



Chanel Cilombo

Student number: MPMCHA001

**Title: ‘*MERGER NOTIFICATION: THE NECESSITY FOR
ADEQUATELY DEFINING CONTROL*’.**

Supervisor: Dr Jacqueline Yeats

Co-Supervisor: Judge Dennis Davis

In fulfillment of the Commercial LLM degree by course work and minor
dissertation.

CML5606W

Word-count: 25 205 (excluding footnotes)

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the commercial LLM in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of commercial LLM dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Date: 15 September 2017

Signed: Chanel Cilombo

DEDICATIONS

For Prem, my light.

ACKNOWLEDGMENTS

I kindly acknowledge and thank the University of Cape Town and its Post Graduate funding office for the full financial coverage of the cost of the LLM programme, as well as further generous support and contributions received throughout the fulfillment thereof. Without which, this work would not have reached its completion.

I would like to thank my participants, without whom there would have been no research, Dennis Davis JP, Adv. le Roux, Michael Katz and the ENS competition department, and last but not least Norman Manoim, I am forever in your debt.

I am further indebted to both my supervisors and the commercial law department at UCT as a whole. Jacqui and Dennis the guidance, knowledge and clemency you afforded me will never be forgotten.

To the entire group of staff at Student Wellness, thank you for your warmth, support and kindness. Most notably to Elaine and Kathy for holding my pieces together with finesse and integrity.

Finally without the love and unwavering support of my friends (most notably, Ricky for the MacBook) and my family, I would not have had the strength to complete this journey, I am so grateful.

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CHAPTER ONE: INTRODUCTION

1.1 *Background and problem to be addressed*

Company law notions of control are not always harmonious with those of competition law, and thus the former may need to create its own jurisprudence informed by an appreciation of the purpose of merger notification under the Competition Act 89 of 1998.

My research in this study will examine the definitions of control under the Competition Act (the “Act”),¹ comparatively to that of a company law notion of control as set out by the Companies Act,² which falls legislatively short in terms of adequately setting out the parameters of control with regards to mergers and amalgamates. This paper will explore numerous matters that have come to the attention of the courts on these grounds.³

In order to undertake the inquiry of this research, it is also important to consider the definitions of a merger, and of control, in terms of section 12(1)(a) and section 12(2) of the Act, respectively. Together with relevant sections 13A(3), 14A(1), 16(2) and 17, setting out merger notification and implementation, compulsory notification necessitated by large concentrations that require commission approval, as well as transactions that require tribunal approval after referral from the commission, and lastly the Competition Appeal Court merger proceedings in order to set aside a Tribunal decision to set conditions on a merger or to prohibit it.

Over and above considering the case law and developments in merger control and competition more generally, where it may have a bearing on the requirements for

¹ As amended by the Competition Amendment Act 1 of 2009.

² 71 of 2008.

³ See *Distillers Corporation SA Ltd v Stellenbosch Farmers' Winery Group Limited and Bulmers (SA) Pty Ltd and Seagram Africa Pty Ltd* 08/CAC May 01; *Bulmer SA et al v Distillers Corporation SA Ltd et al* Case number 101/FN/Dec00; *Cape Empowerment Trust v Sanlam Life Insurance Limited and Sancino Projects Limited* Case no 05/X/Jan06; *Ethos Private Equity Fund IV and Tsebo Outsourcing* Case number 30/LM/Jun03; *Caxton and CTP Publishers and Printers Limited v Naspers Limited and others* Case number 16/FN/Mar04; *Gold Fields v Harmony Gold Mining Co Ltd* Case No 86/FN/Oct04; *Johnnic Holdings Limited v Hosken Consolidated Limited and the Competition Commission* Case number 65/FN/Jul 05; *Competition Commission and Edgars Consolidated Retail Stores (Edcon) and Retail Apparel Pty Ltd* Case number 95/FN/Dec02.

merger notification, defining control, and the legal consequences for the failure to adhere to these principles.

A further subtopic for examination in this study being, when parties to a merger have failed to notify the authorities, how should the relevant competition powers, namely the tribunal, calculate the administrative penalty, as the Act does not provide adequate enough guidelines in this regard.⁴ Sections 59(2) and 59(3) are insufficient in themselves and thus South Africa is in need of adequate legislative guidelines for determining the appropriate penalty. Or further if penalties prove to be insufficient deterrent as some might argue, whether criminal sanctions ought to be proposed and implemented, following and expanding upon an ever increasingly conservative stance the competition authorities have adopted to addressing and cure contravention of the Act, as evident from the recently added provision of 73A.⁵

1.2 Purpose and aim

The value of the research lies in its uniqueness and potential to contribute implicitly to the arena of mergers and acquisitions, the smooth functioning of a South African economy, and its market structures.

For example the reliance on a Companies Act interpretation for what represents issued share capital, and whether there is a consequent need to develop the law in order to bridge the definitional gap for the purpose of adequately regulating merger notification. The ambit of which has become an important area of contestation and debate, now ripe to address and decide on, as organisations have employed various elaborate means in their endeavours to avoid notification. There exist various potential reasons as to why this is so. The most seemingly discernable reason (although the case law indicates otherwise, lending itself to other instances of failure to notify to later be explored in this paper) being to escape the microscope of the competition

⁴ See *Woodland Dairies (Proprietary) Limited and Another v Competition Commission* 2010 (6) SA 108 SCA; *Southern Pipeline Contractors and Conrite Walls v The Competition Commission* 105/CAC/Dec10 and 106/CAC/Dec 10; *Federal Mogul Southern Africa v Competition Commission [2005] 1 CPLR 50 CPAC*. Further see the Competition Commission South Africa's new 'Guidelines for the determination of administrative penalties for failure to notify a merger and implementation of mergers contrary to the Competition Act' February 2017 Draft.

⁵ As amended.

authorities, in fear of the transaction under scrutiny being prohibited or restricted by the imposition of conditions for approval.

Another reason may be that the parties to the transaction lack the resource of time and need to conclude the proceedings expediently. If they fail to commence operations in time, further financial loss may result due to the delays of administration. This instance would usually arise in the case of a hostile takeover or a competitive bid.

Alternatively, financial institutions such as banks and investment funds that also seek expediency of process and cost minimisation, might jump the gun, perceiving themselves to not hold controlling shareholder status despite regularly engaging in shareholder deal-making, in brief or intermittent periods.

A further potential reason being that those in opposition to the transaction taking place, whether they be rival bidders or competitors of the acquiring firm, may seek to use failure to notify as a justification in attempting to suppress the transaction, via interdicting its operation.

It is my hope that I am able to contribute implicitly to the area of mergers and acquisitions, in order to effectively amalgamate and unify companies law and competition law with regards to the definition of control and its consequences on merger notification.

Furthermore, to develop the current legislation in order to best achieve an outcome that is in alignment with the philosophy and principles set out in section 2 of the Act, in order to promote the efficiency, adaptability and development of the economy, as well as employment and advancing the social and economic welfare of South Africans, especially those historically disadvantaged, in realising a wider distribution of ownership. In addition to expanding South African participation in world markets, and to recognize foreign competition on a domestic level, where fair choice should be afforded to the consumer.⁶

⁶ S2 (a-f).

The purpose of the exploration regarding monetary and criminal penalties will be to assess and evaluate if these are effective means of curbing anti-competitive behaviour and creating efficiency in business and the markets.

Due to the unique nature of the focus area under inquiry, there is a dearth of academic information on the topic necessitating the conduction of this particular research, making it a distinctive undertaking for exploration. However, not without its pitfalls as no definitive answer emerged, further there were insufficient company law participants in the sample which may result in validity issues due to bias and reactivity.

1.3 Methodology

1.3.1 Sample

I have selected for my sample, participants that are professionals and academics in the fields of both competition and companies' law to address the potential definitional gap, the consequences thereof and how to adequately reform the legislation in question or at the very least cure the problem through less intrusive means. The hand-selected participants chosen for the study include Judge Dennis Davis,⁷ Advocate Michelle le Roux,⁸ Michael Katz,⁹ the Edward Nathan Sonnenbergs (ENS Africa) competition department,¹⁰ and Norman Manoim.¹¹

While it was my initial aim to divide participants as evenly as possible between the spheres of company law and competition law, this was not possible to achieve as the many experts in company law that I approached, all save one who was brave enough to answer,¹² were unable to answer matters relating to competition law, based on a lack of proficiency. It is submitted that this is telling of at least a gap of knowledge and understanding if not an imbalance between the two pieces of legislation, and

⁷ Judge President of the Competition Appeal Court.

⁸ Making regular appearances in competition matters.

⁹ Corporate/commercial chairman at ENS.

¹⁰ 2016 Competition team of the year in The African Legal Awards.

¹¹ Tribunal member.

¹² Michael Katz.

perhaps further why there is such a dearth in academic and professional materials on the matter.

1.3.2 *Ethics*

The study received ethical clearance and all of the participants agreed to waive anonymity and confidentiality, as none would be susceptible to vulnerability as a result of conducting the research.¹³

1.3.3 *Data collection*

The data collection method for this research was conducted electronically, a 10-part questionnaire,¹⁴ was sent to each participant with the relevant company or competition law competencies, this was executed via email correspondence. The participants were required to submit written answers open to their subjective interpretation and opinion.¹⁵

1.3.4 *Research design*

A qualitative research design was employed for the purpose of in-depth examination and testing of the hypothesis, purporting there to be a definitional gap with regards to control and the consequences that flow therefrom. This was carried out for the purpose of conducting and gathering a qualitative data set that are meaningful to the field of merger control and its development, by addressing the potential definitional shortcomings which companies often actively seek to either abuse, or are at risk where definitional confusion arises and the correct procedures are not adhered to.

1.4 *Research outline*

Having introduced the nature of the research, its purpose, aims and methodology, a brief chapter summary will be outlined below.

¹³ See annexure A: ethical clearance.

¹⁴ See annexure B: questionnaire.

¹⁵ See annexure C: answers from participants 1-5.

Chapter two details the definition and origins of the concept of a merger, and sets out the history thereof, as well as role of competition in merger regulation. This is done in comparison with foreign jurisdictions, looking to their competition regimes, the purpose of which being to examine whether the South African Act is adequate. It will be submitted that our domestic practice should take from the Canadian statute as well as African anti-trust legislation from Kenya. Both serve as solid foundational frameworks to work from, as both pieces of legislation provide for a wider definition of control, and accordingly what constitutes a merger, as the two are inextricably bound in a state of bilateral dependence.

Chapter three explores the definitions of control in the Competition Act, in comparison to those provided for in the Companies Act. The purpose of which being to examine and test the hypothesis that there is a definitional gap between the two pieces of law, equating to legislative shortcomings that then become open to abuse by entities seeking to avoid notification and accordingly the scrutiny of the competition authorities, whether anti-competitive conduct be the motivating force to do so, or otherwise. Attempting to prove this theory will be achieved through an examination of the prevailing case law, listing the various forms of control. In addition to interpreting the data gathered from specifically selected human participants, in order to establish their meaning and relevance in context. Together with looking to foreign jurisdictions for alternative definitions that may be better suited to a M & A climate in general, notwithstanding being a better and more flexible fit to the South African economy, it will again be submitted that Canada and Kenya serve as the best examples, setting out a very broad notion of control.

Chapter four deals with notification, which is also inextricably linked to the necessity for adequately defining control and consequently mergers and amalgamates. As once a threshold has been triggered for a large merger, it will consequently be caught for notification, subject to the approval of the competition authorities, with or without conditions such as structural remedies, or where found to be a potential but real threat to competition in the markets it must be prohibited, open to appeal via the Competition Appeal Court.

Chapter five explores the administrative penalty. Where parties to a large merger fail to notify the competition authorities, they will be in contravention of the Act, thus making the procedure mandatory, administrative penalties being calculated according to 10 per cent of the annual turnover of the undertakings in question. There is a progressing trend the South African authorities are evidently following, in accordance with a more severe stance on implementing fines for failure to notify a large merger, as illustrated by the recent hospital case, seeing a whopping R1 billion sanction imposed, agreed to via consent order, facilitated through the corporate leniency programme, allowing the hospital groups immunity for a section 4 offence. It is herein opined that this case further illustrates that firms involved in anti-competitive conduct may be motivated not to notify their merger in order to avoid the authorities scrutiny. Thus anti-competitive behaviours may be a precursor to a firm's failure to notify.

Chapter six considers the potential for the implementation of criminal sanctions for failure to notify, based on recent amendments to the Competition Act via the insertion of section 73A, criminalising cartel conduct for the first time in South Africa. In exploring this possibility, the foreign legislation will again be consulted, together with the data gathered.

CHAPTER TWO: MERGERS

2.1 *Introduction: history and origin of competition law*

This concept stems from a Latin and an Anglo-Norman French linguistic origin and heritage.¹⁶ However legally, the assorted global models for merger control have their roots in various sources predominantly from the United States with the enactment of the Sherman Act in 1890,¹⁷ as well as the Clayton Act,¹⁸ in addition to seeing strong European influence and developments. However originally stemming from Canadian jurisprudence, the first piece of competition legislation having been enacted in 1889, and is accordingly the oldest anti-trust statute in the developed world.¹⁹

The current Canadian Competition Commission Act RSC 1985,²⁰ strives to balance objectives that are frequently in conflict, with the purpose of facilitating equitable prospects for small enterprises attempting to gain entry and stability within the relevant market sectors, and further to promote adaptability and efficiency. The Act is federal law, comprising of both civil and criminal provisions.

Appropriately, the South African realm of competition law that governs mergers is thus derived from Canadian and American jurisprudence conceived in the nineteenth century.²¹ More recently the drafters of the South African Act “borrowed liberally” from the Canadian Act. Most notably from section 91 defining a merger, ‘in sections 92 to 100, merger means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.’²²

¹⁶ Mid seventeenth century (in the sense ‘immerse oneself’): from Latin *mergere* ‘to dip, plunge’; the legal sense is from Anglo-Norman French *merger*.

¹⁷ The Sherman Antitrust Act (Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1–7) is a landmark federal statute in the history of United States antitrust law passed by Congress under the presidency of Benjamin Harrison.

¹⁸ Enacted October 15 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

¹⁹ The Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade.

²⁰ C–4.

²¹ Minette Neuhoff *A Practical Guide to South Africa Competition Policy & Law* (2006) 11.

²² R.S., 1985, c. 19 (2nd Supp.).

This is clearly reflected in chapter 3 of the South African Act, of which section 12(1)(a) sets out “[f]or the purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. A merger contemplated in such a manner to include the purchase or lease of shares, an interest or assets, or the amalgamation of firms or joint ventures.”²³

Competition law itself however, while to many may appear to be a modern evolution of legal practice stemming from contemporary economic policies, its origin in fact dates much further back to the foundations of legal principles established by the Roman’s in their unsuccessful attempts to regulate monopolies in the sixteenth and seventeenth centuries.²⁴ Thus what was once a restraint of trade doctrine at common law, eventually developed and suffused over time to become known as Competition policy, anti-trust, or anti-monopoly (in addition to companies law and tax law), in order to manage macro-economic issues that a contract alone is insufficient to govern,²⁵ necessitating adequate legislation on such matters in order to facilitate transparency and accountability in the markets and to protect consumers and smaller traders alike.²⁶

2.2 *The role of competition in merger regulation*

The aforementioned description’s set out a broad scope of what constitutes a merger, accordingly necessitating far reaching law and policy for adequate and effective regulation. The consequence of a merger is therefore the removal of a competitor from the market, resulting in alterations to the structure of the market, thus necessitating a merger control framework and system for regulation to prevent abuse of the merger procedure, barriers to entry for entrant players, and the domination of market power enabling large players to unilaterally reduce output and raise prices, culminating in negative ramifications affecting both the consumer and the public

²³ See section 12(1)(b)(i)-(ii).

²⁴ Martin Brassey *et al* *Competition Law* (2002) 62.

²⁵ *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 878 (A).

²⁶ *op cit* note 24 at 51 – 62.

interest.²⁷ The role of competition policy can thus be viewed for the purpose of enhancing consumer welfare. As is evidenced in section 2(b), stipulating one of the purposes of the Act as being to promote competition in South Africa in order to “provide consumers with competitive prices and product choices”.

