made.

For parties to be considered to be acting in concert, section 117 of the Companies Act requires an agreement between or among two or more persons 'in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction

or offer'. Typically, engagement on ESG matters such as meetings and calls between investors in the company concerned will not amount to acting in concert, provided the purpose of the collaboration is not co-operation for the purpose of entering into or proposing an affected transaction or offer. The phrase has been interpreted in two ways:

- According to the wide interpretation favoured by the *High Court in Securities Regulation Panel v MGX Holdings Ltd*¹, the definition of 'act in concert' does not require that the purpose of the agreement be the acquisition of control. Instead, there need only be co-operation by the parties (pursuant to an agreement) which has as its purpose the entering into or proposal of an affected transaction (i.e. a transaction which would have the effect of vesting 'control'). It is not necessary that the co-operation serve the purpose of gaining control, though it may intentionally or unintentionally have that effect.
- A more restrictive interpretation enjoys greater judicial support and has been endorsed both by academic commentators as well as the Takeover Regulation Panel (TRP) and Supreme Court of Appeal.² According to this interpretation, a concert act must be aimed at achieving control since an affected transaction is by definition a transaction that confers control. A 2015 ruling by the TRP in *Remgro Limited v Mediclinic International Limited and Al Noor Hospitals Group PLC*³ also narrowed the focus of the inquiry to the purpose of the agreement between the parties rather than their co-operation more generally. *Gold Fields Limited (Gold Fields) v Harmony Gold Mining Company Limited (Harmony)* discussed below, applied the restrictive approach.
- It is worth bearing in mind that when identifying the purpose of an agreement, the weight of authority is that one must look at the immediate or direct purpose and not the 'ultimate purpose'. While an agreement may form part of a series of steps designed to achieve the ultimate purpose of entering into a proposed

transaction, there is only a concert act if there is action taken pursuant to an agreement that itself has as its direct purpose the entering into or proposing of an affected transaction.

- Importantly, the purpose of an agreement is also distinct from its effect. Further, identifying the direct or immediate purpose of an agreement is complicated by the reality that a single agreement can have multiple purposes and each party to the agreement might conceive of the agreement's purpose differently.

The PRI South Africa Network Engagement Working Group previously held discussions with the TRP. From these discussions, the PRI South Africa Network Engagement Working Group understands that the TRP's view is that one party will not be a concert party of another party by reason only of them coming together merely to discuss matters of mutual interest or to share their views and concerns about particular companies.

COMPETITION/ ANTI-TRUST

The participation of competitors in organised associations or industry associations, is not per se prohibited by the Competition Act; however, competition authorities continue to view such participation with some suspicion as they may provide a platform for firms to engage in anticompetitive information exchange. It is generally accepted the exchange of information between competitors can be problematic in circumstances where it would facilitate collusion and result in the contravention of the horizontal prohibited practices provisions of the South African Competition Act. From a competition law perspective, 'information exchange' refers to sharing information that has a particular economic value to a firm such as, for example, information relating to prices, output, costs or its business strategy. In order to assist business to better understand the boundaries within which certain information may be exchanged between competitors, on 14 July 2017, the South African Competition Commission issued guidelines on

¹ Unreported WLD Case No. 16026/ 03: 23 June 2004.

² See: *Bock & Others v Duburoro Investments (Pty) Ltd 2004 (2) SA 242 (SCA); Rand Gold and Exploration Co Ltd & Another v Fraser Alexander Ltd & 18 Others (unreported WLD: 6 September 1994, Case No. 21801/ 94).*

³ *Remgro Limited v Mediclinic International Limited and Al Noor Hospitals Group PLC (order issued: 14 December 2015).*



exchange of information between competitors. We discuss these principles in detail in the pages to follow which deal with section 4 offences.

CHANGE IN CONTROL OF REGULATED FINANCIAL SERVICES FIRMS

Many jurisdictions require investors holding more than a certain percentage of shares in certain regulated financial institutions to be approved by a regulatory authority. The rationale for this requirement is that the financial services sector is a strategically important sector of the economy where it is crucial the controllers of financial services firms are fit and proper, and in particular are prudentially sound.

Where shareholders or potential shareholders are deemed to act in concert, their shareholdings may be aggregated for the purposes of determining whether regulatory approval is needed. Approval might, as a result, be required where it would not be needed if the shareholders were not acting in concert.

ACTING IN CONCERT SCENARIOS

The table below considers a number of scenarios and whether these scenarios would amount to acting in concert or insider trading for the purposes of the JSE Limited Listings Requirements (JSE LR), the Financial Markets Act, 19 of 2012 (FMA) and the Companies Act, 71 of 2008 (Companies Act) and regulations in terms of the Companies Act (Regulations).

Please refer to the table which follows and sets out in greater detail the South African legal and regulatory framework applicable to collaboration or co-ordination by shareholders in a company, including the relevant provisions dealing with shareholders acting in concert. The analysis of the scenarios is based on the description provided but the actual application of the relevant law/

regulation will depend on the specific facts that apply. It is, therefore, possible that changes or nuances in the fact pattern could change the analysis in relation to a scenario.

Whether acting in concert or insider trading triggers a requirement under the JSE LR, the FMA, the Companies Act and the Regulations will depend on whether the company subject to the shareholder engagement is in the scope of the requirements and whether a relevant threshold is triggered by the amalgamation of shares/ voting power.



| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|--|--|---|--|--|
| 1. | <p>Several investors agree to join a working group to engage with a number of companies that they are shareholders in on specific issues (e.g. the environmental impact of plastics on oceans) and agree in writing to terms of reference for the group.</p> <p><i>The terms of reference include the objective of engaging with the companies to promote more sustainable approaches to plastics to reduce their environmental impact on oceans.</i></p> <p><i>Potential activities for the group described in the terms of reference include dialogue with companies (including meetings/ calls with the company and signing joint letters) but not activities such as filing resolutions with companies on the issue or voting against/ for directors depending on their view of the company's approach to its environmental impact on plastics in the oceans.</i></p> | <p>The JSE LR would not be applicable in this scenario, as the actions contemplated do not include the filing, and voting in respect of, resolutions of the company.</p> | <p>The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information.</p> | <p>On the set of facts presented, it is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Cartel behaviour as embodied in price-fixing, dividing markets and collusive tendering is considered to be the most egregious competition law violation. It is outright prohibited for competitors to fix prices, divide markets (agreements not to compete with one another) or to collude for tenders. It is important to note that outside of the collusive behaviour set out above, section 4(1)(a) would regulate any interactions or co-ordination between competitors.</p> <p>In order to allege a contravention of section 4(1)(a), a complainant would be required to show the conduct under scrutiny substantially lessens or prevents competition. The respondents in a section 4(1)(a) complaint then need to show there are efficiency, procompetitive or technological gains resulting from the agreement which outweighs the anticompetitive effect thereof. Notwithstanding the above and as stated herein elsewhere, the competition authorities do not necessarily frown upon collaborative conduct which would result in objectively determinable efficiencies that apply to the general workings of the industry and are not related to price or strategy. The factors that influence price differ from market to market; therefore, when in doubt with regard to whether a principle forming the subject of collaborative conduct is directly or indirectly related to the price of a product or commercial strategy, the investors ought to seek advice. Examples of non-price collaborative conduct relate to issues such as improvement of investment decisions, benchmarking best practices and more precise knowledge of market demand.</p> |
| 2. | <p>Same as scenario 1, but the formation and objectives/ planned activities of the group are agreed orally only.</p> | <p>The JSE LR would not be applicable in this scenario, as the actions contemplated do not include the filing and voting in respect of resolutions of the company.</p> | <p>The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information.</p> | <p>On the set of facts presented, it is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Cartel behaviour as embodied in price-fixing, dividing markets and collusive tendering is considered to be the most egregious competition law violation. It is outright prohibited for competitors to fix prices, divide markets (agreements not to compete with one another) or to collude for tenders. It is important to note that outside of the collusive behaviour set out above, section 4(1)(a) would regulate any interactions or co-ordination between competitors.</p> <p>In order to allege a contravention of section 4(1)(a), a complainant would be required to show the conduct under scrutiny substantially lessens or prevents competition. The respondents in a section 4(1)(a) complaint then need to show there are efficiency, procompetitive or technological gains resulting from the agreement which outweighs the anticompetitive effect thereof. Notwithstanding the above and as stated herein elsewhere, the competition authorities do not necessarily frown upon collaborative conduct which would result in objectively determinable efficiencies that apply to the general workings of the industry and are not related to price or strategy. The factors that influence price differ from market to market; therefore, when in doubt with regard to whether a principle forming the subject of collaborative conduct is directly or indirectly related to the price of a product or commercial strategy, the investors ought to seek advice. Examples of non-price collaborative conduct relate to issues such as improvement of investment decisions, benchmarking best practices and more precise knowledge of market demand.</p> |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|---|---|--|---|---|
| 3. | <p>A number of investors agree to join a working group to engage with several companies that they are shareholders in on specific issues (e.g. the environmental impact of plastics on oceans) and agree in writing to terms of reference for the group.</p> <p>The terms of reference include the objective of engaging with the companies to promote more sustainable approaches to plastics to reduce their environmental impact on oceans.</p> <p>Potential activities for the group described in the terms of reference include dialogue with companies (including meetings/ calls with the company and signing joint letters), filing resolutions with companies on the issue and voting against/ for directors depending on their view of the company's approach to its environmental impact on plastics in the oceans.</p> | <p>The JSE LR would not be applicable in this scenario as the activities contemplated by the group do not include voting on resolutions dealing with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | <p>The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information. While it is an offence to encourage or discourage another person from dealing in securities relating to the inside information, the kind of conduct contemplated in this scenario is unlikely to meet the threshold.</p> | <p>It is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. However, certain 'pooling' arrangements between shareholders may trigger a merger notification obligation where such agreements between shareholders relate to strategic matters and the appointment of key staff such as CEOs. In order to mitigate risk, the investors ought to seek advice on each specific scenario of joint voting to rule out the above.</p> |
| 4. | <p>Same as scenario 3, but the formation and objectives/planned activities of the group are agreed orally only.</p> | <p>The JSE LR would not be applicable in this scenario as the activities contemplated by the group do not include voting on resolutions dealing with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | <p>The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information. While it is an offence to encourage or discourage another person from dealing in securities relating to the inside information, the kind of conduct contemplated in this scenario is unlikely to meet the threshold.</p> | <p>It is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions.</p> |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|--|---|---|--|---|
| 5. | <i>A number of investors sign a letter to a company they are shareholders in asking the company to set a target for greenhouse gas emissions reductions.</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information. | It is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |
| 6. | <i>A number of investors have a meeting with or call each other to discuss labour rights issues at a company they are shareholders in.</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information. Depending on whether the information is public and how material it is, it may constitute inside information. It is not an offence to have the meeting/call provided those attending have disclosed to each other that the information being discussed is inside information. | It is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |
| 7. | <i>Three investors meet with a company they are shareholders in and encourage it to improve labour rights within their operations and to disclose information related to labour rights issues on an annual basis.</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | The relevant provisions of the FMA are not applicable, provided the information shared among the parties does not constitute inside information or trading in the securities of the companies in question while in possession of inside information. | It is unlikely this would constitute acting in concert for the purposes of the Companies Act and the Regulations as there does not appear to be any agreement to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|---|---|--|--|--|
| 8. | <i>An investor met with a company to discuss water use in its supply chain. This investor then shares their notes on the call with a group of other investors.</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | The relevant provisions of the FMA are not applicable provided the information shared does not constitute inside information. If the information does constitute inside information, the disclosure thereof could amount to an offence unless: (i) the information was disclosed because it was necessary to do so for purposes of the proper performance of such person's functions of his or her employment, office or profession; and (ii) the party disclosing the information notified the recipients that such information constitutes inside information. | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Please see our comments in scenario 1 above. |
| 9. | <i>A number of investors in a company meet to discuss the impact of deforestation on the company and discuss how their organisation intends to vote at the company's AGM (without making any agreement as to how to vote).</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | This is unlikely to trigger the provisions of the FMA. However, to the extent that the information about how these investors plan to vote is: (i) non-public; and (ii) likely to have a material effect on the price or value of the company's securities, the information may constitute inside information and the investors may, among other things, be restricted from trading the company's shares until such information has been made public. | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Please see our comments in scenario 1 above. |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|--|--|---|--|--|
| 10. | An investor makes public before a company's AGM that they will vote for a resolution for the company to adopt a responsible sourcing policy. | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | <p>This does not constitute inside information, provided the information has been made public as understood in the FMA. The FMA defines information as being made public in circumstances which include, but are not limited to when the information: (i) is published in accordance with the rules of the relevant regulated market; (ii) is contained in records which by virtue of any enactment are open to inspection by the public; (iii) can be readily acquired by those likely to deal in any listed securities to which the information relates or can be readily acquired by those likely to deal in any listed securities of an issuer to which the information relates; or (iv) is derived from information which has been made public.</p> <p>This would have to be assessed on a case-by-case basis to ensure the statement by the investors does not fall foul of the FMA's prohibition on creating a false or deceptive appearance of the demand for, supply of, or trading activity in connection with a company's securities. In respect of securities traded on a listed market, it is an offence to make or publish any statement (promise or forecast) which is false, misleading or deceptive.</p> | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |
| 11. | An investor tells a limited number of other investors before a company's AGM that they will vote for a resolution for the company to adopt a responsible sourcing policy. | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | <p>This is unlikely to trigger the provisions of the FMA.</p> <p>However, to the extent that the information about how these investors plan to vote is: (i) non-public; and (ii) likely to have a material effect on the price or value of the company's securities, the information may constitute inside information and the investors may, among other things, be restricted from trading the company's shares until such information has been made public.</p> | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Notwithstanding the above, there should be caution regarding 'signalling' behaviour as this may be tantamount to prohibited tacit collusion. |
| 12. | A number of investors agree to vote in favour of a shareholder resolution requiring a company in which they are shareholders to be more energy efficient. | <p>The JSE LR would not be applicable in this scenario as the resolution in question does not deal with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | <p>This is unlikely to trigger the provisions of the FMA.</p> <p>However, to the extent that the information about how these investors plan to vote is: (i) non-public; and (ii) likely to have a material effect on the price or value of the company's securities, the information may constitute inside information and the investors may, among other things, be restricted from trading the company's shares until such information has been made public.</p> | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. Please see our comments in scenario 13 below. |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|--|--|---|--|---|
| 13. | <i>A number of investors agree to vote against the reappointment of a director or for the appointment of a new director of a company they are shareholders in at its AGM.</i> | <p>The JSE LR would not be applicable in this scenario as the resolution in question does not deal with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | <p>The relevant provisions of the FMA are not applicable as the scenario does not contemplate the trading in securities, the sharing of inside information nor the creation of a market corner.</p> | <p>The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. However, certain ‘pooling’ arrangements between shareholders may trigger a merger notification obligation where such agreements between shareholders relate to strategic matters and the appointment of key staff such as CEOs. In order to mitigate risk, the investors ought to seek advice on each specific scenario of joint voting to rule out the above.</p> |
| 14. | <i>A number of investors agree to vote the same way on all votes at a company's AGM.</i> | <p>This is likely to fall within the definition of acting in concert for purposes of the JSE LRs as the agreement between the investors may be seen as their co-operation for a common purpose in terms of an arrangement or understanding. The JSE LRs provide for a number of shareholder resolutions in which the voting rights of a controlling or majority shareholder are not taken into account for purposes of the resolution. To the extent that: (i) the aggregate shareholding of the investors is sufficient to meet the definitions of a majority or controlling shareholder; and (ii) one or more of the resolutions being voted on require the votes of a majority or controlling shareholder to be excluded, this arrangement may result in the investors' votes being excluded for purposes of those resolutions.</p> | <p>The relevant provisions of the FMA are not applicable as the scenario does not contemplate the trading in securities, the sharing of inside information nor the creation of a market corner.</p> | <p>Provided the company is a regulated company, if any of the resolutions relate to entering into an affected transaction, the investors will be considered to be acting in concert and the investors that are coming into concert will be required to notify the regulated company and the TRP.</p> <p>If any of the resolutions being passed will result in any of the investors (or all of them in aggregate) acquiring a beneficial interest in the voting rights attached to securities issued by a regulated company and before the acquisition, the parties were able to exercise less than 35% of the voting rights attached to the securities of the company and as a result of the acquisition the parties are able to exercise at least 35% of the voting rights attached to the securities of the company, then the agreement by the investors may trigger the mandatory offer provisions under the Companies Act and the Regulations.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. However, certain ‘pooling’ arrangements between shareholders may trigger a merger notification obligation where such agreements between shareholders relate to strategic matters and the appointment of key staff such as CEOs. In order to mitigate risk, the investors ought to seek advice on each specific scenario of joint voting to rule out the above.</p> |
| 15. | <i>A number of investors discuss co-filing a shareholder resolution for a company they are shareholders in to tie executive compensation to sustainability metrics.</i> | <p>The JSE LR would not be applicable in this scenario as the resolution in question does not deal with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | <p>This is unlikely to trigger the provisions of the FMA. The scenario does not contemplate the trading in securities, the sharing of inside information nor the creation of a market corner.</p> | <p>The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate to enter into or propose an affected transaction or offer.</p> | <p>It is unlikely this co-ordination would fall foul of the horizontal prohibited practices sections of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. However, certain ‘pooling’ arrangements between shareholders may trigger a merger notification obligation where such agreements between shareholders relate to strategic matters and the appointment of key staff such as CEOs. In order to mitigate risk, the investors ought to seek advice on each specific scenario of joint voting to rule out the above.</p> |