The function of competition policy being, to act as a regulatory tool, facilitating economic functional efficacy in a free market environment. Implemented by the competition channels of authority, investigative bodies and legislated practice adjudicated by the competition courts. The commitment of which being to act as a conduit for pro-competitive activity facilitating and balancing business and consumer welfare and protection,²⁸ as well as the public interest and society in its entirety.²⁹

Not only must competition law and companies law be aligned and up to date with best corporate and business practice, but must also show due regard to those that have been disadvantaged by previous historical inequality and social injustices of the past, in line with the principles enshrined in our Constitution.³⁰

Unlike other areas of competition law and policy, when it comes to merger control and regulation, the governing legislation can be said to be “prophylactic in nature”,³¹ as it aims to eradicate the abuse of market power by preventing its formation at the start, therefore ex-anti control is exercised where a particular threshold is met.³²

Where such a merger is caught, dependent on its size, the undertakings involved are legally required to furnish the Competition Commission with prior notification regarding the intended large or intermediate merger, where the system is mandatory. Small mergers on the other hand only require voluntary notification, unless any of the firm’s party to the merger is under investigation, or respondent to a pending proceeding with regards to a prohibited practice allegation. While large and

²⁷ Ibid at 224-228.

²⁸ See s2(b) of the Competition Act 89 of 1998.

²⁹ *Glaxo Wellcome Plc and Another v Competition Commission of South Africa* [2000] ZACT 33 (28 July 2000).

³⁰ The Constitution of the Republic of South Africa Act 108 of 1996.

³¹ Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobucci ‘*The law of Economics in Canadian Competition Policy*’ (2002) 131.

³² Ibid.

intermediate mergers cannot be implemented until the competition authorities have granted approval, after they have conducted an analysis examining the potential pro-competitive or anti-competitive effects the merger may pose.³³

2.3 *What constitutes a merger?*

A merger can be described as the coming together or “marriage” of two entities coalescing and fusing into one consolidated new entity. Within the ambit of this definition there are different categories further defining mergers.

Horizontal mergers involve the supply of the same market industry products by competitors within the same geographical area, as evidenced in the case law on the topic.³⁴ With regards to horizontal mergers, the governing competition policy is premised on the notion that an increase in market concentration resulting in an increase in market power. The consequence of which being, a hike in prices, subsequently leading to inefficient market output levels, in addition to the transmission of wealth, choice, and variety from consumers to traders.³⁵ There is a clear an undeniable nexus showing a causal relationship between an increase in market power correlating to greater market power, this is especially evident in extreme cases of mergers in monopoly markets that generate high barriers to entry.³⁶ These mergers warrant the highest level of concern in competition, and are thus prohibited under section 4(b), unless approved under the Act after notification (where required) and consideration. They can however also result in efficiencies due to economies of scale and pooled resources.³⁷ Economic theory lays the foundation for evaluating market conditions in order to assess the impact of a merger.³⁸ However ultimately each matter must be heard and assessed on a case-by-case basis, as each merger differs.³⁹

³³ Philip Sutherland and Katharine Kemp *Competition Law of South Africa* (2014) 8-3 – 8-9.

³⁴ See *American Natural Soda Ash Corporation v Competition Commission* 2005 6 SA 158 (SCA).

³⁵ Maher M. Dabbah ‘*EC and UK Competition Law Commentary, Cases and materials*’ (2004) 131.

³⁶ *Ibid.*

³⁷ *Op cit* note 24 at 225.

³⁸ *Ibid* at 132.

³⁹ *Ibid* at 269.

Vertical mergers comprise of players operating at different levels of the supply chain, for example from manufacturer to distributor and therefore may include both forward and backward integration, through the acquisition of a customer or a supplier, which may lead to structural changes in an industry.⁴⁰ Vertical mergers raise less of a competition concern comparatively to their horizontal counterparts, however can still lead to raised costs, barriers to entry, and upstream interdependence.⁴¹

Accordingly direct competition is not per se eliminated, as the relationship is not horizontal in nature. Accordingly infringements are assessed on a case-by-case basis under section 5 of the Act, in terms of the rule of reason, where it can be shown to have resulted in the substantial lessening of competition.⁴²

A conglomerate encompasses everything else, including unrelated businesses, different markets, products, and consumers, thus the parties thereto have no apparent economic relationship. This may include geographic extension and product extension mergers.⁴³ The purpose for which being to maximise efficiency, and usually have little to no effect on competition as the firms involved operate in different markets, neither does it affect the structure of the market or levels of concentration. Yet still it may have socio-political ramifications where too much power is gained by such an entity.⁴⁴

Acquisitions on the other hand, while often used synonymously, differ from mergers in that a merger incorporates two similar sized undertakings that combine into one. The names of the firms will generally also merge to form anew, notwithstanding the event in which the parent firm name is used, one of the two will usually emerge as the dominant management. While acquisitions deal with for example, where a larger firm buys a smaller firm, which then becomes its subsidiary, having acquired all of the target firm's stock. This may be executed in a manner that could either be friendly and negotiated amicably, or hostile for the acquiree, where it is not freely elected by

⁴⁰ Ibid at 226.

⁴¹ Ibid at 227.

⁴² *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), is a US antitrust case in which the United States Supreme Court overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁴³ Op cit note 24 at 225.

⁴⁴ Ibid at 227.

both parties, but rather through the compulsion of one of them, where alternative methods of escape or rescue are unavailable, and there is no room left for poison pills or white knights to avail the situation, resistance is simply futile.⁴⁵

The guiding philosophy of mergers and acquisitions can accordingly be seen as an endeavour to maximise value creation through the synergy between divisions, increasing cost reductions by applying economies of scale and scope, facilitated by the transference of competencies and shared infrastructure. In order to do so effectively, especially within a South African economic landscape, considerations and respect of cultural diversity must be given due regard for effectual implementation, growth, mere survival or an opportunity to exit and escape.

2.4 EU merger control guidelines

The dominant legislation regarding merger control can be found in the European Union Community Merger Regulation (139/2004), and the Implementing Regulation (802/2004), as amended.⁴⁶ While the former provides for the assessment criteria with which to evaluate a concentration, the latter relates to procedural matters, such as notification protocol. In late 2016, the European Commission released further guidelines and a series of notices, updating those published in 2008,⁴⁷ and 2013,⁴⁸ in order to aid parties to a transaction that may fall within the ambit of EU Merger Regulation.

A merger is defined under European competition law when ‘change of control on a long lasting basis results from (a) the merger of two or more previously independent undertakings... (b) the acquisition... of direct or indirect control of the whole or parts of one or more other undertakings.’⁴⁹ Prior notification for these transactions is required, followed by commission approval and clearance, before the implementation of the concentration may proceed. In instances where EC Regulation is not applicable

⁴⁵ Case No COMP/M.6381 – *Google/Motorola Mobility*. Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004.

⁴⁶ (1269/2013).

⁴⁷ Consolidated Jurisdictional Notice.

⁴⁸ Notice on the Simplified Procedure.

⁴⁹ Art. 3(1), Reg 139/2004.

to the transaction, it will still be subject to the domestic merger control laws and guiding policies of the EU member state(s) relevant to the merger.⁵⁰

2.5 The relevant South African legislation

2.5.1 The Competition Act

Taking heavily from the jurisdictions detailed above as the forerunners to the development of competition law, South Africa followed suit with similar frameworks, beginning with the Regulation of Monopolistic Conditions Act 24 of 1955, followed by the Maintenance and the Promotion of Competition Act 96 of 1979, being the predecessor to the current Competition Act, having been jettisoned for its ineffectiveness,⁵¹ and accordingly replaced with Act 89 of 1998 which became effective on 1 September 1999, in order to address South Africa's economic and political history.⁵² Followed by the Competition Amendment Act 1 of 2009, which came into force on 1 April 2013 with regards to section 6, and on 1 May 2016 in terms of section 12 and 13.

The preamble of the current Act sets out that due regard must be given to previously discriminative practices and that equality must be afforded to all in order to facilitate “full and free participation in the economy by all South Africans.”⁵³

Mergers are regulated by chapter 3 of the Competition Act, setting out matters for consideration and who has the authority to give such consideration in the merger assessment process,⁵⁴ namely the Tribunal and the Commission, these competition authorities duties are provided for in terms of chapter 4 of the Act. As the purpose of competition law is regulatory, the merger control provisions under Chapter 3 accordingly detail the relevant procedures governing these transactions. Section 11 sets out the thresholds and categories of mergers. Section 12 the legal definition of a merger. Section 13 and 14 detail notification, implementation and investigation by the

⁵⁰ Reg 139/2004.

⁵¹ Mouton Commission 1977.

⁵² Op cit note 24 at 87.

⁵³ Preamble amended by s. 22 of Act 39 of 2000.

⁵⁴ See section 12A(1) of the Competition Act.

Competition Commission. Section 15 handles merger revocation by the Commission. Section 16 deals with Tribunal merger proceedings. Section 17 Competition Appeal Court proceedings, as well as merger procedure intervention under section 18.

Only after such careful consideration are the empowered authorities permitted to prohibit or authorise (with or without conditions), or to refer mergers upon notification. Parties to the merger may also appeal such a decision in terms of section 16(1)(a)-(b) read with section 13A(3). The Commission has no power with regards to large merger and is obligated to refer notice to the Tribunal complete with a recommendation as to whether implementation should be approved or not.⁵⁵ Whereas small mergers on the other hand need only be notified on the bases set out in section 13(5)(b) and section 14(1)(b) detailing that after considering the merger, the Commission must issue the prescribed certificate either declaring its approval, conditions or prohibition.

Merger evaluation is a two-pronged test in terms of section 12A(1) comprising of both purely economic competition factors of consideration weighed against public interest factors provided for in section 12A(3), relating to the effect that the merger will have on a specific industrial sector or region, employment, small or previously disadvantaged firms being able to gain market entry, and the ability for local business to compete as international players in foreign markets.

The factors set out in section 12A(2) relate to the substantial lessening of competition, while there are 8 factors for consideration, namely the actual and potential level of import competition in the market, the ease of market entry, concentration and history of collusion in the market, the degree of countervailing market power, growth innovation and product differentiation within the markets, the nature and extent of vertical integration within a market, whether the business or a part thereof of a party to the merger has failed or is likely to do so, and finally whether the merger will result in the removal of an effective competitor. The list is not exhaustive nor is there any

⁵⁵ See section 14A(1).

hierarchy to the list, neither will all factors be relevant to each case, again following a Canadian approach.⁵⁶

2.5.2 The Companies Act

On the other hand the other governing piece of legislation dealing with mergers is the “new” Companies Act 71 of 2008, which came into force on 1 May 2011 having undergone a substantial overhaul especially with regards to mergers comparatively to its precursor the 1973 Act. Having since been heralded for bridging many of the legislative gaps between competition law and companies’ law.

However it is asked herein whether this is sufficient, or if there are still gaps in both definition and procedure that need to be further fused together in order to best align the companies legislation with that of competition law.

An amalgamation or merger is defined in terms of section 1 as ‘a transaction, or series of transactions, pursuant to an agreement between two or more companies resulting in-

- (a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or
- (b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement’.

Under the Companies Act, mergers and amalgamations are specifically dealt with in section 113 read with section 115 and 116, found in the provisions of Chapter 5, setting out fundamental transactions, takeovers and offers. Detailing proposals for amalgamation or merger, setting out requirements, namely the satisfaction of the

⁵⁶ Op cit note 24 at 269.

solvency and liquidity test, as well as a written agreement between the proposed merging parties setting out the terms and manner of implementation, respectively.

2.6 Conclusion

In summary it is clear the two pieces of legislation differ with regards to defining control for the purposes of merger regulation. This paper will explore whether these differences are material, and whether the difference may be exploited by entities planning to merge, but seek to avoid the scrutiny of the authorities by failing to notify. It is apparent from the comparison of these two pieces of legislation that problems are sure to still arise despite the introduction of the new Act, due to how they differ at a definitional level with regards to what constitutes a merger, as a merger is defined on the basis of control thus need to define control is essential. It is submitted that to cure the discrepancy, rather than reforming both pieces of legislation, the definition of both mergers and control should be slightly relaxed to make room for a broader understanding of what constitutes a merger as set out in the Competition Act, which would make bridging the gap easier in order to align the two provisions for a better fit. This would benefit competition as well as business, in as much that merging parties would be better prepared for the requirements and consequences that attach to control.

CHAPTER THREE: DEFINING CONTROL

3.1. *Background and context*

The delineation and characterisation of control is a crucial component to the section 12(1) definition of a merger. However, the manner in which it is used in the subsection is not specifically expressed at all in the Act. This legislative failure has led to interpretive uncertainty, '[a]s yet, the competition authorities have not decided what the term "control" really means.⁵⁷ For example in *Distillers*, counsel for the appellant argued that control constituted 50 per cent plus one share.⁵⁸

The outcome of the data render similar findings, in as much that opinions differ, creating uncertainty and indicating a need to resolve the matter, in order to settle on an adequate definition of control for merging parties who may be caught for notification, as failure to follow mandatory notification procedures will result in serious time and cost implications for the business of the parties to the transaction. The provisions of the Companies Act will thus be consulted in comparison to aid the definitional process where it is possible.

3.2 *Under the Competition Act*

In terms of section 12(2) 'A person controls a *firm* if that person –

- (a) beneficially owns more than one half of the issued share capital of the *firm*;
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm*, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;
- (c) is able to appoint or to veto the appointment of a majority of the directors of the *firm*;
- (d) is a holding company, and the *firm* is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

⁵⁷ Op cit note 33 at 8-14.

⁵⁸ *Distillers Corporation SA Ltd v Stellenbosch Farmers' Winery Group Limited and Bulmers (SA) Pty Ltd and Seagram Africa Pty Ltd* 08/CAC May 01 354.

(e) in the case of a *firm* that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) in the case of a close corporation, owns the majority of members' *interest* or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has *the ability to materially influence*⁵⁹ 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) to (f).⁷

While s 12(2)(a) – (f) imply a *numerus clausus*, it is not in fact an exhaustive list (supposedly).⁶⁰ The tribunal had previously confirmed this assertion in *Bulmer*, acknowledging that there were many instances of mergers that were not listed, for example the purchase of assets as set out in s 12(1)(a).⁶¹

As tempting as it may be to suggest an amendment of s 12(2), for the inclusion of further cases where control has taken place, this may only serve to further ostensibly portray it as a closed list, leaving open for gaps at risk of being open to abuse, or serving as a danger to merging parties who will unwittingly be caught for notification.

To cure these issues it is suggested that control be defined in terms of and in relation to its use in s 12(1), for the purposes of clarity and certainty. Further, s 12(2) should be made more general and open, simplifying it to a broader notion, as that offered by s 12(2)(g) referring to the ability to 'materially influence' the *firm* in a manner comparable to control. However it must be noted, the last subsection of the provision may also lead to negative joint control, in instances where minority shareholders have the ability to veto a business plan.⁶² S12(2) should consequently include a substantive element of control in line with the single economic entity approach.⁶³ It is opined that the legislation should provide a clearer and more general point of reference as to

⁵⁹ Own emphasis.

⁶⁰ *Ethos Private Equity Fund IV and Tsebo Outsourcing* Case number 30/LM/Jun03 23-24; *Caxton and CTP Publishers and Printers Limited v Naspers Limited and others* Case number 16/FN/ 46.

⁶¹ *Bulmer SA et al v Distillers Corporation SA Ltd et al* Case number 101/FN/Dec00 13-14.

⁶² Op cit note 24 at 236.

⁶³ This functional, rather than formalistic, approach in identifying the entity to which liability is attributed under competition law makes it possible for two or more separate legal entities to be found to form a single economic unit.

when a transaction is a merger, subject to review on a rebuttable presumption. '[T]o provide for a more realistic, if less exact, definition of control.'⁶⁴ As it is submitted that the bright-lined categories set out in section 12(2)(a)-(c) give rise to various problems, namely, subsection (a) is an odd provision in that it stipulates only in terms of an owner and not a nominee. Courts have also at times interpreted the section in a restrictive manner based on economic interest,⁶⁵ and at other times in a manner that is not compatible with company law.⁶⁶ Subsection (c) appears to be in conflict with the company law approach, thus is recommended to also look to section 3 of the Companies Act for a more accurate phrased provision.