| No. | Description of scenario | JSE LR | FMA | Companies Act and Regulations | Competition Act |
|-----|--|--|--|--|---|
| 16. | <i>A number of investors with shares in a company state that they intend to divest from the company if it does not publish a sustainability report.</i> | The JSE LR would not be applicable in this scenario as the actions contemplated are unlikely to constitute acting in concert given that the investors are not co-operating for a common purpose pursuant to an arrangement or understanding. Therefore, the shareholding of relevant investors is unlikely to be aggregated for purposes of the JSE LR. | <p>Provided no inside information is shared between the investors, this is unlikely to trigger the provisions of the FMA.</p> <p>This, however, would have to be assessed on a case-by-case basis to ensure the statements by the investors do not fall foul of the FMA's prohibition on creating a false or deceptive appearance of the demand for, supply of, or trading activity in connection with a company's securities.</p> | <p>The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer.</p> <p>To the extent that any of the investors dispose of their beneficial interest in sufficient securities of a class issued by the company such that, as a result of the disposal, the investor no longer holds a beneficial interest in securities amounting to a particular multiple of 5% of the issued securities of that class, then provided that the company is a regulated company, the investor is required to notify the company in the prescribed manner and form within three days after the disposal.</p> | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |
| 17. | <i>Investors agree to vote against the directors' remuneration report and remuneration policy at the AGM of a company they are shareholders in.</i> | <p>The JSE LR would not be applicable in this scenario as the resolution in question does not deal with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | The relevant provisions of the FMA are not applicable as the scenario does not contemplate the trading in securities, the sharing of inside information nor the creation of a market corner. | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |
| 18. | <i>Investors agree to vote against reappointing the auditors at the AGM of a company they are shareholders in.</i> | <p>The JSE LR would not be applicable in this scenario as the resolution in question does not deal with matters which may result in the JSE aggregating the voting rights of the investors.</p> <p>For example, the contemplated activities do not include resolutions approving related party transactions, delisting the company, or changing its primary listing.</p> | The relevant provisions of the FMA are not applicable as the scenario does not contemplate the trading in securities, the sharing of inside information nor the creation of a market corner. | The relevant provisions of the Companies Act and its Regulations are not applicable as the investors are not coming together for the purposes of any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer. | It is unlikely this co-ordination would fall foul of the horizontal prohibited practices in section 4 of the Competition Act given that it is not an agreement on price, strategy, market allocation or trading conditions. |

ACTING IN CONCERT REQUIREMENTS IN SOUTH AFRICA

The table below sets out in greater detail the South African legal and regulatory framework applicable to collaboration or co-ordination by shareholders in a company, including the relevant provisions dealing with shareholders acting in concert.

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|--|--|---|-----------|--|
| <p>Listing disclosure rules</p> | <p>Chapter 4 of the JSE Limited Listings Requirements (the JSE LR) – Conditions for listing.</p> | <p>Companies listed on the securities exchange operated by the JSE.</p> | | <p>Acting in concert</p> <p>The JSE may, at its sole discretion, require a listed company to provide it with a declaration that, to the best of the knowledge and belief of the directors, the beneficial shareholders of the company – whose shares are registered in the names of one or more nominees – do not include any person who may be acting in concert with any other person insofar as it may affect their classification as public shareholders. While this discretionary power is mentioned in the sections of the JSE LR dealing with related party transactions and shareholder spread requirements, it is couched in sufficiently broad and permissive language to arguably entitle the JSE to require such a declaration in instances other than these two.</p> <p>By way of example, in relation to a resolution to: (i) delist any of a company’s securities from the JSE; (ii) vote in favour of a related party transaction; or (iii) move the primary listing of a company from the JSE to another exchange but keeping a secondary listing on the JSE, any votes by the controlling shareholder, its associates and any party acting in concert with them will not be taken into consideration. Faced with a company seeking to pass any of the foregoing resolutions, the JSE may exercise its discretionary power to require the company to make the declaration above and if any shareholders of the company are acting in concert with a controlling shareholder of the company, their votes would not be taken into consideration for purposes of such resolution.</p> <p>The JSE LR define acting in concert more broadly than under the Companies Act to be: co-operation for a common purpose by two or more persons pursuant to an agreement, arrangement or understanding, whether formal or informal, between them; and associates shall be deemed to be so co-operating unless proven otherwise. No guidance is provided in the JSE LR as to what constitutes a common purpose as envisaged in this definition.</p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---|--|---|-----------|---|
| Insider trading/prohibited trading practices | Chapter X of the Financial Markets Act, 19 of 2012 (the FMA) | <p>The provisions of the FMA which regulate insider trading and prohibited trading practices are in respect of 'securities' which are defined as:</p> <ul style="list-style-type: none"> a. listed and unlisted: <ul style="list-style-type: none"> i. shares, depository receipts and other equivalent equities in public companies, other than shares in a share block company as defined in the Share Blocks Control Act, 1980 (Act No. 59 of 1980); ii. debentures, and bonds issued by public companies, public state-owned enterprises, the South African Reserve Bank and the Government of the Republic of South Africa; iii. derivative instruments; iv. notes; v. participatory interests in a collective investment scheme as defined in the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002), and units or any other form of participation in a foreign collective investment scheme approved by the Authority in terms of section 65 of that Act; and vi. instruments based on an index. b. units or any other form of participation in a collective investment scheme licensed or registered in a country other than the Republic; c. the securities contemplated in paragraphs (a)(i) to (vi) and (b) that are listed on an external exchange; d. an instrument similar to one or more of the securities contemplated in paragraphs (a) to (c) prescribed by the registrar to be a security for the purposes of this Act; e. rights in the securities referred to in paragraphs (a) to (d), but excludes: <ul style="list-style-type: none"> i. money market securities, except for the purposes of Chapter IV; or if prescribed by the registrar as contemplated in paragraph (d); ii. the share capital of the South African Reserve Bank referred to in section 21 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989); and iii. any security contemplated in paragraph (a) prescribed by the registrar. | N/ A | <p>Acting in concert</p> <p>The JSE may, at its sole discretion, require a listed company to provide it with a declaration that, to the best of the knowledge and belief of the directors, the beneficial shareholders of the company – whose shares are registered in the names of one or more nominees – do not include any person who may be acting in concert with any other person insofar as it may affect their classification as public shareholders. While this discretionary power is mentioned in the sections of the JSE LR dealing with related party transactions and shareholder spread requirements, it is couched in sufficiently broad and permissive language to arguably entitle the JSE to require such a declaration in instances other than these two.</p> <p>By way of example, in relation to a resolution to: (i) delist any of a company's securities from the JSE; (ii) vote in favour of a related party transaction; or (iii) move the primary listing of a company from the JSE to another exchange but keeping a secondary listing on the JSE, any votes by the controlling shareholder, its associates and any party acting in concert with them will not be taken into consideration. Faced with a company seeking to pass any of the foregoing resolutions, the JSE may exercise its discretionary power to require the company to make the declaration above and if any shareholders of the company are acting in concert with a controlling shareholder of the company, their votes would not be taken into consideration for purposes of such resolution.</p> <p>The JSE LR define acting in concert more broadly than under the Companies Act to be: co-operation for a common purpose by two or more persons pursuant to an agreement, arrangement or understanding, whether formal or informal, between them; and associates shall be deemed to be so co-operating unless proven otherwise. No guidance is provided in the JSE LR as to what constitutes a common purpose as envisaged in this definition.</p> <p>Inside information</p> <p>In terms of the FMA, inside information is specific or precise information which has not been made public and which is obtained or learnt as an insider and if the information were to be made public, it would be likely to have a material effect on the price or value of any security on a regulated market. The FMA does not provide for a definition of 'specific or precise information' and this will be determined on a case-by-case basis.</p> <p>Insider</p> <p>An insider is a person who learns inside information through being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information related or is a person who knows the direct or indirect source of information was a person contemplated above. A person who has access to such insider information by virtue of their employment, office or profession is also regarded as an insider.</p> <p>Regulated market</p> <p>A regulated market is any domestic or foreign market that is regulated in terms of the laws of the country in which the market conducts business as a market for dealing in securities listed on that market.</p> <p>Insider trading offence</p> <p>Under the FMA (among other things) if a person who is in possession of inside information (and knows they have inside information):</p> <ul style="list-style-type: none"> • deals, directly or indirectly or through an agent, in securities listed on a regulated market, or in derivative instruments related to such securities; to which the inside information relates or which are likely to be affected by it; or • encourages or discourages another person from dealing in securities relating to the inside information, such person commits an offence. <p><i>Requirements continued overleaf..</i></p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---------------------|-------------------------|------------------|-----------|---|
| | | | N/ A | <p>Disclosure offence</p> <p>An insider who knows that he or she has inside information and who discloses the inside information to another person commits an offence under the FMA unless they can prove that, on a balance of probabilities: (i) the information was disclosed because it was necessary to do so for purposes of the proper performance of such person’s functions of his or her employment, office or profession; (ii) the disclosure of the information was unrelated to dealing in securities in a regulated market; and (iii) that he or she at the time of disclosing the information, also disclosed that the information was inside information.</p> <p>Prohibition of false, misleading or deceptive statements, promises and forecasts</p> <p>The FMA prohibits any person from making or publishing any statements, promises and forecasts, in respect of securities traded on a regulated exchange, which are false, misleading or deceptive.</p> <p>Prohibited trading practices</p> <p>No person:</p> <ol style="list-style-type: none"> a. may, either for their own account or on behalf of another person, knowingly, directly or indirectly, use or participate in any practice which has created or is likely to have the effect of creating: <ul style="list-style-type: none"> • a false or deceptive appearance of the demand for, supply of, or trading activity in connection with that security; or • an artificial price for that security. b. who ought reasonably to have known that he or she is participating in a practice referred to in subparagraph (a), may participate in such practice. <p>A person referred to in subparagraph a. above is guilty of an offence. Effecting or assisting in effecting a market corner is one of the instances in which a person will be found to have engaged in a prohibited trading practice as set out in a.</p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|--|--|---|------------|---|
| <p>Takeover mandatory offer rules</p> | <p>Chapter 5 of the South African Companies Act, 71 of 2008 (the Companies Act) and regulations in terms of the Companies Act (the Regulations).</p> | <p>Holdings in regulated companies.</p> <p>In terms of the Companies Act, a 'regulated company' is a public company, a state-owned company and a private company if the percentage of the issued securities of that company which have been transferred, other than by transfer between related or inter-related persons, within a period of 24 months immediately before the date of a particular transaction or offer exceeds 10% of the issued securities of that company.</p> | <p>35%</p> | <p>Acting in concert and mandatory offer provisions</p> <ul style="list-style-type: none"> The Companies Act defines to act in concert as: 'any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer'. The Companies Act prescribes the circumstances in which parties would be obliged to make a mandatory offer. These include circumstances where: <ul style="list-style-type: none"> two or more persons acting in concert (concert parties) have acquired a beneficial interest in voting rights attached to any securities issued by a regulated company; before that acquisition, the concert parties together were able to exercise less than 35% (the prescribed percentage) of all the voting rights attached to the securities of the regulated company; and as a result of that acquisition – together with any other securities of the regulated company already held by those concert parties – the concert parties are able to exercise at least 35% of all of the voting rights attached to securities of the regulated company. <p>Parties acting in concert</p> <ul style="list-style-type: none"> To be acting in concert, it must be shown the parties are acting pursuant to an agreement between them. The Companies Act defines 'agreement' broadly to include a contract, arrangement or understanding between two or more parties that purports to create rights and obligations between those parties. We understand this to include verbal agreements entered into between parties. However, it is not sufficient only that there is an agreement between the parties for them to be found to be acting in concert. The definition also requires that the parties co-operate for a specific purpose: entering into or proposing an affected transaction or offer. Thus, when the parties reach their combined 35% shareholding in the regulated company, in order for them to trigger a mandatory offer, they must be co-operating with each other with the objective of entering into or proposing an affected transaction or offer. It should be noted that it is possible for parties to come in and out of concert This is dependent on the intention of the parties at particular points in time and each instance of coming in and out of concert requires notification to be made to the regulated company and the TRP. <p>An affected transaction includes:</p> <ul style="list-style-type: none"> a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company; an amalgamation or merger; a scheme of arrangement between a regulated company and its shareholders; the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company such that, as a result of the acquisition, the person (acting individually or in concert) holds a beneficial interest in securities amounting to 5%, 10%, 15%, or any further whole multiple of 5%, of the issued securities of that class; the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert; a mandatory offer; and a compulsory acquisition and squeeze out. <p>Acquisition of a beneficial interest</p> <ul style="list-style-type: none"> In addition to the requirement that the parties are acting in concert, the mandatory offer provisions require the parties to 'have acquired a beneficial interest in voting rights' in circumstances where: (i) before the acquisition, the parties jointly were able to exercise less than 35% of the voting rights of the regulated company's securities; and (ii) after the acquisition, they become able to exercise at least 35% or more of such voting rights. <p><i>Requirements continued overleaf..</i></p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---------------------|-------------------------|------------------|-----------|---|