3.2.1 *The case law*

The courts have applied both formalistic and literalistic approaches to constructing the meaning of the expression control, a literalistic approach being favoured,⁶⁷ in order to interpret the provisions of s12(1) dealing with direct forms of control, and the indirect forms of control set out in s12(2). A bright-line method being employed to the later section, in order to immediately illuminate the listed conduct as instances where control as been deemed to have been acquired.⁶⁸ This creates a level of certainty, in respect of relieving pressure on the definition of control, '[h]owever the competition courts interpretation of the provision is open to criticism', as the provisions run the risk of being constructed in an overly formalistic manner, which further serves to potentially undermine voluntary compliance.⁶⁹

3.2.1.2 *Change of control*

While the Act is still relatively new and its infancy, having come into effect on 1 September 1999, its innovative nature has generated a wealth of case law with regards to defining what constitutes a merger. The bulk of these matters deal with the question of whether a change in control has taken place, and will be considered below in

⁶⁴ Op cit note 33 at 8-16.

⁶⁵ *Caxton and CTP Publishers and Printers Limited v Naspers Limited and others* Case number 16/FN

⁶⁶ *Ethos Private Equity Fund IV and Tsebo Outsourcing* Case number 30/LM/Jun03.

⁶⁷ Supra note at 61.

⁶⁸ Supra note 66 at 16, 34, 35, 42, & 43.

⁶⁹ Op cit note 33 at 8-16.

assessing whether the competition authorities have adequately defined control in legislative theory, as well as in interpretation and practical application thereof.

In the seminal case of *Distillers*,⁷⁰ the Competition Appeal Court (CAC) was faced with the decision as to whether a transaction constituted a merger, where a change had taken place in direct (but not indirect) control.⁷¹

The matter hinged on the fact that both appellants were owned by a mutual group of controlling shareholders, and thus in proposing to merge (acquisition of assets and liabilities of one by the other), contended that, upon such merger, no change of control would take effect, negating the need to file a merger notification with the competition authorities.⁷²

The Competition Appeal Court had two methods of approach at its disposal in deciding on the *Distillers* matter,⁷³ namely that it could ameliorate and revolutionise the effect of the onus of notification in employing a purposive construction of what will be caught as a merger, by reading in an implied exemption in relation to transactions where immediate controllers may change, yet the ultimate controllers remain constant (as was contended by the merging parties).⁷⁴

However it was in the alternative that the Appeal Court rather adopted a literal interpretation, construing any change of control as a merger, whether as the result of a direct or indirect change in shareholding.⁷⁵

The court held that it was inconsequential as to whether there had been a shift in indirect control, i.e. in the ultimate shareholding, but rather what was of significance was that a change in direct control had taken place, meaning the transaction was caught by the definition and thus notifiable as a merger, obligating the merging parties to comply with filing procedures.⁷⁶

⁷⁰ *Supra* note 58.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

*‘Thus, the acquisition of the assets by the first applicant would bring about the acquisition of control as between first appellant and second appellant, irrespective of what effect the transaction itself might have on the ultimate control that the shareholders of the two appellants exercised’.*⁷⁷

The court further expressed that the Act is silent, as no express provision has been legislated detailing transactions between a company and its wholly owned subsidiary.

In deciding on the same matter prior to appeal, the Tribunal read in an exception for where entities are part of the same ‘single economic entity’. Finding on the facts that the parties had failed to show that the three controlling shareholders comprised a single economic entity.⁷⁸

Whilst not enslaving itself to literalism in adopting this approach, the CAC clearly did so for valid policy reasons in order to interpret when a merger is caught in a comprehensive fashion, so that a greater number of mergers fall under the inspection competition authorities.

*‘...the purpose of merger control envisages a wide definition of control... the relevant market.’*⁷⁹

The Competition Appeal Court went on to express a further principle that was to be thematically shadowed in cases to follow, viz. more than one firm can control another at the same time.

‘The wording of section 12(2) clearly contemplates a situation where more than one party simultaneously exercises control over a company. This situation can be illustrated with the following example: A beneficially owns more than half the issued share capital of the firm. He concludes an agreement with B in order that the latter may run the business. B agrees

⁷⁷ Ibid at 27.

⁷⁸ Supra note at 61.

⁷⁹ Supra note 58 at 36.

*provided that he obtains control over the appointment to the board of directors as well as senior staff and marketing policy. In such a situation A would control the firm as defined in terms of section 12(2)(a) and B would exercise control as defined in term[s] of section 12(2)(g). In short, while A would have ultimate control, B would have control of a sufficient kind to bring him within the ambit of control as defined by section 12.'*⁸⁰

In *Cape Empowerment Trust v Sanlam Life Insurance Limited* (et al),⁸¹ a later decision deciding on what constitutes a merger, the Tribunal took note that '[s]imultaneous control of a company for purposes of section 12 by two or more entities is a concept specifically acknowledged by the *Distillers* case.'⁸²

This conclusion has far reaching ramifications, not always immediately apparent to those operating in business and trading in the markets, who often believe the converse to be correct, i.e. that there is only a singular controller to be caught, to the exception of situations dealing with joint ventures, and consequently a joint control dynamic within the stipulated definition of a merger under section 12(1). Thus from a commerce perspective, the objective of merger control should be to only intervene where the circumstance is such that the said sole controller passes the control to another through an act of cession.

In accordance with the Act, control may be established directly or indirectly for the purpose of concluding the presence of a merger.⁸³ Section 12(1) sets out how direct control is established, while indirect control is not always as apparent or straightforward to determine, section 12(2) attempts to list instances of indirect control in order to assist and guide the courts in determining when control has indirectly passed. Naturally the list is said to be non-exhaustive, as a variety of forms of indirect control may exist, including new potential manifestations of control that may exist in the future. The influence the exercise of control culminates in must however be material, in accordance with s12(2)(g).

⁸⁰ Supra note 58 at 25.

⁸¹ Case no 05/X/Jan06.

⁸² *Cape Empowerment Trust v Sanlam Life Insurance Limited and Sancino Projects Limited* Case no 05/X/Jan06 54.

⁸³ *Primedia Ltd v Competition Commission* 39/AM/May06 12/02/2007 135.

The *Bulmer* matter offers a narrow construction of direct control, only regarding the immediate owners of assets as direct controllers. As such majority shareholders would amount to indirect controllers. This seems illogical and would further result in direct control scarcely being established at all.⁸⁴

As is evident, the *Distillers* case illustrates the possibility for there to be more than one controller at play simultaneously, and that the concept of a merger should be construed expansively.⁸⁵

Accordingly the fear of hegemonic designs on the part of their rivals has inspired private players to interdict the implementation of proposed mergers involving their competitors, while still in their incipiency, conduct that can be viewed as a potentially powerful tool to thwart, or at least hamper rival ambitions. A sterling example of such efforts to thwart rivals Naspers, is illustrated in the *Caxton* matter. Caxton brought the matter forward with regards to restructuring M-Net's businesses, as preceding the transaction, Naspers owned shares, directly and indirectly in M-Net, cumulating to a holding of less than 50 per cent of an economic interest in M-Net. However, it was common cause that prior to the merger, MNH 98 held 52 per cent of M-Net's shares, making it the controlling shareholder. This company was a joint venture between Naspers and two other firms, thus Naspers and its fellow shareholders jointly controlled M-Net. Subsequent to concluding the transaction, Naspers significantly increased its direct interest in M-Net by over 30 per cent. Accordingly post transaction, while it's direct interest remained below 50 per cent, its cumulated direct and indirect interests now were in excess of 50 per cent.⁸⁶

Counsel for Caxton based its argument on the *Ethos* case, submitting that Naspers had crossed the bright-lined tests set out in section 12, as its holdings had now crossed the 50 per cent threshold, thus constituting a merger. However the Tribunal held that the facts of the case distinguished it from the *Ethos* matter, in as much that part of the holdings in M-Net were held indirectly, further submitting that, even if indirect holdings were to be counted, the recognised controller should at least control the

⁸⁴ Supra note 61.

⁸⁵ Supra note 58.

⁸⁶ Supra note 65.

indirect shareholdings. The relevant amount of shareholdings to take Naspers over the threshold was held in MNH 98, and that company was the subject of joint control and not Naspers sole control, accordingly that stake could not be counted in the Tribunal's determination, and without it no line had been crossed and it was thus found that there was no change in control, and therefore did not constitute a merger.⁸⁷

Where a joint venture constitutes a merger as per s12(1), merger control laws will apply. However, the Act does not specifically provide for a definition with regards to what a joint venture is, the only stipulation being that 'control may be obtained by one or more firms' which is problematic in itself.

The courts in *Distillers* interpreted this to mean more than one firm could simultaneously yet separately control another firm, therefore rejecting a unitary approach to control. This is correct, as it asserts the legislatures' acknowledgement of joint control constitutes a legitimate form of control.⁸⁸ The commission has published a non-binding practitioners guide, accordingly it is submitted that the Act might need to include further details in order to determine when such instances of control have been established.

Section 12(2) sets out a 'person' will have control when falling into a bright-lined category. This creates further complications with regards to joint controllers, who may each fall into differing categories. The two forms of control are distinct and thus a joint controller may consequently become a sole controller at a later stage.⁸⁹

As the Act does not specify what constitutes joint control, the courts have interpreted it to be shown through either an express or tacit agreement between the various controllers, which 'ally themselves',⁹⁰ strongly.⁹¹ As such, intention to control must be material, however the courts held that an agreement to act together in a single

⁸⁷ Ibid.

⁸⁸ Supra note 66; *Business Venture Investments 790 (Pty) Ltd/Afrox Healthcare Ltd* 105/LM/Dec04 5.

⁸⁹ Supra note 66 at 28.

⁹⁰ *Johannic Holdings Limited v Hosken Consolidated Limited and the Competition Commission* Case number 65/FN/Jul 05 98 read with 60.

⁹¹ *Gold Fields v Harmony Gold Mining Co Ltd* Case No 86/FN/Oct04 30-31.

resolution is sufficient, as it would result in the control structure being robustly altered by the intended joint action.⁹²

This treatment of the notion of joint control may however produce deleterious results, with regards to minority shareholder voting agreements. Accordingly, the interval of long-lasting control will be exercised through the joint agreement, rather than in terms of whether the resolution will impact the structure of the target firm. Therefore this constraint should be relaxed.⁹³ It is still imperative to adequately define joint control for the purpose of detecting collusive agreements that would constrict or substantially lessen competition in the markets,⁹⁴ thus determining whether the transaction would pass or be prohibited.⁹⁵ Consequently, they can be perceived as separate, yet related issues for consideration by the authorities.

It may further be helpful in the context of providing an explanation on the meaning of control, to examine the definition of a business, and the role it plays in establishing control.⁹⁶

The definition of a business has further sparked debate, when regarded in terms of what constitutes a merger. The *Edon* matter illustrated these deliberations, having been brought before the tribunal by the commission for the failure to notify a merger. The crux of the matter hinged of whether a debtors book of an insolvent company amounted to a merger. It was argued by the commission that it was, on the grounds that it was an acquisition of assets. Conversely, the tribunal held this was not the test, and that the issue at hand was rather whether the assets constituted whole or part of a business of another firm,⁹⁷ concluding with the assertion that it did, as it gave strategic value to a firm in this market, and amounted to a market share, consequently part of a business.⁹⁸

⁹² Ibid at 31-33.

⁹³ Op cit note 33 at 8-37.

⁹⁴ Supra note 83 at 77-79.

⁹⁵ Supra note 88.

⁹⁶ *Competition Commission and Edgars Consolidated Retail Stores (Edcon) and Retail Apparel Pty Ltd* Case number 95/FN/Dec02.

⁹⁷ Ibid para 22-23.

⁹⁸ Op cit note 33 at 42-43.

However, it was noted that not all book debts could amount to a merger, and consequently each matter must be interpreted on the individual facts of the case.⁹⁹

In doing so the tribunal considered the practices of foreign jurisdictions in dealing with issues of this nature, emphasising a reliance on the EC and US approaches. It was finally held a merger had taken place and Edcon was fined for failure to notify.¹⁰⁰

3.3 *Defining control under the Companies Act in comparison to section 12*

With regards to the provisions set out in the Companies Act of 2008, there are a number of sections relating to mergers, as aforementioned in chapter 2, more specifically when trying to establish a solid definition of control under this Act, the following provisions will apply.

3.3.1 *Section 2: Related and inter-related persons, and control*

- ‘(1) For all purposes of this Act—
- (a) an individual is related to another individual if they—
 - (i) are married, or live together in a relationship similar to a marriage; or
 - (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
 - (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and
 - (c) a juristic person is related to another juristic person if—
 - (i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
 - (ii) either is a subsidiary of the other; or
 - (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).
- (2) For the purpose of subsection (1), a person controls a juristic person, or its business, if—
- (a) in the case of a juristic person that is a company—
 - (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a); or
 - (ii) that first person together with any related or inter-related person, is— (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;
 - (b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members’ interest, or controls directly, or has the right to control, the majority of members’ votes in the close corporation;

⁹⁹ Ibid.

¹⁰⁰ Ibid at 68.

(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

(3) With respect to any particular matter arising in terms of this Act, a court, the Companies Tribunal or the Panel may exempt any person from the application of a provision of this Act that would apply to that person because of a relationship contemplated in subsection (1) if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.’

Delpont has asserted that section 2 is based on section 12 of the Competition Act,¹⁰¹ and Davis JP acknowledges the importance of the section in relation to defining control, implying it may be superior to that set out in section 12 of the Competition Act. Adv. Le Roux further makes reference to section 2, concluding it to be an adequate characterisation of the notion of control, and somewhat more comprehensive than that of section 12.

Subsection 1 deals with related and interrelated persons,¹⁰² which may be helpful to consult with regards to joint ventures, as the Competition Act only makes reference to a ‘person’ falling into one of the bright-lined categories, where there is more than one controller and different controllers fall into different categories set out in section 12(2). Section 2 thus gives a more comprehensive guide to related individuals and the concept of interrelation with regards to control over a juristic person, and subsidiary relationships.¹⁰³

It is thus submitted that this provision may serve to provide clarity in a particular matter when assessing whether control has been established, in concurrent consultation with Issue 3 of the Practitioners Guide, dealing with issues relating to joint control.

In his commentary, Delpont further notes control may also be established over the business of a juristic person however acknowledges that under section 2(1)(c)(ii) a

¹⁰¹ Piet Delpont *Henochsberg on the Companies Act 71 of 2008* (2012) 28(5).

¹⁰² S2(1).

¹⁰³ *Kudumane investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd* 34403/2011. 11 June 2012 (GSJ) 50; *Peel v Hamon J&C Engineering (Pty) Ltd* [2013] 1 All SA 603 (GSJ) 56.

juristic person may be a subsidiary.¹⁰⁴ However section 3 falls somewhat short in that it only provides for a company to be a subsidiary of that juristic person.¹⁰⁵

Subsection 2 sets out control of a juristic person or its business, this must be read with section 3(1) where such a person acts together with a related or interrelated person in manners contemplated in section 3(1)(a)(i)-(ii).

It is fundamental to understand when and how person are related with regards to section 2, in order to establish whether other provisions of the Companies Act might apply, in addition to effectively regulating transactions that involve related persons, as the terms 'related' is widespread throughout the Act, potentially triggering the provisions of section 41(1) setting out the issuing of shares to related persons, as well as section 44 and section 45, detailing the rules governing financial assistance in respect of the acquisition of shares, or to related persons, respectively.¹⁰⁶ As aforementioned, section 2 and section 3 need be read together, as looking to subsidiary relationships alone would be insufficient.