| | | | 35% | <ul style="list-style-type: none"> In applying the relevant provisions of the Companies Act and the Regulations, unless the context indicates otherwise, 'acquisition' is defined as including 'any act or transaction as a result of which a person acquires or has an increased voting power in a company, irrespective of whether that person acquired any securities of the company in or as a result of that act or transaction'. The Company Act's definition of a 'beneficial interest' includes a right or an entitlement of a person, through (not only ownership but also) agreement, relationship or otherwise, alone or together with another person, to exercise or cause to be exercised 'in the ordinary course' any or all of the rights attaching to a company's securities. The definition of 'beneficial interest' would extend to cover the exercise of any voting rights attaching to a company's securities. <p>Exception to the mandatory offer provisions</p> <p>The Regulations provide for an exception to the mandatory offer provisions. They provide that although persons may be acting in concert, they are not, for that reason alone, required to make a mandatory offer, if:</p> <ul style="list-style-type: none"> at the time of coming into concert, each of the concert parties was entitled to exercise voting rights which were less than the prescribed 35%; as a result of coming into concert, they are entitled, in aggregate, to exercise voting rights exceeding the prescribed 35%; and none of them has acquired any further securities. <p>Disclosure and notification requirements</p> <p>Notification to the regulated company</p> <p>A person, directly or indirectly, acting individually or in concert with any other person or persons, must notify a regulated company in the prescribed manner and form within three business days after that person:</p> <ul style="list-style-type: none"> acquires a beneficial interest in sufficient securities of a class issued by that company such that, as a result of the acquisition, the person holds a beneficial interest in securities amounting to 5%, 10%, 15%, or any further whole multiple of 5% percent, of the issued securities of that class; or disposes of a beneficial interest in sufficient securities of a class issued by a company such that, as a result of the disposition, the person no longer holds a beneficial interest in securities amounting to a particular multiple of 5% of the issued securities of that class. <p>Presumption of parties acting in concert</p> <ul style="list-style-type: none"> In terms of the Companies Act, there is a rebuttable presumption that a person granted an option to acquire shares with a voting right in a regulated company is presumed to have acted in concert with the grantor of the option, unless the voting rights are retained by the grantor. Further, the Regulations provide that the following persons are presumed to be acting in concert with one another: <ul style="list-style-type: none"> a company with: (i) its directors; (ii) any company controlled by one or more of its directors; and (iii) any trust of which any one or more of its directors is a beneficiary or a trustee; and any of the company's pension, provident or benefit funds and share incentive schemes with one another. Within five business days after coming into concert, or coming out of concert, each person involved must make a declaration and deliver it to the regulated company concerned, and to the executive director of the TRP. If the TRP is aware of persons coming into concert or coming out of concert, and those persons have not declared themselves as having come into concert or coming out of concert in accordance with the Regulations, the TRP may presume those persons came into concert or came out of concert from a date determined by the TRP as being the date of coming into concert or coming out of concert. |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---------------------------------------|---|---|-------------|---|
| <p>Competition/ anti-trust</p> | <p>Section 4 of the South African Competition Act 89 of 1998, as amended (the Competition Act).</p> | <p>Parties in a horizontal relationship which means a relationship between competitors.</p> | <p>N/ A</p> | <p>Prior to delving into the relevant provisions of the Competition Act, it is important to reiterate that competition authorities acknowledge the sharing of information among competitors, in appropriate circumstances could have benefits, including but not limited to: improvement of investment decisions, benchmarking best practices and more precise knowledge of market demand. It is generally accepted the exchange of information between competitors can be problematic in circumstances where it would facilitate collusion and result in anticompetitive collusive behaviour between competitors, which may harm consumers. More importantly, in the context of collaborative conduct between competitors, the participation of competitors in organised associations or industry associations, is not per se prohibited by the Competition Act; however, competition authorities still continue to view such participation with some suspicion as they may provide a platform for firms to engage in anticompetitive information exchange. At the outset, we distinguish between a scenario where the investors are competitors and a scenario where the investors have collectively invested in the same company.</p> <p>Section 4 of the Competition Act regulates anticompetitive conduct applicable to competitors only. Whether parties are competitors is a factual enquiry and simply refers to the fact that the parties are in the same line of business. Judicial interpretation has further confirmed it is sufficient for purposes of section 4, that the parties be potential competitors. In the case of private equity investors, for example, the fact that these firms are in the business of seeking out attractive investments, irrespective of these investments falling in different markets, for purposes of this provision, the requirement of competitor or potential competitor in the private equity investment market would be met.</p> <p>Where the investors are collectively invested in the same company, a contravention of section 4 is unlikely to arise unless the investors have interests in companies which compete with or are in the same line of business with the investee company. In this scenario, investors would have to ensure they do not exchange or agree on pricing, strategic or trading decisions regarding their different investments in the market in which the investee company and its competitors operate.</p> <p>In the event the investee companies use the information collected from their investor shareholders to collude, both the investors and investee companies would be exposed to a section 4 contravention.</p> <p>We set out below the applicable provisions of section 4. Section 4(1)(a) of the Competition Act prohibits the exchange of information between competitors that has the effect of substantially preventing or lessening competition unless a party to the information exchange can prove efficiency benefits that arise from the information exchanged. In order for information exchange to be assessed under section 4(1)(a), the authorities will first rule out it is not cartel conduct as described below. Once this has been done, the following elements of section 4(1)(a) information exchange are applicable:</p> <p>Section 4(1)(a) requires the following elements:</p> <ul style="list-style-type: none"> • the parties are competitors (please see the synopsis above) or in a horizontal relationship; • the information exchange has anticompetitive effects. Such anticompetitive effects may manifest where the information sharing allows the firms to align their behaviour in a manner which results in, for example, the foreclosure of a new entrant; and • if it is established the information exchange has resulted in anticompetitive effects, the firms would have an opportunity to adduce evidence showing the technological gains, efficiencies or procompetitive gains of the information sharing outweigh the anticompetitive effects. Examples of such gains are that the information sharing has resulted in a significant reduction of costs incurred to produce the relevant products or provide the relevant services. <p>Section 4(1)(b) of the Competition Act, however, strictly prohibits the exchange of information that involves:</p> <ul style="list-style-type: none"> • the direct or indirect fixing of a purchase or selling price or any other trading condition; • the dividing of markets by allocating market shares, customers, suppliers, territories or specific types of goods or services; and • collusive tendering is strictly prohibited (cartel agreements/ conduct). <p>This means that once the authorities show such an agreement exists, a contravention of this section has been established and parties to that agreement are not allowed to lead any evidence regarding any gains which may result from such an agreement. The logic behind this strict liability is that cartel agreements are presumed to be harmful and it is accepted that no consumer benefits can ever flow from such agreements, i.e. these agreements have the inherent tendency to harm consumers. We also note cartel behaviour may take a less overt form through signalling and public announcements which may be seen as a form of tacit collusion. Firms should avoid public announcements that comment on past and future conduct of competitors. For example, statements commending firms for constraining capacity investment, for not pricing aggressively, or for focusing on enhancing profits and not revenues are anticompetitive because they run the risk of co-ordinating on constraining competition.</p> <p><i>Requirements continued overleaf...</i></p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---------------------|-------------------------|------------------|-----------|---|
| | | | N/ A | <p>In contrast to section 4(1)(a), the named restrictive horizontal practices in section 4(1)(b), that is, cartel agreements (price-fixing, allocation of markets and collusive tendering) are per se (strict liability) contraventions. Accordingly, in order to prove firms have engaged in price-fixing, market division, or collusive tendering, all that is required is evidence that the named conduct has taken place. In the context of the working group, this contravention may occur in the investment industry where the investors are active, as well in the markets where the companies in which the investors have invested operate. An instruction from the investors, for example, that the investment vehicles adhere to an anticompetitive agreement which the investor competitors have reached will lead the investment vehicles to also engage in cartel conduct. In such circumstances, the authorities would seek to prosecute both the investor and the investment vehicle for cartel conduct with the view to also levy the administrative penalty on the investor company.</p> <p>A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person: (i) caused the firm to engage in a prohibited practice; or (ii) knowingly acquiesced in the firm engaging in a prohibited practice.</p> <p>Control as envisaged in terms of section 12(2)g of the Competition Act.</p> <p>At the outset, the Competition Act sets out three jurisdictional facts that ought to exist in order to trigger a merger notification obligation:</p> <ul style="list-style-type: none"> • The transaction ought to involve the purchase or lease of the shares, an interest or assets of the other firm in question; or an amalgamation or other combination with the other firm in question; • The transaction ought to meet the merger thresholds set out in the Competition Act; and • Such transaction ought to result in one or more firms directly or indirectly acquiring direct or indirect control of the target business in whole or in part. <p>Section 12(2)(g) of the Competition Act provides that a person controls a firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs a-f.</p> <p>(negative control). The scenarios of control posed in section 12(2) a-f include where a party owns more than half of the issued share capital of the firm or is able to appoint or veto the appointment of a majority of directors of the firm (legal or de jure control). In other words, section 12(2)(g) is a catch-all phrase which establishes that a party has acquired control over a firm where such party may not necessarily be the majority shareholder but may have the ability to veto certain strategic decisions of that firm singlehandedly or through a pooling arrangement with other non-controlling shareholders.</p> <p>The notion of control is given a wide meaning and, therefore, the Competition Commission’s guidelines⁴ as well as case law from the Competition Tribunal and the Competition Appeal Court provide that the appointment of directors to the board – in such a manner which would result in those directors materially influencing the strategy of that firm – would confer control for purposes of section 12(2)(g).</p> <p>Notwithstanding the above, it must be noted the mere appointment or ability to veto the appointment of a director does not confer control for purposes of this provision. It is rather the appointment or the ability to veto the appointment of a majority of the directors that would confer control. Minority may amount to the acquisition of control. Where investors in the working group, therefore, are able to collectively or individually appoint or veto the appointment of a majority of the directors, the element of acquisition of control would be met.</p> <p>Section 12(2)(g) of the Competition Act provides that a person controls a firm if that person has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs a-f.</p> <p>(negative control). The scenarios of control posed in section 12(2) a-f include where a party owns more than half of the issued share capital of the firm or is able to appoint or veto the appointment of a majority of directors of the firm (legal or de jure control). In other words, section 12(2)(g) is a catch-all phrase which establishes that a party has acquired control over a firm where such party may not necessarily be the majority shareholder but may have the ability to veto certain strategic decisions of that firm singlehandedly or through a pooling arrangement with other non-controlling shareholders.</p> <p>The notion of control is given a wide meaning and, therefore, the Competition Commission’s guidelines⁴ as well as case law from the Competition Tribunal and the Competition Appeal Court provide that the appointment of directors to the board – in such a manner which would result in those directors materially influencing the strategy of that firm – would confer control for purposes of section 12(2)(g).</p> <p><i>Requirements continued overleaf..</i></p> |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|---------------------|-------------------------|------------------|-----------|--|
| | | | N/ A | <p>Notwithstanding the above, it must be noted the mere appointment or ability to veto the appointment of a director does not confer control for purposes of this provision. It is rather the appointment or the ability to veto the appointment of a majority of the directors that would confer control. Minority may amount to the acquisition of control. Where investors in the working group, therefore, are able to collectively or individually appoint or veto the appointment of a majority of the directors, the element of acquisition of control would be met.</p> <p>(negative control). The scenarios of control posed in section 12(2) a-f include where a party owns more than half of the issued share capital of the firm or is able to appoint or veto the appointment of a majority of directors of the firm (legal or de jure control). In other words, section 12(2)(g) is a catch-all phrase which establishes that a party has acquired control over a firm where such party may not necessarily be the majority shareholder but may have the ability to veto certain strategic decisions of that firm singlehandedly or through a pooling arrangement with other non-controlling shareholders.</p> <p>The notion of control is given a wide meaning and, therefore, the Competition Commission's guidelines⁴ as well as case law from the Competition Tribunal and the Competition Appeal Court provide that the appointment of directors to the board – in such a manner which would result in those directors materially influencing the strategy of that firm – would confer control for purposes of section 12(2)(g).</p> <p>Notwithstanding the above, it must be noted the mere appointment or ability to veto the appointment of a director does not confer control for purposes of this provision. It is rather the appointment or the ability to veto the appointment of a majority of the directors that would confer control. Minority may amount to the acquisition of control. Where investors in the working group, therefore, are able to collectively or individually appoint or veto the appointment of a majority of the directors, the element of acquisition of control would be met.</p> |

⁴ *Guidelines for the determination of administrative penalties for failure to notify mergers and implementation of mergers contrary to the Competition Act No. 89 of 1998, as amended.*

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|----------------------------------|---|---|-------------|--|
| <p>Changes in control</p> | <p>Sections 157 and 158 of the Financial Sector Regulation Act, 9 of 2017 (FSRA).</p> | <p>The relevant provisions of the FSRA relate to significant owners of eligible financial institutions; managers of a collective investment scheme; and financial institutions prescribed in regulations to the FSRA.</p> | <p>N/ A</p> | <p>The FSRA provides for the following approval and notification requirements in respect of significant owners:</p> <ol style="list-style-type: none"> a. A person may not effect any arrangement that will result in the person – alone or together with a related or inter-related person – becoming a significant owner of a financial institution, without the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed. b. A significant owner of a financial institution: <ul style="list-style-type: none"> • which has been designated as a systemically important financial institution, may not, without having obtained the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, effect any arrangement that will result in the person, alone or together with a related or inter-related person, ceasing to be a significant owner of the financial institution; and • which has not been designated as a systemically important financial institution, may not, without prior notification to the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, effect any arrangement that will result in the person, alone or together with a related or inter-related person, ceasing to be a significant owner of the financial institution. c. A person may not effect any arrangement that will result in the person, alone or together with a related or inter-related person, increasing or decreasing the extent of the ability of the person, alone or together with a related or inter-related person, to control or influence materially the business or strategy of the financial institution: <ul style="list-style-type: none"> • without having obtained the prior written approval of the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, if the responsible authority on granting of an approval referred to in (a) above, required its prior written approval of any such increase or decrease; or • without the prior notification to the responsible authority for the financial sector law in terms of which the financial institution is required to be licensed, if the responsible authority on granting of an approval referred to in (a) above, did not require its prior written approval of any such increase or decrease. d. If a person enters into an arrangement in contravention of (a), (b) or (c) above, the arrangement, insofar as it has an effect mentioned therein, is void. e. An approval in terms of a, b or c may not be given unless the responsible authority is satisfied that: <ul style="list-style-type: none"> • the person becoming a significant owner, or the arrangement, or any increase or decrease in the extent of the ability of the significant owner to control or influence the business or strategy of the financial institution will not prejudicially affect or is not likely to affect the prudent management and the financial soundness of the financial institution; and • the person meets and is reasonably likely to continue to meet applicable fit and proper person requirements. <p>In terms of the FSRA, a person is a significant owner of a financial institution if the person, directly or indirectly, alone or together with a related or inter-related person, has the ability to control or influence the business strategy of the financial institution. A person has the ability in the following instances:</p> <ol style="list-style-type: none"> a. the person, directly or indirectly, alone or together with a related or inter-related person, has the power to appoint 15% of the members of the governing body of the financial institution; b. the consent of the person, alone or together with a related or inter-related person, is required for the appointment of 15% of the members of a governing body of the financial institution; or c. the person, directly or indirectly, alone or together with a related or inter-related person, holds a qualifying stake in the financial institution. |