This legislative short-coming was highlighted in the recent unreported High Court matter, which further served to illustrate situations where the bright-lined tests are not applicable to a scenario of joint de jure control, however one party also had de facto control and therefore a greater capacity to 'materially influence' the policy of the business.¹⁰⁷ The court rightly established this to be the enquiry for examination, concluding it to be a factual enquiry based on the circumstances of the case. The court further addressed whether purely factual control is sufficient for there to be an 'ability' to materially influence the policy of the business within the context of competition law, making reference to the *Caxton* case, where it was submitted by the court with regards to the meaning of 'ability', that it implies a power derived through agreement or a similar legal instrument, and cannot be said to be established through how a company is managed, nor whether parties elect to exercise these rights. This

¹⁰⁴ Op cit note 101.

¹⁰⁵ See DH Botha *Groups in South African Company Law* (LLD thesis University of Pretoria June 1981).

¹⁰⁶ Yaniv Kleitman *CORPORATE AND COMMERCIAL ALERT* (Cliffe Dekker Hofmeyr 2017). <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2017/corporate/download/Corporate-and-Commercial-Alert-New-Appointment-10-May-2017.pdf> accessed: 01/09/2017.

¹⁰⁷ In terms of s2(d).

case further highlights that better regard be paid to the catch-all set out in section 2(*d*) in order to best determine whether control has been established. It is submitted the courts accordingly need apply their minds to the context rather than mechanically following a checklist set out by the bright-lined provisions.¹⁰⁸

Section 2(2)(*b*) contemplates control situations arising from Close Corporations and can be viewed as very similar to the provisions set out in section 12(2)(*f*), in as much that control is determined according to the majority of the voting power.

Section 2(2)(*c*) deal with trust situations control being based on voting power, the ability to appoint trustees, as well as on the ability to appoint or change the beneficiaries to the trust. This provision can similarly be found in section 12(2)(*e*) of the Competition Act.

Section 2(2)(*d*) is significant in that it mirrors the default provision found in section 12(2)(*g*) of the Competition Act. Stating person controls a juristic person when that person has the ability to materially influence the policy of that juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraphs (*a*), (*b*), and (*c*).

Section 2(3) makes allowance for persons detailed in section 2(1) to rebut the presumption of relation with the necessary evidence.

It is submitted in agreement with Delpoort that section 2 is an exhaustive list modeled off the Competition Act's section 12,¹⁰⁹ indicating that both pieces of legislation are overly constrictive and that not enough regard is paid to section 12(2)(*g*) and its sister provision identically twinned in section 2(*d*) of the Companies Act by the respective courts in both competition and companies law. He goes on to observe that while control centers around the majority of votes on a board, reference is only made to appointment and election, or the power to control that conduct, but falls silent and fails to set out the powers dealing with removal, assuming it to be through approval by special resolution. Section 2(*d*) is however meant to expance beyond the confines

¹⁰⁸ *De Klerk v Ferreira and Others* (35391/14) [2017] ZAGPPHC 30 (2 February 2017).

¹⁰⁹ Op cit note at 101.

of ordinary corporate law principles based on voting control, in accordance rather with what the circumstances may dictate on a case-by-case basis.¹¹⁰

3.3.2 Section 3: *Subsidiary Relationships*

- (1) A company is—
- (a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination—
 - (i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or
 - (ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or
 - (b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a).
- (2) For the purpose of determining whether a person controls all or a majority of the general voting rights associated with issued securities of a company—
- (a) voting rights that are exercisable only in certain circumstances are to be taken into account only—
 - (i) when those circumstances have arisen, and for so long as they continue; or
 - (ii) when those circumstances are under the control of the person holding the voting rights;
 - (b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and
 - (c) voting rights held by—
 - (i) a person as nominee for another person are to be treated as held by that other person; or
 - (ii) a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.
- (3) For the purposes of subsection (2), ‘hold’, or any derivative of it, refers to the registered or direct or indirect beneficial holder of securities conferring a right to vote.’

Section 3 dealing with subsidiary relationships, is assumed to be interpreted in line with the provisions set out in the old Act under section 1(3)(a) with regards to subsidiaries in the context of defining control. Michael Katz includes the provision in his analysis on comparing the two Acts in order to define control. Delpont submits that again, the circumstances set out in the provision dealing with subsidiaries is exhaustive.¹¹¹

¹¹⁰ Op cit note 33 at 8-22 – 24.

¹¹¹ See *Unisec Group Ltd v Sage Holdings Ltd* 1986 (3) SA 259 (T).

The new section, although worded differently, in substance it has the same meaning, although no specific reference is given to one replacing the other. The only material difference being in respect of holding companies, in as much that the new section relaxes the requirement for membership or registered shareholding of their subsidiaries.¹¹²

However the provision does not set out a definition for the term holding company, only the term 'hold' is made reference to in the context of section 3(3). Notwithstanding, this provision is confusing with regards to beneficial (direct and indirect) holders of shares to which voting rights attach. It is submitted that section 12(2)(d) of the Companies Act offers no solution to this legislative oversight as it simply makes reference to the old Act's section 1(3)(a).

It is clear that while there are numerous overlaps with the competition provisions, the Companies Act is also somewhat problematic in regards to defining holding and subsidiary relationships, and thus may fall foul of being overly narrow and constrictive.

Section 3(1)(a)(i) is similar to section 12(2)(b) with regards to defining a company in terms of voting rights. Bright lining however creates a risk of being constructed in a disproportionately narrow sense by the courts.

Section 3(1)(a)(ii) is similarly comparable to section 12(2)(c) in respect of electing directors. The former being phrased in more specific language, as the Competition Act only makes reference to the appointment of the majority of directors, while conversely the Companies Act refers to the appointment of directors who hold the majority of voting rights at meetings of the board. It is submitted that the Companies Act offers a sounder and more logical explanation, as the majority of the directors may not hold the majority of the voting rights.¹¹³

Section 3(2) sets out when a person will hold the majority of voting rights, and is also comparable with and encompassed by section 12(2)(b). However, the term 'controlled

¹¹² Op cit note 33 at 8-24.

¹¹³ Supra note 111.

entity’ is wider and less technical concept than that of a subsidiary. In this sense the Competition Act is preferred as it is less constrictive and may therefore leave room open for this to be interpreted to include other corporate bodies in addition to companies. The Companies Act only defines beneficial interest (assumed to mean beneficial owner in the common law sense) and not beneficial holder, however the beneficial holder of securities and a holder of a beneficial interest do not equate to the same thing.¹¹⁴

Furthermore Delport opines that while the reference to holding voting rights in a ‘fiduciary capacity’ or as a ‘nominee’ was intended by the legislature to prevent these types of representatives evading the provision in order to abuse the corporate personality of the undertaking, using it as an alter ego to escape the consequences of potentially unconscionable conduct.

3.3.3 Section 123: Mandatory Offers

‘(1) In this section, “**prescribed percentage**” means the percentage prescribed by the Minister in terms of subsection (5).

(2) This section applies if—

(a) either—

(i) a regulated company reacquires any of its voting securities as contemplated in section 48; or in terms of a scheme of arrangement contemplated in section 114; or

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

(b) before that acquisition a person was, or persons contemplated in paragraph (a)(ii) together were, able to exercise less than the prescribed percentage of all the voting rights attached to securities of that company; and

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

(3) Within one day after the date of a completed acquisition contemplated in subsection (2),

¹¹⁴ Op cit 101 at 32.

the person or persons in whom the prescribed percentage, or more, of the voting securities beneficially vests must give notice in the prescribed manner to the holders of the remaining securities, including in that notice—

(a) a statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated 10 company; and

(b) offering to acquire any remaining such securities on terms determined in accordance with this Act and the Takeover Regulations.

(4) Within one month after giving notice in terms of subsection (3), the person or persons contemplated in subsection (2) must deliver a written offer, in compliance with the Takeover Regulations, to the holders of the remaining securities of that company, to acquire those securities on the terms contemplated in subsection (3)(b).

(5) For the purposes contemplated in this section, the Minister, on the advice of the Panel, may prescribe a percentage of not more than 35% of the voting securities of a company.’

Section 123 of chapter 5, setting out fundamental transactions, and deals with mandatory offers. In such a context, the section stipulates that the holder of 35 per cent of the voting securities,¹¹⁵ must give notice to other holders informing them of the holders right to exercise voting power, and its obligation to make offers for the acquisition of the remaining securities, in a manner that is in accordance with the Act and the Take Over Regulations referred to in section 120 of chapter 5.

As this is an example of the exercise of control, it is submitted that it may in fact prejudice and unfairly exclude minority shareholder’s rights to vote, as well as other forms of consequent inclusion, effectively barring their means of participation. It is further submitted that while the purported objective of the section is to treat all shareholders fairly and equally,¹¹⁶ there may be instances where majority shareholders collude to the minority’s detriment.

¹¹⁵ The 35 per cent threshold is determined by the Minister in accordance with Regulation 86(1). This is not relevant to competition law. Rather, s12(2)(a) setting out 50 per cent or more of issued share capital is regarded as determinative of establishing control in the context of quantifying percentages as qualifying factors in providing a definition for control.

¹¹⁶ Farouk Cassim *et al Contemporary Company Law* 2 ed (2012) 736.

Yet in *Gold Fields*, Lewis P held in *obiter* that hostile mergers or take-overs were necessary in facilitating the competition process, however, that the Competition Act seeks to ‘chill’ these forms of bids in particular sectors.¹¹⁷

3.4 Findings of the research

In embarking upon a comparison between two pieces of legislation and the various definitions of control offered by the Competition Act and the Companies Act respectively, as set out above, the following was observed and noted by the participants,¹¹⁸ as experts in these fields. I will list the responses collected from the participants in the order that the sample was received, and accordingly data was gathered. In answering the questions, ‘*is there a gap between the Competition Act definition of control and the companies law definition of control?*’ and ‘*are either or both areas lacking in definition?*’¹¹⁹

Davis JP submitted, *[t]here is a significant provision, s[ection] 2 of the Companies Act. However in competition law, the courts decide the question,*’ and for the second question stated, ‘*[y]es, in competition law.*’¹²⁰

Adv. le Roux omitted the first question, and opined on the second that ‘*[t]he point is not that there is a lack of definition, it’s that the two Acts are aiming at different concepts of control. The Co[mpanies] Act reflects the policy to regulate control so as to prevent its abuse with respect to governance/shareholders – protecting minorities and subsidiaries, as well as to trigger the reporting requirements in corporate groups.*

The Comp[etition] Act is concerned about changes in control that would alter market power/structure/conditions of competition – such as by increasing the likelihood of coordination or concentrations that could produce dominant positions that may be abused. So it is a wider, more flexible definition, without hard/bright lines like the 35% deemed control provision in Co law.

¹¹⁷ Supra note 91.

¹¹⁸ See answers to question 2 of the research questionnaire.

¹¹⁹ Op cit note 14.

¹²⁰ Op cit note 15.

The need to understand Co[mpany] law concepts of votes/rights and relationships (e.g. concert parties) applies in Comp[etition] law of course, but the need for certainty that the former requires for corporate governance could be a hindrance in competition/merger control circumstances. A party may be able to impact the market and therefore competition without falling into one of the definitions of controller for Co[mpany] law purposes. Its identity and conduct may be relevant for merger control though.

There are many Co[mpany] law scenarios and questions, though, that comp[etition] law ignores as a result. E.g. issues around meaning of “beneficially owns” “majority of shares”, how to account for vote allocation arrangements or shareholder agreements on voting (voting pools, for e.g.).

But, frankly, the Caxton decision and the meaning of sec 12(2)(g) in particular, provide sufficient guidance for merger control purposes.¹²¹

Michael Katz asserted, in relation to the difference between concepts of control in the Companies Act and Competition Act, ‘*The question as to whether there is any alignment in the concepts of “control” in the Companies Act raises interesting issues.*

It is vital not to consider the concept of “control” in a vacuum in both the Companies Act and the Competition Act but rather to examine control in a particular context.

Thus, for example, “control” in company law is relevant in the definition of holding and subsidiary companies (Section 3 of the Companies Act), the prohibition of providing financial assistance to acquire securities (Section 44 of the Companies Act) and the prohibition of intra-group finance (Section 45 of the Companies Act).

For your purposes the question of “control” arises in the context of merger control. In this context control for Competition Act purposes as set out in Section 12(2) of the Competition Act : there are certain bright line tests - Section 12(2)(a),(b), (c); and the

¹²¹ Ibid.

overriding omnibus test in Section 12(2)(g) which rests on the ability to “materially influence the policy of the juristic person in a manner comparable ...”

Control for Companies Act purposes is relevant in the obligation set out in Section 123 of the Companies Act to make a mandatory offer where a party acquires at least 35% of the voting securities of a company . The threshold of 35% is deemed control. The important question is whose securities must be aggregated to determine whether the 35% threshold has been crossed? In this regard the securities held by the following parties must be aggregated : the acquiring party; related parties and inter-related parties of the acquiring party; and persons acting in concert with the acquiring party.

It will be seen from the foregoing that in merger control, the Competition Act definition is wider in that Section 12(2)(g) has a potentially broad sweep.

The Companies Act, although it does not have the breadth of Section 12(2)(g) (save in the case of Close Corporations), is potentially wider in that it includes the three categories of persons referred to [in the aforementioned] paragraphs ... above.

As regards merger control for company law purposes, the 35% threshold is conclusive.

The only issue that arises is whether there are concert parties whose shares may be taken in account. This is a factual enquiry to be answered in each case.

For competition law purposes, the 35% threshold is not relevant.

In an acquisition of securities of more than 35% or less than 35%, control may be achieved dependent on the application of the principles set out in Section 12(2)(g) to the shareholder profile of the company concerned. Thus, in a company where there is a large number of shareholders with relatively small shareholdings, control may be achieved with less than 35%. Conversely, in a company with a smaller number of large shareholders, control may only be achieved with more than 35%.

There are sometimes debates in the competition law space relating to the relevance of shares held by related and concert parties.

Thus, you will see that the concepts of control in company law and competition law are based on different philosophical and policy considerations. The tests for measuring control are designed to achieve the different policy and philosophical objectives.¹²²

The ENS competition department commenting in support submitted, 'I don't believe so. Apart from the fact that part of the Companies Act definition of "control" derives from the Competition Act, I regard them as discreet pieces of legislation - each subject to its own case law, jurisprudence and policy drivers. Of course, the jurisprudence may overlap, from time to time, but the essential approach to each section must be informed by the broader statutory context in which it exists.

With this in mind, the Competition Act serves a fundamentally different purpose to the Companies Act (in general); and the "control" provisions in each serve fundamentally different purposes (in particular).'

'In commenting on the definition of "control" in the Competition Act only, I do not believe that it is lacking in definition. If anything, it is too complicated, in my view, and could be reduced substantially. Given the nuances applicable to "control" from a competition law perspective, my preference is for a simply worded, broad definition that is given meaning, over time, in case law, policy documents and guidelines.¹²³

Norman Manoim responded, *'I don't think of this as a gap.*

The notion of control serves different purposes under the respective Acts and hence we shouldn't expect the definitions of control to be the same. In competition law a change of control can mean a change in the behavior of the firm in the market, which may have implications for competition, and hence its concept of control is wider than

¹²² Ibid.

¹²³ Ibid.

*that in company law. For Competition law a change in de facto control is as important, if not more important than a change in de jure control.*¹²⁴

3.5 Analysis and Recommendations

It has become evident through this study, that both concepts of a merger, and that of control as defined by section 12, have been formulated in a confusing manner, consequently making the provisions difficult to interpret in certain cases. This is clear from the inconsistency displayed by the courts' application of the section. In the *Distillers* case, the CAC opined on the purpose of chapter 3 being to carefully monitor transactions that may substantially lessen competition.¹²⁵ Davis JP further remarked that it is also aimed at promoting competition in certain market structures.¹²⁶

The Tribunal however offered a better interpretation in the preceding decision on the matter. In as much that it was constructed in a wider manner, and held 'the legislature intended to raise the burden of notification to avoid undesirable consequences on all involved of having to unravel transactions afterwards'. Thus it has been observed that the obligation to notify must be construed broadly, and in summary, section 12(2) is not determinative in establishing the meaning of the word control.