| Type of requirement | Legislation/ regulation | Holding affected | Threshold | Requirements |
|--|---|---|----------------|--|
| <p>Shareholding in respect of banks</p> | <p>Banks Act, 94 of 1990 (Banks Act).</p> | <p>Institutions conducting the business of a bank.</p> | <p>>50%</p> | <p>No person other than a bank or an institution which has been approved by the Prudential Authority and which conducts business similar to the business of a bank in a country other than South Africa may exercise control over a bank, unless such person is a public company and is registered as a controlling company in respect of such bank.</p> <p>A person is deemed to exercise control over a bank if, in the case where that person is a company, the bank is a subsidiary of that company, or whether or not that person is a company, if that person alone or together with his or her associates:</p> <ol style="list-style-type: none"> holds shares in the bank of which the total nominal value represents more than 50% of the nominal value of all the issued shares of the bank, unless, due to limitations on the voting rights attached to the shares so held by the person alone or together with his or her associates, as the case may be, such person voting independently or such person and his or her associates voting as a group, is or are unable to decisively influence the outcome of the voting at a general meeting of the bank; is entitled to exercise more than 50% of the voting rights in respect of the issued shares of that bank; or is entitled or has the power to determine the appointment of the majority of the directors of that bank. <p>An ‘associate’ includes any person who has entered into an agreement or arrangement relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares in the bank or controlling company in question.</p> <p>A person who holds more than 15% of the total nominal value or the total voting rights in respect of all the issued shares of a bank or controlling company.</p> <p>For the sake of completeness, there are provisions in the Banks Act setting out requirements relating to the acquisition of more than 15% of the total nominal value or the total voting rights in respect of the issued shares of a bank or a controlling company. While the Banks Act requirements do not necessarily speak directly to acting in concert, as it contemplates an acquisition, these are notable financial regulatory constraints.</p> <p>This is especially in relation to the potential ability to exercise control over a licensed bank by way of voting as a group with associated companies. Permission from the Prudential Authority and or the Minister of Finance (depending on the threshold) is required to acquire shares or voting rights in respect of the issued shares in a bank or controlling company. Such permission will be granted only if it will not be contrary to the public interest, and will not be contrary to the interests of the bank or its depositors or controlling company.</p> |
| <p>Conflicts of interest</p> | <p>Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS).</p> | <p>All licensed financial services providers (FSP).</p> | <p>N/ A</p> | <p>All FSPs must render services honestly, fairly, with due skill, care and in the interests of clients, avoiding conflicts of interests.</p> <p>The Code of Conduct for Administrative and Discretionary FSPs (Code of Conduct) states that a discretionary FSP may not directly or indirectly - without the relevant client’s prior written approval - exercise voting rights on behalf of clients to gain control of a listed or unlisted company, except where such voting rights are exercised to protect the interests of clients on whose behalf the financial products involved are held as investments or on the instructions of such clients. We note this as a notable financial regulatory constraint mechanism, rather than necessarily as a result of acting in concert.</p> |