Other cases however have illustrated a more restrictive view, further attesting to the erratic interpretation and application of section 12. The interpretation of the merger provisions shown in the *Johnnic* case differs from that in *Cape Empowerment Trust*, to the extent that authors Kemp and Sutherland have noted that this 'seems illogical'.

While the bright-lined provisions set out in section 12(2)(a) – (c) need not necessarily be jettisoned entirely, they have led to uncertainty, accordingly it is recommended that the wider reaching more general provision set out in section 12(2)(g) be used as a guide to follow, the language of 'material influence' being adequate and in line with

¹²⁴ Ibid.

¹²⁵ Supra note 58 at 357-358.

¹²⁶ Citing Richard Whish *Competition Law* 4ed (2001) 728.

article 3(2) of the EC Merger Regulations, setting out a person obtains control where the ‘possibility of exercising decisive influence’ over a firm is conferred over them.¹²⁷

The default provision is sufficiently general enough to widen or narrow the scope of the section on an individual case-by-case basis according to policy grounds, if it is interpreted correctly by the courts, who have not done so, as is evident from the case law. This it is submitted that the legislature would have been correct in providing for an explicit definition of control in relation to defining a merger as set out in section 12(1). However, in the current absence, section 12(g) can be applied to ease the definitional complications surrounding control.

With regards to joint control, as the Act fails to define it at all, a blend of descriptions from the *Sasol* case,¹²⁸ as well as Issue 3 of the Practitioner’s Update,¹²⁹ can be consulted for some clarity. In addition to the European approach, setting out that joint control is established where it can be shown that functions are being performed normally, executed by firms operating on the market.¹³⁰ It is submitted this is a sound requirement and should be implemented into South African competition law.

Although the Companies Act sets out a more comprehensive list codified under the various provisions aforementioned, most notably sections 2, 3, 113, 115, 116, and 123, and can thus be argued to provide a greater specification of instances where control may be established, however these provisions are still not without fault and problems of their own, therefore potentially leaving open a gap for situations where control has passed in a manner not listed. This might result in companies either actively exploiting this gap in order to avoid notification for reasons that will be explored under the section, chapter 4.

Or, where bona fide errors have been made as the result of ignorance on behalf of the parties to the transaction being unaware of the consequences that will flow from

¹²⁷ Reg 139/2004.

¹²⁸ *Sasol Chemical Industries (Pty) Ltd v Competition Commission* 45/CR/May06 2008/06/02.

¹²⁹ Competition Commission South Africa Issue 3: Practitioner’s Update *The application of merger provisions of the Competition Act 89 of 1998, as amended, to joint ventures* (2001).

¹³⁰ Richard Whish *Competition Law* 4ed (2001) 749.

control passing in a manner constituting a merger of a certain size, as set out in chapter 5 below.

This accordingly could lead to severe time and cost implications that could disadvantage the business of the undertakings in question, and may later lead to a greater ripple effect throughout the market of that particular sector.

Furthermore issues may arise with regards to beneficial ownership versus beneficial interests,¹³¹ as section 12(2)(a) only sets out and deals with the term 'owns', this is problematic. Section 56(3) of the Companies Act at least set out requirements for listed companies to keep registers regarding beneficial ownership. Again, this might be of use in a competition law context, and something the authorities ought to consider including into the South African competition law regime.

The *Ethos* and *Cape Empowerment Trust* cases act as good examples that the meaning of beneficial holding of shares is unclear. It was held that the holder of the majority of preference shares is the sole controller of that particular undertaking to which the preference shares attach. Despite the fact that in practice, preference shares seldom have voting rights that attach to them.¹³² It is thus opined herein that these cases serve to illustrate that while section 2(d) of the Companies Act mirrors section 12(2)(g) of the Competition Act, it needs to be interpreted in a similar manner giving it the relevant breadth that its application requires, in order to best align its jurisprudence with an appreciation of competition law. Notwithstanding that the provisions of the Companies Act may reciprocally be consulted where sections 12(2)(a)-(f) are unhelpful in order to avoid overly formalistic constructions of the law, as have already been seen in the courts interpretation of the legislation thus far.

While the two different pieces of legislation serve different philosophical and policy functions within the commercial sphere, it is herein opined that a reason cannot be found as to why the provisions in both the respective statutes cannot be turned to and made use of where it would be beneficial in terms of the need to establish control, as well as to reach a fair and favourable outcome. Thus while different in purpose and

¹³¹ Supra note 65 above at 32-33.

¹³² Supra note 82 above at 47-49.

function, they should be viewed as separate but complimentary pieces of legislation, until such time as a more adequate singular and uniform definition of control can be legislated, as neither is without its flaws.

It is therefore submitted that these legislative problems need to be cured in order to facilitate consistency and a balanced reading of the provisions governing merger control for a more stable outcome. It is recommended that a solution may be to relax the provision aimed at defining control to give it a wider effect, in line with Canadian, European and Kenyan merger control, all of which offer much wider definitions.

The manner in which the Canadian Competition Bureau governs merger control is set out in two parts according to the regulatory framework. Part VIII of the Act sets out substantive merger review, the provisions of which apply to all mergers (the term is correctly defined very broadly), not just those caught for notification based on size, but rather those that have a adequate Canadian nexus (in other words, a real and significant connection to Canada), and therefore subject to potential investigation and evaluation by the Commissioner and possible referral to the Tribunal. Conversely, the Act's pre-merger notification regime is more limited in its ambit. Part IX of the Act creates five broad categories of transactions that are subject to pre-merger notification if they meet certain party and transaction size thresholds. These include, asset acquisitions, share acquisitions, acquisitions of an interest in an unincorporated combination, amalgamations, and the formation of unincorporated combinations.

The Act does also contain a bright-lined definition of 'control', in as much that it provides for, the holding or acquisition of more than 50 per cent of the voting securities of the corporation or, in the case of a partnership, the holding or acquisition of an interest in the partnership entitling the holder or acquirer to more than 50 per cent of the profits of the partnership or of its assets on dissolution. However, the Act's pre-merger notification regime does not require that control be acquired to trigger a filing obligation. The acquisition of 'any of the assets in Canada of an operating business' (other than in the ordinary course), or of shares yielding cumulative ownership of more than twenty per cent of the shares of a public company (more than 50 per cent if the acquirer already owned twenty per cent or more before the proposed transaction) or more than 35 per cent of the shares of a private company (more than

50 per cent if 35 per cent or more was owned before the proposed transaction), will be sufficient to trigger a notification obligation (provided that other financial criteria are met). There are similar types of thresholds respecting acquisitions of interests in combinations.

Additionally minority interests less than outright control may be caught by the substantive provisions of the Act, as the provision defines a merger to include any transaction by which a party acquires a ‘significant interest’ in the business of another person. What constitutes a ‘significant interest’ is not defined by the Act. However, the Commissioner’s Merger Enforcement Guidelines contemplate that the acquisition of a ‘significant interest’ could occur at as low as a ten per cent ownership interest, or in some cases without an equity interest if contractual or other circumstances allow material influence to be exercised over the business of another person. It is submitted that a significant interest has a broader sweep than that of a material influence, and is thus a better-worded provision to follow in respect of defining control.

Control of mergers is set out in part IV of the Kenyan Act providing, ‘[a] person

“controls” an undertaking under the Act if that person-

- (a) beneficially owns more than half of the issued share capital or business or assets of the undertaking;
- (b) is entitled to a majority of the votes that may be cast at a general meeting of the undertaking, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;
- (c) is able to appoint, or to veto the appointment, of a majority of the directors of the undertaking;
- (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act;
- (e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
- (f) in the case of the undertaking being a nominee undertaking, owns the majority of the members’ interest or controls directly or has the right to control the majority of members’ votes in the nominee undertaking; or
- (g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the points above.¹³³

¹³³ S41(3) of the Competition Act No. 12 of 2010 as amended by the Competition (Amendment) Act No. 49 of 2016 (the Act), which came into operation on 1 August 2011, together with all rules and subsidiary legislation, created thereunder.

Minority and other interests are captured in the last point above provided that such person exercises 'control' as contemplated above. The Consolidated Guidelines, however, indicate that the Authority will not ordinarily view an acquisition of a minority interest below twenty per cent of the voting securities of an undertaking held only for the purpose of passive investment without exercising influence over the affairs of the undertaking as an exercise of 'control'.

It is evident from an examination of the Kenyan Act that the provisions are similar to those set out in the Competition Act, as well as those provided for by the Companies Act, this suffusion incorporates an enhanced characterisation of instances where control may be established, offering a clearer framework for the courts to employ in determining whether a merger of a certain size has occurred. As it has been opined above and below, when constructing the issue of control, it is recommended that reading from provisions set out in both Acts could be helpful. The Kenyan legislation conveniently negates this need by concisely including the relevant elements from the Companies Act into the provisions of the Competition Act, as well as polishing out a number of flaws. This is a good example for African anti-trust, accordingly it is thus submitted that South Africa should follow a similar model incorporating both spheres of commercial law in order to best address matters relating to merger control.

CHAPTER FOUR: NOTIFICATION AND FAILURE TO COMPLY

4.1 Introduction and history

Gun jumping can be broadly defined within the scope of premerger unlawful coordination between the parties to a merger transaction, namely and most commonly at a procedural level, where mandatory premerger notification and the requisite clearance after the stipulated waiting period has not been adhered to despite the relevant thresholds having been met. For example where an acquiring firm exercises control over the target firm prior to or without first receiving clearance from the Commission or Tribunal where applicable. Gun jumping may further occur in a substantive manner, where prior to the transaction, the parties thereto coordinate their competitive conduct.

Historically, unnotified transactions have long since been a concern in foreign jurisdictions namely in the US, as provided for by section 1 of the Sherman Act, section 7A of the Clayton Act, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, under which firms may incur penalties as high as \$16000 per day for the period of noncompliance. These American antitrust provisions may result in either civil or criminal sanctions where a firm has been found in violation thereof, therefore the transaction could be considerably hindered. The EU Commission and its member States authorities have similarly followed suit with similar governing legislation on the matter.

As has South Africa in terms of the regulations set out in the Act. Consequently, firms intending to merge need to be cognisant of these developments where negotiating and initiating new transactions and should be mindful not to be found in violation. This was however not always so under the Maintenance and Promotion of Competition Act, which was devoid of statutory provisions setting out mandatory pre-notification of mergers, accordingly merger control relied on voluntary notification. Therefore the current Act in place is somewhat state of the art comparatively, detailing thresholds setting out different types of mergers and whether they require compulsory pre-

notification and clearance for approval of the transaction, showing much needed legislative reform.¹³⁴

4.2 Legislated merger thresholds and their effect on notification compliance

Mergers caught for notification are dependent on a threshold set out in section 11 (5)(a),(b), and (c) of the Act, further categorising mergers by size. These categories of mergers defined by the Act in section 13, detailing small mergers, and section 13A setting out notification and implementation of other mergers, on an intermediate or large scale.

Section 11 (1)(a) provides that it is for the Minister (in liaison with the Competition Commission) to determine these thresholds on both lower and higher ends of the spectrum. Such determinations are to be made based on the assessment of “combined annual turnover or assets, or a lower and higher threshold of combinations of turnover or assets...”

Accordingly, a small merger is defined where assets and or turnover amounts to less than R560 Million of the acquiring companies and the target firm, over the last financial year, or where the target firms assets and or turnover from the last financial year is less than R80 Million. Intermediate mergers on the other hand, occur when the assets and turnover of the acquiring companies and the target firm sum to at least R560 Million, but no more than R6.6 Billion, over the last financial year. As well as where the target firms assets and turnover of the last financial year amount to between R80 Million and R190 Million. Finally, a large merger takes place where the assets and turnover of the acquiring group of companies and the target firm amounts to R6.6 Billion over the last financial year, in addition to when the assets and turnover of the target firm is at least R190 Million within the last financial year.

However, while these legislated definitional thresholds exist, not all mergers actually resemble one as per these definitions for competition law purposes, as the terms is usually seen through a commercial lens and therefore understood in such a context.

¹³⁴ Op cit note 21.

As such, other like transactions for example amalgamations, acquisitions, and divestments should all be carefully scrutinized, and further, in order to avoid inadvertently missing filing and thus incurring costly penalties. It is thus advisable to seek out the legal counsel of a competition expert in instances where uncertainty may arise, as it is evident that the Competition Authorities are adapting a no tolerance stance with regards to failure to notify a notifiable merger.

This position was made clear in the recent matter regarding a large merger between *Life Healthcare Group Pty Ltd and Joint Medical Holdings Ltd*,¹³⁵ where a record fine was imposed on the merging parties. On 7 April 2016, the two hospital groups entered into an agreement with the competition commission, admitting failure to notify, and further acquiescing to penalty payment.

The hospital moguls were found in contravention of section 11 of the Act, for failure to notify a large merger, where the threshold was met. The merger was implemented without the approval of the Competition Tribunal and was therefore in contravention of chapter 3 of the Act.

Prior to this offence in 2004, the respondents were found to be operating hospitals within Southern Africa in contravention of section 4 of the Act, and admitted to partaking in the prohibited practice of price-fixing.

In reaching final settlement, the Competition Commission dropped the former and more egregious complaint, in exchange the parties entered into a consent agreement to facilitate the process (adhering to the principles of the Corporate Leniency Policy).¹³⁶ This agreement set out the parties' admission of guilt with regards to entering into and implementing a large merger without the approval of the competition authorities. LHG further disinvested from JMH.

However, despite the commissions' leniency in terms of the section 4 offence, it was made clear (from the hefty penalty imposed for failure to notify) that entities conducting themselves in contravention of the Act will be dealt with harshly, slapping

¹³⁵ *Competition Commission vs Life Healthcare Group (Pty) Ltd; Joint Medical Holdings Ltd* FTN229Feb16.

¹³⁶ See addendum to consent order.

the respondents with a R10 Million fine. A consequence more severe than any prior penalty imposed for implementing a merger without competition commission approval. The highest to date preceding the hospital case piling in comparison, at a meager R1mil fine for gun jumping activities under the South African Act.

More recently, in 2017, Caxton again attempted to snub Naspers actions by applying to intervene in its rivals settlement agreement with the Competition Commission, in order to increase the proposed R1 Million fine for failure to notify to R40 Million, stating the settled amount to be ‘shockingly inappropriate’,¹³⁷ however, the Tribunal rejected Caxton’s application for leave to intervene in the merger hearing. This rivalry has been noted (on Caxton’s part) as ‘borderline obsessive’ by Lewis.¹³⁸

Conversely when dealing with small mergers, they generally do not require compulsory notification, and there are no filing fees payable. The commission may however still calls for its notification within 6 months of implementation if the merger is seen to potentially substantially lessen competition. The commission issued guidelines on the notification of small mergers, that have been effective since April 2009, more specifically, the commission requires a small merger to be notified where at the time of entering into the transaction any of the firms, or firms within the group, are respondents to pending proceedings referred by the commission to the tribunal, or are subject to an investigation in terms of Chapter 2 of the Act. In addition the commission must further assess whether the merger can or cannot be justified on public interest grounds.¹³⁹

The commission is empowered with the jurisdiction to decide on notified small and intermediate mergers, however with regards to large mergers, it is for the competition tribunal to give their final decision. Similarly, the commission is empowered to approve any small or intermediate merger that has been filed (with or without conditions), or to prohibit it entirely. However with regards to large mergers it is again for the tribunal to decide, as the commission is only empowered to make

¹³⁷ <https://www.moneyweb.co.za/news/south-africa/naspers-control-structure-under-tribunal-spotlight/> accessed: 02/09/2017.

¹³⁸ David Lewis *Thieves at the Dinner Table: Enforcing the Competition Act: A Personal Account* (2012).

¹³⁹ Op cit note 24 at 41.

recommendations thereto.¹⁴⁰ The parties to the merger, as well as intervening parties to the merger proceedings are not prohibited from appealing these decisions made by the commission or tribunal to approve or prohibit a merger on the relevant grounds.

In further classifying notified mergers for the purpose of operational efficiency, the commission differentiates between levels of complexity with regards to competition or public interest concerns.