ABOUT BOWMANS

Bowmans has extensive experience advising investors, companies, boards and other stakeholders in relation to legal issues arising from the above legislative framework, including on the application of concert party rules and the stakeholder engagements.

We consistently advise on complex, high-profile mergers and acquisitions transactions, which, by their very nature, often require us to guide our clients (who include social impact investors) on how to engage stakeholders and to navigate our rules around concert parties.

More information: [https:// www.bowmanslaw.com/](https://www.bowmanslaw.com/)

DISCLAIMER

The information contained in this report is meant for the purposes of information only and is not intended to be investment, legal, tax or other advice, nor is it intended to be relied upon in making an investment or other decision. This report is provided with the understanding that the authors and publishers are not providing advice on legal, economic, investment or other professional issues and services.

Bowmans is not responsible for the content of websites and information resources that may be referenced in the report. The access provided to these sites or the provision of such information resources does not constitute an endorsement by Bowmans of the information contained therein.

Unless expressly stated otherwise, the opinions, recommendations, findings, interpretations and conclusions expressed in this report are those of the various contributors to the report and do not necessarily represent the views of Bowmans.

The inclusion of company examples does not in any way constitute an endorsement of these organisations by Bowmans.

While we have endeavoured to ensure that the information contained in this report has been obtained from reliable and up-to-date sources, the changing nature of statistics, laws, rules and regulations may result in delays, omissions or inaccuracies in information contained in this report.

Bowmans is not responsible for any errors or omissions, or for any decision made or action taken based on information contained in this report or for any loss or damage arising from or caused by such decision or action.

All information in this report is provided 'as-is', with no guarantee of completeness, accuracy, timeliness or of the results obtained from the use of this information, and without warranty of any kind, expressed or implied.

Key Contacts



DAVID GERAL

Head of Banking and Financial Services
Regulatory
Johannesburg, South Africa

T: +27 11 669 9514

E: david.geral@bowmanslaw.com



CHARLES DOUGLAS

Co-Head of M&A
Johannesburg, South Africa

T: +27 11 669 9426

E: charles.douglas@bowmanslaw.com



DEREK LÖTTER

Co-Head of Competition
Johannesburg, South Africa

T: +27 11 669 9357

E: derek.lotter@bowmanslaw.com



LEBOHANG MABIDIKANE

Partner
Johannesburg, South Africa

T: +27 11 669 9656

E: lebohang.madikane@bowmanslaw.com



SIBONELO MDULI

Senior Associate
Johannesburg, South Africa

T: +27 11 669 9637

E: sibonelo.mdluli@bowmanslaw.com



ABOUT PRI

The Principles for Responsible Investment (PRI) works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance (ESG) issues and to support signatories in integrating these issues into investment and ownership decisions.

The PRI acts in the long-term interests of its signatories, of the financial markets and economies in which they operate and ultimately of the environment and society as a whole.

The six Principles for Responsible Investment are a voluntary and aspirational set of investment principles that offer a menu of possible actions for incorporating ESG issues into investment practice.

The Principles were developed by investors, for investors. In implementing them, signatories contribute to developing a more sustainable global financial system.

More information: www.unpri.org

PRI DISCLAIMER

The information contained in this report is meant for the purposes of information only and is not intended to be investment, legal, tax or other advice, nor is it intended to be relied upon in making an investment or other decision. This report is provided with the understanding that the authors and publishers are not providing advice on legal, economic, investment or other professional issues and services.

PRI Association is not responsible for the content of websites and information resources that may be referenced in the report. The access provided to these sites or the provision of such information resources does not constitute an endorsement by PRI Association of the information contained therein.

Unless expressly stated otherwise, the opinions, recommendations, findings, interpretations and conclusions expressed in this report are those of the various contributors to the report and do not necessarily represent the views of PRI Association or the signatories to the Principles for Responsible Investment.

The inclusion of company examples does not in any way constitute an endorsement of these organisations by PRI Association or the signatories to the Principles for Responsible Investment.

While we have endeavoured to ensure that the information contained in this report has been obtained from reliable and up-to-date sources, the changing nature of statistics, laws, rules and regulations may result in delays, omissions or inaccuracies in information contained in this report.

PRI Association is not responsible for any errors or omissions, or for any decision made or action taken based on information contained in this report or for any loss or damage arising from or caused by such decision or action.

All information in this report is provided 'as-is', with no guarantee of completeness, accuracy, timeliness or of the results obtained from the use of this information, and without warranty of any kind, expressed or implied.





Cape Town, South Africa

T: +27 21 480 7800

E: info-cpt@bowmanslaw.com

Dar es Salaam, Tanzania

T: +255 76 898 8640

E: info-tz@bowmanslaw.com

Durban, South Africa

T: +27 31 265 0651

E: info-dbn@bowmanslaw.com

Johannesburg, South Africa

T: +27 11 669 9000

E: info-jhb@bowmanslaw.com

Kampala, Uganda

T: +256 41 425 4540

E: info-ug@bowmanslaw.com

Moka, Mauritius

T: +230 468 8411

E: info-ma@bowmanslaw.com

Nairobi, Kenya

T: +254 20 289 9000

E: info-ke@bowmanslaw.com



Follow us on Twitter:

@Bowmans_Law

www.bowmanslaw.com

Alliance Firm:

Aman Assefa & Associates Law Office, Addis Ababa, Ethiopia

T: +251 1470 2868

E: info@aaclo.com