Categorisation has three further phases ranging from phase 1 being non-complex, phase 2 being of a complex nature, and phase 3 being very complex. Additionally, the commission has further published merger investigation service standards, most notably in reference to time constraints imposed on the investigation. These service standards are necessitated by the stringent time frames provided for by the Act, setting out the time period of investigation based on the size of the merger, such that small and intermediate mergers must be reviewed within 20 business days, however the commission has the power to extend this to a maximum of 40 business days.¹⁴¹ Large mergers on the other hand need to be reviewed within 40 business days, and only upon the granting of an application submitted by the commission to the tribunal, requesting such extension, may the investigative process be delayed, and only by 15 business days at a time.¹⁴²

4.3 Potential reasons for failure to notify: findings from the study

Davis JP. and Adv. le Roux are both of the opinion that the most commonly noted reason leading to failure to notify is based on disagreement as to whether control has passed from one entity to another.¹⁴³

The ENS department elaborates on this in somewhat more detail, commenting '*In my experience, missed merger notifications tend to fall into one of the following categories:*

¹⁴⁰ Ibid at 42.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Op cit note 15.

- a. *Bona fide errors, where the missed merger is occasioned by ignorance of the obligation; mistaken interpretation of the applicable law; or mistaken application of the applicable facts.*
- b. *Deliberate decisions to ignore merger notification obligations owing to the commercial exigencies of the transaction (usually time related).*
- c. *Deliberate decisions to ignore merger notification obligations owing to an apprehension that the transaction will ultimately be prohibited or subject to onerous conditions.*¹⁴⁴

Maniom in answering stated, ‘*There are firms who have failed to notify a merger and when this has been uncovered, have used as a fact in mitigation that because the change in control did not amount to a change in control in company law i.e. they did not own more than 50% plus one of the shares or they didn’t have control over the board, that they did not know this was a notifiable change of control in competition law. [Further, see] answer under 4. [There are reasons that firms seek to evade notifying a merger but this is not influenced by the gap between company law and competition law. Because a firm may not implement a notifiable merger without prior clearance from the competition authorities which may take some time to come through, firms may seek to evade notification for strategic reasons. For instance there may be rival bidders for the same firm (See Bidvest Adcock) or a hostile takeover (Harmony Goldfields)]. In other instance firms may not know they have to notify because a change of de facto control as opposed to de jure control is often opaque or uncertain. For instance under section 12(2)(g) de facto control is very widely defined and unsurprisingly there are instances where firms did not consider that control had changed but others considered it had. (see the Caxton v SABC and Multichoice cases both Tribunal and CAC decisions.)*’

Adv. le Roux finds no definitional shortcomings in either Act’s provisions with regard to defining control.¹⁴⁵ It is posited that these two submissions are in conflict with one another, as, if either or both definitions were adequate, then surely the most noted reason by the participants for failure to notify would not center around the issue of control. Perhaps the findings read too much into the data (which are sparse), but

¹⁴⁴ Ibid.

¹⁴⁵ Op cit note 14.

nevertheless concludes that if the definitional understanding of what constitutes control is unclear enough for the regular occurrence of failure to notify mergers, then is there not a need for reforming these legislated definitions in order to paint a clearer picture for firms who may incur massive penalties and delays in concluding the transaction and getting the deal through.

Adv. le Roux further submitted in answer to question 7 of the research questionnaire, as to whether failure to notify is ever an indication of or precursor to anticompetitive behaviours, “*Not in my experience, haven’t seen a correlation between notification failures and prohibited practices [.]*”¹⁴⁶

Yet the recent hospital case, is (herein opined) a shining example of such a situation, where a consent order was agreed to in exchange for leniency with regards to price fixing which we know to be anticompetitive conduct. Thus while a generally unlikely reason for failure to notify, it is notwithstanding a seeming obvious one, as firms would attempt to avoid scrutiny from the competition authorities in the event that the transaction would be prohibited or subject to undesirable conditions for approval.

Davis JP on the other hand has observed failure to notify being a precursor to anticompetitive conduct, citing the latest *SABC* case.¹⁴⁷ In which yet again, a complaint was brought by *Caxton*, against *SABC and Multichoice*,¹⁴⁸ claiming that the parties had concluded a merger, which they failed to notify. The issue for determination being whether an agreement between the parties gave rise to a notifiable merger in terms of section 12(1), section 13A(1) and section 13A(3), section 14(1)(b), section 16(2), and section 17.

The Tribunal found no merger had taken place, despite Caxton’s allegations of foul play. First of all that the agreement gave Multichoice exclusive license over certain SABC content to broadcast on an entertainment channel on DStv, secondly there was

¹⁴⁶ Op cit note 15.

¹⁴⁷ Ibid.

¹⁴⁸ *Caxton and CTP Publishers and Printers and Others and Multichoice (Pty) Ltd and Others* Case No. 140/CAC/Mar 16 CT.

a concern that SABC would broadcast its channels on an unencrypted basis without any conditional access system.¹⁴⁹

The ENS department commented similarly, submitting *'It could be. The category of missed merger in (c) above may be indicative of underlying anti-competitive behaviour.'*¹⁵⁰

Conversely Maniom answered, *'Strangely enough this is seldom the reason. Most are driven by the need to get a merger through quickly for the reasons I explained earlier. I can think of only two cases where there was probably and anticompetitive motive both involving health care mergers. One involving Netcare as the acquiring firm and the other Life Health care...'*¹⁵¹

There are other examples in our case law thus far that suggests many further reasons for failure to notify, namely, where banks or investment funds who are only briefly shareholders in regular and various deals, and thus accordingly might not view themselves as controlling shareholders despite passing legally determinative thresholds.

In the *Standard Bank* matter,¹⁵² the tribunal imposed a fine summing to R 350 thousand for the failure to notify a transaction and was therefore found in contravention of section 13A(1) & (3). Despite a finding by the Tribunal that it was unlikely to substantially lessen competition, or cause any loss or damage to the markets concerned, nor did it raise any public interest issues. Accordingly, the penalty was set at a base level equivalent to the applicable filing fee, as the sole aggravating factor in the matter was weighed against the three mitigating factors mentioned.

¹⁴⁹ <http://www.comptrib.co.za/publications/press-releases/sabc-and-multichoice/> accessed: 02/04/2017.

¹⁵⁰ Op cit note 15.

¹⁵¹ Ibid.

¹⁵² *Competition Commission vs Standard Bank of South Africa Ltd* FTN228Feb16.

Another reason may be that parties needing to get a transaction through swiftly for strategic purposes will attempt to avoid notification due to the delays it may cause in concluding the deal. For example where a target firm is hostile, or there are competitive bids at play.

Conversely, opponents to the transaction often rival bidders or competitors to the acquiring firm may interdict the implementation of the merger based on its non-notification, in order to quash the transaction. To illustrate, in *Johnnic Holdings Limited v Hosken Consolidated Limited and the Competition Commission*,¹⁵³ where Johnnic faced with an unwelcome bid from Hosken sought to interdict the company from exercising the shares it had acquired in Johnnic, totally 30 per cent through a series of transactions. It attempted to appoint 3 of its directors to the Johnnic board, the motion was denied. Later another 10 per cent was acquired totaling 40 per cent, at which point a mandatory offer was made to the remaining shareholders, as obliged by company law, to acquire their shares. Hosken then notified the merger to the Commission. The interdict was brought at the point in time where the transaction had been notified but not yet approved, thus Johnnic aimed to “quarantine” the shares Hosken had acquired to prohibit them from being able to vote on them until approval from the competition authorities has been obtained, irrespective as to whether control has been realised.

4.4 Remedies

A merger is approved or recommended for approval by the commission to the tribunal, where a specific remedy has been found to adequately address the competition and or public interest issues uncovered through the merger review process.¹⁵⁴ The majority of the conditions imposed by the commission have been crafted for the purpose of remedying job loss, while other conditions imposed by the competition authorities have been designed to foster competitiveness of small and

¹⁵³ Supra note 90.

¹⁵⁴ See section 12A(1) & 12A(3).

historically disadvantaged businesses, by removing certain dominant barriers to entry.¹⁵⁵

When reviewing a merger the Commission will make contact with the largest group of consumers and competitors relevant to the markets concerned that the merging parties seek to transact in, as these third party concerns serve to aid the Commission in their decisions. Public interest concerns of course also factor into the equation due to statutory obligation, and thus irrespective of anticompetitive effects social considerations must always be borne in mind.

Where such concerns are legitimate competition issues, the Commission will propose either structural or behavioural remedies. For example behavioural remedies predominantly include issues relating to cross-directorship, in order to limit time spent by directors sitting on competing company boards, the Commission accordingly limits the disclosure and trade of commercially sensitive information between competing companies with mutual shareholders and directors in implementing behavioural solutions. Whereas structural conditions may include ordering that the shareholding be held in trust and only divested after a specific time period.

Remedies further serve as a compliance mechanism employed by the Commission, as regular reporting obligations must be adhered to and submitted periodically. When it comes to the Commission's attention that a remedy imposed on a merger has not been complied with, it will issue a Notice of Apparent Breach, to which the parties have an opportunity to prove no breach has occurred, or to rectify it. Where these steps are not performed or are inadequate the tribunal is empowered to impose administrative penalties not in excess of 10 per cent of annual turnover.

4.5 Conclusion

It is evident that the competition authorities are taking a firm stance on merger control and will not hesitate to intervene in a transaction that either poses a competition or public interest threat or simply fails to comply with the prescribed formalities. Yet in

¹⁵⁵ Op cit note 24 at 46.

order to perform this task up to par the limitation that inconsistent definitions of control create must be addressed in order to clearly delineate when parties are obliged by statute to notify a transaction of a particular size, as to avoid the prohibition of the merger, the imposition of conditions, or penalties (to be addressed in the following chapter).

Accordingly it is advised where a transaction may cause concern regarding the lessening of competition, the parties need seek suitable counsel and address these concerns with the Commission pre-merger in order to avoid penalisation, or to negotiate the imposition of suitable remedies, as there would be a greater likelihood of a positive outcome for the transaction getting through where cooperation is forthcoming from the merging parties, and conditions can be agreed to prior to the mergers implementation as well as expediting the investigative process. Furthermore, both domestic and foreign firms must be mindful of the legislated thresholds set out by the Act, regarding merger size and when and in what circumstances a merger will be caught for notification before they attempt to implement the transaction, as well as observing the relevant merger control filing periods that govern the notification process in the applicable jurisdiction. As merger control regimes are increasingly becoming more sophisticated on a global scale, following the American and EU approaches in addressing mergers that fail to comply with notification formalities.

It is further noted that while there are a myriad of reasons which may lead to firms failing to notify a merger, ranging from anticompetitive agreements at play between the parties, to getting the deal through as fast as possible for tactical reasons, it is still the issue of adequately defining control and understanding the various and diverse circumstances in which control may pass from one entity to another (necessitating notification), that comprises the predominant reason for firms failing to comply with notification procedure and thus exposing the transaction to prohibition, remedies, or penalties.

CHAPTER 5: THE ADMINISTRATIVE PENALTY

5.1 Introduction & background

Administrative penalties must be implemented with a broader policy objective in mind of future deterrence and the protection of successful competition in the markets. However these objectives need be balanced at times between firm cooperation and expeditious settlement.¹⁵⁶

The manner in which administrative penalties are determined is not entirely clear in South Africa, as the Act itself does not specifically provide for guidelines in this regard. While the Commission has released, and now published a final guideline,¹⁵⁷ following a six-step method adapted from the decision in *Competition Commission v. Aveng Africa Limited t/a Steeledale* and others,¹⁵⁸ it is not a binding policy determination thus the Competition Authorities may still exercise discretion in its application and therefore it remains to be seen as to whether they will hold the desired sway of transparency and predictability. However, it is further still limited by the 10 per cent statutory cap imposed by section 59(2), as well as being overly convoluted and is thus opined to be inadequate.

This is however a useful step in the right direction to a contentious matter, as evidenced in *Woodland Dairies (Proprietary) Limited and Another v Competition Commission*,¹⁵⁹ where it was held that administrative penalties can be likened to criminal sanctions, accordingly the doctrine of proportionality should be applied when determining an appropriate penalty.¹⁶⁰ In *Federal Mogul Southern Africa v Competition Commission*,¹⁶¹ it was stated that when determining the administrative

¹⁵⁶ Patrick Smith and Andrew Swan *Quantifying cartel damages: South African policy and recent developments* (2014) 2.

¹⁵⁷ Competition Commission (2015) *Guidelines for the Determination of Administrative Penalties for Prohibited Practices*. Further see the 2017 Draft.

¹⁵⁸ *Competition Commission v. Aveng Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd & BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09.

¹⁵⁹ *Woodland Dairies (Proprietary) Limited and Another v Competition Commission* 2010 (6) SA 108 SCA at para 10.

¹⁶⁰ *Southern Pipeline Contractors and Conrite Walls v Competition Commission* 105/CAC/DEC10 and 106/CAC/DEC10 at para 9.

¹⁶¹ *Federal Mogul Southern Africa v Competition Commission* [2005] 1 CPLR 50 CPAC at para 72.

penalty, focus should not only be on the deterrence but regard must be had to a show of fairness to the offending party.

It was along these lines that pursuant to a section 4(1)(b) charge of contravention Southern Pipeline Contractors ('SPC') and Conrite Walls approached the CAC in challenge to the administrative penalty imposed, on the grounds that "the administrative penalty imposed on them respectively was calculated in contravention of the framework laid out in section 59 of the Act and as a result is excessive".¹⁶²

The cartel participants submitted that it was unclear as to what constituted 'total turnover' for calculating an appropriate penalty and the meaning of 'preceding year' for the purposes of section 59(2) of the Act, and as a result, SPC argued that the Tribunal misdirected itself in that it imposed a penalty based on the company's 'total turnover' shown in its 2008 statements.¹⁶³ The Tribunal usually uses 'affected turnover', which it declined to employ in this matter. Refusing to follow the arithmetic approach applied by the EU,¹⁶⁴ and considered factors not listed in section 59(3) such as the harm caused to the public purse and the taxpayer, and further that the case was serious warranting 'the highest sanction', finally considering the nature and duration of the offence, and on these bases merely imposed the 10% cap limiting the amount payable in fines.¹⁶⁵ The CAC rejected the Tribunal's approach, instead following the EU method, while not identical to the factors set out in the provision of section 59(3), the CAC recommended this approach as providing a basis for calculation of the base amount.¹⁶⁶

Furthermore SPC submitted that the Tribunal erred in relying on the Commissions calculations of net affected turnover.¹⁶⁷ Lastly they argued that due to mitigating circumstances that merited a reduction in percentage in the calculation of an adequate penalty, the imposition of the maximum 10 per cent cap provided for in section 59(2) of the Act was overly Draconian.¹⁶⁸

¹⁶² Supra note 160 at 2.

¹⁶³ Ibid at 38.

¹⁶⁴ Ibid at 17.

¹⁶⁵ Ibid at 47.

¹⁶⁶ Ibid at 49.

¹⁶⁷ Ibid at 38.

¹⁶⁸ Ibid.

It is thus submitted that the Tribunal's approach is undesirable in that it fails to adequately consider the factors set out in section 59(3), and further it must be said that South Africa is in need of clear legislated guidelines for the determination of an appropriate administrative penalty. A binding framework will aid in creating certainty and eradicating frivolous litigation. It is opined that the 10 per cent maximum cap limiting the amount to be paid is unfavorable in that it does not sufficiently serve as deterrent in preventing the perpetrators of anti-competitive conduct from engaging in these crimes. It is accordingly recommended that the EU guidelines be followed, even where vastly exceeding the permissible cap.¹⁶⁹

In short, the purpose of administrative penalties is to promote competition through the deterrence of anti-competitive activity. Unfortunately, the imposition of large fines on infringing firms does not directly benefit the poor or SMME's, as collected fines are not generally distributed between those that have felt the effects of the harm, but rather go straight to the government budget. Administering fines of this nature must however further be viewed in light of the financial impact of the conduct, as well as public interest related conditions, that may result in substantial excess of the 10 per cent cap. Thus alternative terms for remedy should be considered during settlement proceedings.¹⁷⁰ A more straightforward approach to determining the calculation is therefore recommended, firmly focused on the objective of deterrence, based on an estimation of the harm suffered, and balanced against other policy goals and objectives.

5.2 Recommendation: Economic Development Fund

It is submitted in recommendation that alternative channeling of penalty funds is necessary to enhance competition and growth in the markets as well as to alleviate poverty. As discussed above, the calculation of such penalties is a nuanced, intricate, and at times unclear endeavour, these complications then give raise to the question as to why once calculated, ordered, and paid by the firm, are the funds not being

¹⁶⁹ See the OFT's *guidance as to the appropriate amount of a penalty*, OFT,423, September 2012; see also the European Commission *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003*, Official Journal C 210, 1.09.2006 at 4.

¹⁷⁰ Competition Commission (2014/2015) *Annual Report* at 31.

carefully apportioned towards rectifying the harm suffered to the South African economy and poor, by establishing a source with which to support SMME market entry and sustainable presence, which in turn will alleviate poverty and support working class entrepreneurs.

Through this lens, vigorous law competition enforcement can be a powerful policy tool in ensuring that there is efficient resource allocation in the markets as well as catering for the needs of the poor. Priority must always be afforded (by the competition authorities) to anti-competitive practices affecting sectors relating to essential goods and services in relieving poverty.

On these bases it is clear that South Africa as a developing country need design and develop legislative provisions and amend the Act, in order to clearly set out that the revenue raised from anti-competitive conduct resulting in damage to the markets and the furtherance of economic disparity be funneled into a well administered fund to be established by government, governed by the Department of Trade and Industry (DTI) partnered with the competition authorities, and overseen by the Minister of Finance. It is opined that South Africa ought to implement its competition legislation in a manner that contributes to the maintenance of more expansive economic and social goals, including equitable participation in the markets by SMME's, a more diverse racial demographic, as well as employment creation and retention.

It is crucial to guarantee entrants have access to essential facilities and to empower consumer switching on a timely and efficient basis. Financing entry and expansion is a fundamental part of the puzzle, given the time and resources needed to build South African markets in order to reach the scale required to be competitive in a variety of arenas on a global scale, in addition to creating a movement for financing rivals so as to viably take on formidable incumbents in local markets.

To give a practical example of how the fund could be structured and implemented, the case of *Competition Commission v Pioneer Foods (Pty) Ltd*,¹⁷¹ provides a useful illustration with regard to the settlement arrangement for Pioneer's participation in

¹⁷¹ *Competition Commission v Pioneer Foods (Pty) Ltd* (15/CR/Feb07, 50/CR/May08) [2010] ZACT 9 (3 February 2010).

cartel activity in the bread, wheat, white maize milling, poultry and egg industries. The Commission found consumers had been harmed through price hikes on essential food items, as well as creating barriers to entry for SMME's, and can thus be used as a possible model to be further developed over time and through experience, inasmuch that the Commission surpassed traditional penalties and addressed equity issues head on. Included in the settlement was an exigency stipulating that the company modify its pricing by reducing its gross profit, furthermore an 'Agroprocessing Competitiveness Fund' was established using R250 million obtained from the administrative penalty of R500 million, in order to facilitate and promote competitiveness, employment, growth in food value chains, and to provide finance to SMME's, and finally to increase expenditure and output to create jobs.¹⁷² The Commission has since found that the fund has positively accomplished its purposes of enabling access and development into the affected sectors, together with job creation.¹⁷³

There is thus strong evidence supporting the submission that penalties from competition cases should be channeled into a development finance fund for rivals and entrants, particularly black industrialists. This is in line with the objectives of the Competition Act in opening up the economy to participation by all.

With regard to the evaluation and criteria to be used, it is central to consider the ability for firms to be successful competitors, with the offering, scale and expertise necessary.

The idea is to afford the long-term finance for essential education and competence expansion. Finance should not consequently be offered to just one or two entrants but to those who meet the criteria, acknowledging that several will unavoidably fail nevertheless, it is impossible at the outset to predict which, rivalry between contenders being a natural component of the progression.

Moreover, it must forever be born in mind that finance, without the corresponding measures to address the range of barriers to entry and growth, will not be a successful

¹⁷² Ibid.

¹⁷³ Competition Commission South Africa (2015/2016), *Annual Report*, at page 13.

intervention. The schema for creating entry to the South African economy should thus be based on altering the ex ante procedures in economic regulation to favour new entrants, and to guarantee that ultra vires executives can be effectually opposed, in addition to increased victory in ex post enforcement against anticompetitive conduct. Hence it is necessary to amend the Act to ensure that the competition procedure is protected and the ability of smaller participants and black industrialists to enter and grow can be given influence in decision-making. Complementary measures at government level are further necessary in order to configure space and open up critical infrastructure to rivals.

5.3 Findings

In submitting an answer to research question 8, as to whether the 10 per cent cap is sufficient, Davis JP held it was sufficient. Adv. le Roux gave a deeper analysis, answering *‘I think so – though the Commission should be doing more with its advocacy powers to educate business re notification thresholds etc. – management is aware of prohibited practices compliance, not necessarily always with merger control. If the usual attorney isn’t a competition lawyer, the problem is compounded.’*¹⁷⁴

The ENS team submitted *‘[t]he prospect of paying an administrative penalty of up to 10% of your annual turnover is a compelling deterrent, in my view. It is also not the only remedy at the disposal of the Competition Authorities. See also the possibility of divestiture orders (section 60(l)(a)); and declaratory orders rendering parts of the impugned merger agreement void (section 60(l)(b)).’*¹⁷⁵

Maniom opined *‘[t]hey are sufficient but I think penalties for failure to notify mergers have not benefitted from having to follow the same penalty factors for prohibited practice cases in terms of section 59 of the Act. I think we should look at merger penalties by applying different considerations that are a better fit for considering failures to notify.’*¹⁷⁶

¹⁷⁴ Op cit note 15.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

5.4 *Conclusion*

Thus it is proposed in recommendation that rather than merely being indiscriminately channeled into the states coffers, the funds seized by the authorities through these penalties from undertakings who are found in contravention of the Act for failure to notify a merger, rather be utilised to structure and implement momentum in our markets, its international competitiveness, and the prosperity of our people. Corporations can then provide the top deals for consumers, safeguarding poorer households from overpaying for consumer products, and accelerating access to a wider range of goods. The conceivable prospects for competition policy, including competition law enforcement and pro-competition regulations, to spur gains in productivity, enhance competitiveness, and promote faster economic growth, all the while contributing to poverty reduction are not so far off that they are unattainable, all that is required is unpretentious reform.

CHAPTER SIX: CRIMINAL SANCTIONS

6.1 Background & proposed extension of criminal sanctions for failure to notify

White-collar crime perpetrated by gun jumping corporate cowboys has far reaching and devastating effects on a developing nations economy. This is no different within the South African ambit of commerce. In considering alternative punishment for failure to notify, where monetary penalties alone fail in serving as a sufficient deterrent, it is thus herein posited that there ought to be potential latitude for criminalisation of such conduct, where its anti-competitive effects are far reaching with regards to both the economy and the poor.

In the analysis to follow on the implications this might render, recent amendments tabled by the competition authorities, in addition to the current case law on failure to notify will be examined. As both indicate an emerging trend in South African jurisprudence towards a no tolerance policy, and away from the permissive corporate leniency of the past. Reference to various foreign jurisdictions, both European and African, which criminally sanction failure to notify, will be postulated as evidence of such a penalisation's viability and efficaciousness. It is herein opined to be the correct and logical direction to move towards, as penalties alone have not been satisfactorily preventative punishments. However, this will need to be progressively achieved over some time before implementation is possible.

6.2 Recent amendments to the legislation introducing criminal sanctions to South African competition law

In justifying the introduction of criminal sanctions in South African competition law, one needs look no further than the new amendments to the Act. The insertion of section 73A into the primary Act after section 73 is a revolutionary provision and should be welcomed, having taking almost immediate effect as of 1st May 2016, it reads as follows:

‘(1) A person commits an offence if, while being a director of a firm or while having engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person –

- (a) Caused the firm to engage in a prohibited practice in terms of section 4 (1)(b); or
 - (b) Knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4 (1)(b).
- (2) For purposes of subsection (1)(b), knowingly acquiesced means having acquiesced while having actual knowledge of the relevant conduct by the firm.’

It is clear from the provision set out above that significant changes have been introduced to the South African Competition Act enabled by enforcement the Amendment Act into law, now introducing criminal liability directly onto managers or directors found to be engaging in cartel activity, a revolutionary change in our law, and somewhat of a leap from the previous imposition of fines alone.

Peter Whelan argues that cartel formation involves price-fixing, output restriction, market allocation, and/or bid-rigging, acts which are extremely harmful and damaging and may have a number of destructive effects for customers, consumers, the competitive process and the economy. It may be likened to a sophisticated form of theft involving the deceitful acquisition of wealth that rightly belongs to the consumer.⁵¹⁷⁷

6.3 *Foreign jurisdictions*

6.3.1 *Ireland*

Merger control in Irish statute defines a concentration as ‘the acquisition of control sufficient to allow the exercise of decisive influence’.

This extends to the acquisition of assets and full function joint ventures. The threshold for notification being worldwide turn over of each of two or more undertakings involved of no less than € 50 million (as recently increased by the new Act from € 40

¹⁷⁷ Tsholofelo Letsike *The criminalising of cartels – How effective will the new Section 73A of the Competition Amendment Act be?* Presented at Competition Commission, Competition Tribunal, Mandela Institute & University of Johannesburg Seventh Annual Competition Law, Economics & Policy Conference, Johannesburg, 5 – 6 September 2013.

million, in order to reduce administrative burdens), and irrespective of turnover, all media mergers must be notified. There are strict time limits that must be adhered to, and a substantive test is applied in order to ascertain whether there has been a substantial lessening of competition in markets for goods and services within the Republic of Ireland. This test is applied in the US as well as South Africa,¹⁷⁸ and is similar to the EU merger control charter.

The Competition Acts that govern Irish Merger control include the Competition Act of 2002, and the contemporary addition of the Competition & Consumer Protection Act of 2014. These pieces of legislation make provision for certain criminal sanctions with regards to the breach of merger control principles. Merger control rules are predominantly laid down in part three. Notably section 18(9) sets out that failure to notify the Irish authorities of a merger is a criminal offence for an individual in control of the undertaking, a consequence of conviction for the indictable offence being disqualification from holding office in the capacity of a company director.

The 2014 updated Act makes significant alterations in various regards, however the take home message remains that it is a criminal offence and a civil wrong to participate in an anti-competitive arrangement. Consequently not only fines sounding in money, but also potential imprisonment may result from breaching the provision, for an austere and exacting incarceration period of up to ten years. Any notifying party can, within 40 days, appeal to the High Court to either block a merger, or to allow it on the basis of conditions being imposed. Issues of both fact and law form the substance of such an appeal.

6.3.2 *Developed competition regimes: Canada*

The Canadian federal law contains both civil and criminal provisions. The Act requires pre-merger notification as set out by section 114 of Part IX. Failure to notify a merger of any size is a criminal offence subject to these provisions. However there have been no convictions to date for failure to notify a merger without good and

¹⁷⁸ See the effects test.

sufficient cause. As summary conviction to an administrative penalty of up to C\$ 50,000 is an available alternative to conviction on indictment.¹⁷⁹

6.3.3 *African anti-trust: Kenya*

In other jurisdictions within the African continent, three bodies of law govern the Kenyan competition regime. The Competition Act no. 12 of 2010, overseeing domestic regulation, the COMSA Competition Regulations, and the East African Community Competition Act of 2006, which is not yet operational. The focus will correspondingly be on the domestic component.

The Act defines a merger broadly, based on de facto control being acquired through exerting decision-making influence over an entity, in the form of the right to veto a company election. Accordingly, for the merger to proceed to implementation, approval must be obtained from the Kenyan competition authorities (CAK). Thus similarly to the South African regime, mergers are notifiable as per a threshold system. In order to be caught for notification, the combined turnover of the undertakings must exceed KSh 1 billion. Where a merger falls below this threshold, an application to the competition authority must be made for exclusion. Thresholds are however set separately with regards to the carbon-based mineral and healthcare sectors.¹⁸⁰

Under the Kenyan statute, it is an offence for any party to implement a merger without prior approval from Competition Authority of Kenya. This is manifest from Part IV dealing with mergers, and more specifically section 42 setting out control of mergers. Subsection 5 thereto provides that such a party concerned ‘shall be liable to conviction to imprisonment for a term not exceeding 5 years, or to a fine not exceeding KSh 10 million, or both’.¹⁸¹

An illustration of this provision at work is evident from the contemporary matter concerning market research company Ipsos, the executives of which faced weighty

¹⁷⁹ International Comparative Legal Guidelines 2017.

¹⁸⁰ 2013 Guidelines.

¹⁸¹ S42(5).

administrative penalties and jail time. After their failure to notify the purchase of its competitor, and to gain regulatory approval prior to the implementation of its acquisition of the Aegis Group, creating the third largest global market research company in the world.

In lodging the complaint with the Director of Public Prosecution in order to seek to impose criminal sanctions, the CAK clearly demonstrate that African anti-trust is serious about law enforcement, and the importance of promoting and enhancing competition in order to alleviate poverty.¹⁸²

Consequently, foreign investors would be prudent to appreciate the merger control repercussions for Africa, as sanctions as severe as imprisonment may result, as well as administrative penalties. Both of which may have significant ramifications for conducting business in Africa, in relation to both cost and time.

6.4 Criticisms

While there is a worry that criminal sanctions may negatively affect the impact and efficaciousness of the CLP,¹⁸³ in that it would sufficiently lessen incentive to use the policy and enter into consent orders.¹⁸⁴ As the policy has in the past been heralded for being an example of the Commission's finest work with regards to competition law enforcement and curbing cartel activity.¹⁸⁵ Conversely, it is herein submitted that thus far the imposition of monetary penalties alone have been insufficiently deterrent in nature, consequently there is a call for the potential threat of imprisonment, which would act as satisfactory restriction. This would be justifiable if it facilitated and had the ends of crime reduction in the future. This application of deterrence theory within the ambit of non-notification sanctions is no novel concept to Competition legislation in numerous jurisdictions, both European and within the African continent.

With regards to the constitutional questions that may arise from the introduction of s73A, it is unfortunate that the President did not refer the Bill to the Constitutional

¹⁸² A 2014 matter.

¹⁸³ <http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf>.

¹⁸⁴ Op cit note 138 at 226.

¹⁸⁵ Chantal Lavoie *South Africa's Corporate Leniency Policy: A five year review* 3.

Court for a decision on its constitutionality. However, South Africa has a unique provision when it comes to the question of constitutionality of a Bill. The section (4)(b) provides for either a priori or a posteriori constitutional review. This means that prior to a Bill becoming an Act, it can be referred to the Constitutional Court for a theoretical review. In addition, after an Act has been promulgated, it can also be referred to the Constitutional Court. 47¹⁸⁶

It remains to be seen therefore, if the constitutionality of the new section 73A of the Act will be sent to the Constitutional Court for a review a posteriori. Perhaps such a review could provide clarity and potentially pave the way for the introduction of criminal sanctions being implemented against firms that fail to notify large mergers within a stipulated time period.

Furthermore, the provisions of the recent insertion into the Competition Act, emulate the provisions of the Companies Act and Regulations of 2008 in reference to the duties and liabilities of directors, as set out in s 76 and 77, as well as at the common law. More and more corporate structures are being held to account to all stakeholders. This accountability must further be perceived through the lens of good corporate governance, as illustrated by the King III, and more recently and radically, by the King IV draft that was released for comment, setting the standard of care with not just a profit focus, but further with a social and environmental objective, embodying a far more pluralistic view than has been previously expressed.

6.5 Findings

The data are reflecting a similar set of findings. The commentary on criminal sanctions indicate a general approval of the newly inserted section 73(A), however where criminal sanctions are considered and extended to ambit of failure to notify a large merger, there seems to be consensus that this is a step too far, based on the NPA's levels of competencies.

¹⁸⁶ Ibid.

Davis JP being the only outlier answered '*I am against this provision*'. '*Also are the NPA up to the job?*'¹⁸⁷

Adv. le Roux submitted, '*Excellent enhancement of deterrence. Risk of undermining compliance since the CLP is the reason that we've uncovered cartels to prosecute generally. Concern with NPA's ability or inclination to prosecute. Very concerned that sec 4(1)(b) as currently drafted is too broad and cases other than hard core cartels may attract criminal sanction unfairly - not what could have been intended. Not sure failure to notify should be criminalized. Better advocacy and education to raise awareness, and penalties are sufficient deterrence in my view. Also Commission can retrospectively review mergers so competition harm can be mitigated.*'¹⁸⁸

The ENS team held '*International trends suggest that criminal sanctions for individuals involved in cartel activity are the only effective means of dissuading firms from engaging in such conduct. The financial rewards arising from a well-run cartel tend to overshadow existing sanctions (such as financial penalties and divestiture orders). I am inclined to agree. In this context, SA's introduction of criminal sanctions for cartel behavior is neither radical nor controversial. That being said, the legislation introduces significant practical and legal problems, which militate against its effective implementation. These problems include - (i) different evidentiary standards; (ii) constitutional concerns; and (Hi) institutional concerns (i.e. the capacity constraints and limited specialist expertise of the investigating and prosecuting authorities). The answer varies from jurisdiction to jurisdiction. The US, for instance, has a commendable and effective track record. For the most part, however, the criminalization of cartel activities is a relatively new phenomenon, with the consequence that there is not a wealth of case law / jurisprudence available. In addition, this sanction is not invoked with any great frequency in those jurisdictions where it does exist.*'¹⁸⁹

¹⁸⁷ Op cit note 15.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

Maniom submitted, *'[w]hilst I support criminalizing cartel conduct I think the present provisions will not work. Nor do I believe the NPA has the skills or the capacity to prosecute cartel cases. Countries that have two different authorities enforcing against cartels – the competition authority against the firm applying a civil burden of proof and the prosecuting authority against the individual applying a criminal law standard have generally been far less successful than the US DOJ where the same institution does both.'*¹⁹⁰

6.6 Recommendations

It is therefore recommended that sterner penalties such as criminal sanctions be progressively realised slowly over time, being imposed gradually, and implemented in a manner that would not see negative consequences for the markets and competition as a whole in South Africa.

While section 73(A) may be an appropriate method for dealing with hardcore cartel offences, perhaps our developing economic structures are still too unstable to carry the weight of such hefty punishment with regards to enforcement for failure to notify being imposed on the larger players in the markets, and will thus manifest in an overly Draconian treatment of South African competition law, within the scope and limitations of a developing nations volatile commercial footings.

6.6.1 A dual system

It is submitted that in order for the criminalisation of failure to notify to be implemented with beneficial results, a dual system of administration need be adopted between both criminal and competition law. Therefore the Competition Authorities and the National prosecuting Authority need work in a dynamic symmetry when it comes to enforcement. Operating under a directive and on the basis of a Memorandum of Understanding with regards to who is tasked with which duties. However for effective criminal prosecution of firms who engage in anti-competitive conduct, the relevant authorities as well as the legislature need to take measures to

¹⁹⁰ Ibid.

effectively bridge the gaps between their competencies. This of course may lead to various complications in initial application, where prosecuting authorities lack competition training, and where there are insufficient criminal practitioners within the Commission.

6.7 Conclusion

In submitting for a similar criminal sanction (as discussed above), in South Africa to be implemented effectively criminalising failure of firms to notify a large merger, over and above the new amendments to the Act, such that directors engaging in cartel conduct may now face jail time in addition to hefty penalties. For it to be practically applicable in implementation, it would necessitate the Competition Authorities working in conjunction with the National Prosecuting Authority. It is acknowledged that this will not be without its difficulties, however for the greater good.

Education and outreach should thus not only be aimed at the public, in order to hone into the skills of the existing competition and criminal practitioners that are already prosecuting this conduct, constant training should be considered. Indeed a dual administration can work efficiently and effectively if there is a balance of criminal trained attorneys within the Commission and competition trained practitioners in the NPA. There needs to be a Memorandum of Understanding in terms of which for a certain period of time, there is an exchange of staff between the two institutions, with the aim of better understanding how the other works. This would hopefully lead to a harmonisation of processes. Before all of which can be done however, there needs to be a cohesive definition in place of what amounts to control and a change thereof, that is consistent across both fields of Companies law and Competition law. The definitional gap must be bridged by the necessary legislative amendments (as set out above) in order to lessen and curb companies actively seeking to abuse this gap to the detriment of the economy and society as a whole.

CHAPTER SEVEN: CONCLUSION

7.1 *A summary of the findings*

In trying to best or at least adequately define control for the purposes of merger notification, the study examined and compared the relevant legislation in order to establish if the definitions provided for in the Competition Act and that those set out in the Companies Act are in need of reform in any regarded, and when compared, leave open any potential for lacunas in the legal matrix.

It has become evident through this study, that both concepts of a merger, and that of control as defined by section 12, have been formulated in a confusing manner,¹⁹¹ consequently making the provisions difficult to interpret in certain cases.¹⁹² This is clear from the inconsistency displayed by the courts' application of the section. In the *Distillers* case, the CAC opined on the purpose of chapter 3 being to carefully monitor transactions that may substantially lessen competition.¹⁹³ Davis JP further remarked that it is also aimed at promoting competition in certain market structures.

The Tribunal however offered a better interpretation in the preceding decision on the matter. In as much that it was constructed in a wider manner, and held 'the legislature intended to raise the burden of notification to avoid undesirable consequences on all involved of having to unravel transactions afterwards'.¹⁹⁴ Thus it is has been observed that the obligation to notify must be construed broadly,¹⁹⁵ and in summary, section 12(2) is not determinative in establishing the meaning of the word control.

Other cases however have illustrated a more restrictive view, further attesting to the erratic interpretation and application of section 12. The interpretation of the merger provisions shown in the *Johnnic* case differs from that in *Cape Empowerment Trust*,

¹⁹¹ Op cit note 33 at 8-10.

¹⁹² Ibid at 8-11.

¹⁹³ Supra note 58 at 357 -358

¹⁹⁴ Supra note 61 at 18-19.

¹⁹⁵ Op cit note 33 at 8-12.

to the extent that authors Kemp and Sutherland have noted that this ‘seems illogical’.¹⁹⁶

It is therefore submitted that these legislative problems need to be cured in order to facilitate consistency and a balanced reading of the provisions governing merger control for a more stable outcome. It is recommended that a solution may be to relax the provision aimed at defining control to give it a wider effect, in line with Canadian, European and Kenyan merger control.

While the provisions of section 12(2)(g) of the Competition Act, mirrored in section 2 (d) are said to be catch-all provisions in that only a ‘*material influence*’ is necessary, it is submitted that the courts are not constructing the section widely enough, and thus the legislative failure to adequately define control is compounded by the courts inconsistent reading and application of the section.

This problem is somewhat mitigated by the fact that the amount of mergers caught for notification is limited by thresholds set that are determined in relation to annual turnover, thus limiting the administrative burden in that regard.¹⁹⁷

Nevertheless due to the definitional issues addressed, the pressures of time and the constraints of commerce, as well as potential anticompetitive conduct at play, the mandatory notification process is often avoided when implementing transactions. The penalty for which being an administrative fine as set out above in chapter 5, in which it was posited that the methods of calculation need be aligned closer to those formulated by the European competition authorities.

It was further submitted that the funds pooled from administrative penalties ought to rather be directed into an economic fund, rather than being blindly channeled into state coffers, as it currently stands.

In considering the potential for criminal sanctions in relation to the failure of an undertaking to notify, it is concluded that while this may be a Draconian move, it may

¹⁹⁶ Ibid at 8-13.

¹⁹⁷ 2001 increased thresholds.

exist only in theory (as it does in other jurisdictions) to serve as a further deterrent, as well as to clearly alert merging parties, specifically foreign investors, that infringing these provisions of the Act will be met with severe consequence, in order to protect South African markets from exploitation. The worry of course being NPA involvement, thus adequate guidelines would need to be established to raise the level of competencies necessary to handle competition law matters. However this alone may be insufficient to bridge the knowledge gap.

The purpose of developing predictable, clear and comprehensible merger transaction concepts is to ensure levels of stability in the markets through merger review processes, where transactions may potentially substantially lessen or prevent competition. However such a system should simultaneously avoid an overly constrictive approach where no risk to competition is at play and other less intrusive means are available. Accordingly, the objective must be to minimise cost implications of type I errors, where non-problematic mergers are made to notify, and at the same time avert type II errors, where problematic transactions escape the scrutiny of the merger review process.

This is necessary to maintain and uphold the principles of competition policy itself within the merger review process. The function of which being, to act as regulatory tool facilitating market functionality and efficacy in a free market environment, implemented through the various channels of authority, investigative bodies, and legislated practice. The purpose of competition policy being to act as a conduit for facilitating business growth, consumer welfare and protection, as well as to promote the public interest of South African Society as a whole, by fostering competitive behaviour within the sphere of commerce. Thus it is essential that the legislation be clearly set out to promote these principles, in order to allow for the most beneficial interpretation by the courts who give practical effect, application and meaning to these codified provisions.

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ANNEXURE A: ETHICAL CLEARANCE

My name is Chanel Cilombo and I am a Commercial LLM candidate at UCT, under the supervision of Dr Jacqui Yeats and Judge Dennis Davis. I am conducting research to gather necessary data in fulfillment of the dissertation component of my programme, and would like you to please be a participant if you are kindly willing to consent. You are of course free to decline at any point.

The nature of my research is as follows:

My research in this study will examine the definitions of control under the Competition Act (the “Act”), comparatively to that of company law notions of control. Specifically the reliance on a Companies Act interpretation for what constitutes issued share capital, and whether there is a consequent need to develop the legislation in order to bridge the definitional gap for the purpose of adequately regulating merger notification.

In order to undertake such an inquiry, it is important to consider the definitions of a merger, and of control, in terms of section 12(1)(a) and section 12(2) of the Act, respectively, as well as relevant sections 13(3)(A), 14(1)(b), 16(2) and 17, before considering the case law, and to weigh it up against company law definitions of control, which in my opinion are lacking.

This has become an important area of contestation, as firms have gone to great lengths to avoid notification. A potential reason being that those in opposition to the transaction taking place, whether they be rival bidders or competitors of the acquiring firm, may seek to use failure to notify as a justification in attempting to stifle the transaction, via interdicting its implementation. Several cases for examination and review fall into this category.

A further subtopic for examination in this study is, if and when there has in fact been a failure to notify that has taken place, how should the relevant competition authorities, namely the tribunal, calculate the administrative penalty, as the Act does not provide guidelines in this regard. Sections 59(2) and 59(3) are insufficient in themselves and thus South Africa is in need of adequate legislative guidelines for determining the appropriate penalty. Further, are penalties alone sufficient deterrent or would the potential introduction of criminal sanctions be beneficial (in line with recent amendments to the Act now introducing criminalization for the first time in our law)?

In addition to your participation, I further request that based on your experience and standing in the relevant areas of specialty that you consent to waive confidentiality and anonymity, as I believe your identities will benefit the research.

If you do not consent to the waiver of confidentiality and/or anonymity for whatever reason, please inform me of such a request with your answer submission and your identity will be protected.

The methods to be used once clearance and consent have been obtained, will be the completion of a written email questionnaire that I will send you and you can return at your convenience, but kindly by no later than 7 September 2017.

ANNEXURE B: RESEARCH QUESTIONNAIRE

10-PART WRITTEN ANSWER RESEARCH QUESTIONNAIRE:

Participant:

Field of expertise in law:

1. Is there a gap between the Competition Act definition of control and the companies law definition of control?
2. Are either or both areas lacking in definition?
3. If there is a gap, is it being abused by merging firms to escape notification? Please provide examples.
4. What other reasons may companies actively seek to abuse this gap for?
5. What is needed to remedy and bridge this gap?
6. What are the most common reasons for failure to notify? Please provide examples.
7. Is failure to notify ever an indication of or precursor to anti-competitive behaviours? Please provide examples.
8. Are penalties sufficient punishments and is 10% of annual turn over enough of a deterrent?
9. What are your thoughts on the recent addition to the Competition Act (as amended), now introducing criminal sanctions for cartel conduct under s 73A?
10. In your view, do you think jurisdictions that implement criminal sanctions for failure to notify do so effectively? Please provide examples.

ANNEXURE C: PARTICIPANTS' ANSWERS

Judge Dennis Davis

1. There is a significant provision, s 2 of the Companies Act. However in competition law, the courts decide the question.
2. Yes, in competition law.
3. Don't know but the question of control is problematic in terms of competition law.
4. Not sure.
5. –
6. In competition law, the vagueness of the definition of control.
7. Yes. See latest Multichoice and SABC cases.
8. Yes.
9. I am against this provision.
10. It depends on the country – here it may cause problems for the CLP programme and lengthen the enquiry. Also are the NPA up to the job?

Adv. Michelle le Roux

1. –
2. The point is not that there is a lack of definition, it's that the two Acts are aiming at different concepts of control. The Co Act reflects the policy to regulate control so as to prevent its abuse with respect to governance/shareholders – protecting minorities and subsidiaries, as well as to trigger the reporting requirements in corporate groups.

The Comp Act is concerned about changes in control that would alter market power/structure/conditions of competition – such as by increasing the likelihood of coordination or concentrations that could produce dominant positions that may be abused. So it is a wider, more flexible definition, without hard/bright lines like the 35% deemed control provision in Co law.

The need to understand Co law concepts of votes/rights and relationships (eg concert parties) applies in Comp law of course, but the need for certainty that the former requires for corporate governance could be a hindrance in competition/merger control circumstances. A party may be able to impact the market and therefore competition without falling into one of the definitions of controller for Co law purposes. Its identity and conduct may be relevant for merger control though.

There are many Co law scenarios and questions, though, that comp law ignores as a result. Eg issues around meaning of “beneficially owns” “majority of shares”, how to account for vote allocation arrangements or shareholder agreements on voting (voting pools, for eg).

But, frankly, the Caxton decision and the meaning of sec 12(2)(g) in particular, provide sufficient guidance for merger control purposes.

3. Not that I've seen...
4. –
5. Since I don't have a problem with the different definitions, I am not sure there needs to be any remedy.

6. Most common that I've seen are interpretation and understanding of control so that nothing changes with the merger – i.e. a disagreement with the Commission on whether control has changed.
7. Not in my experience, haven't seen a correlation between notification failures and prohibited practices.
8. I think so – though the Commission should be doing more with its advocacy powers to educate business re notification thresholds etc – management is aware of prohibited practices compliance, not nec always with merger control. If the usual attorney isn't a competition lawyer, the problem is compounded.
9. Excellent enhancement of deterrence
Risk of undermining compliance since the CLP is the reason that we've uncovered cartels to prosecute generally
Concern with NPA's ability or inclination to prosecute
Very concerned that sec 4(1)(b) as currently drafted is too broad and cases other than hard core cartels may attract criminal sanction unfairly - not what could have been intended
10. Not sure failure to notify should be criminalized. Better advocacy and education to raise awareness, and penalties are sufficient deterrence in my view. Also Commission can retrospectively review mergers so competition harm can be mitigated.

Michael Katz

1, 2, & 3. The question as to whether there is any alignment in the concepts of “control” in the Companies Act raises interesting issues.

It is vital not to consider the concept of “control” in a vacuum in both the Companies Act and the Competition Act but rather to examine control in a particular context.

Thus, for example, “control” in company law is relevant in the definition of holding and subsidiary companies (Section 3 of the Companies Act), the prohibition of providing financial assistance to acquire securities (Section 44 of the Companies Act) and the prohibition of intra-group finance (Section 45 of the Companies Act).

For your purposes the question of “control” arises in the context of merger control. In this context control for Competition Act purposes as set out in Section 12(2) of the Competition Act : there are certain bright line tests - Section 12(2)(a),(b), (c); and the overriding omnibus test in Section 12(2)(g) which rests on the ability to “materially influence the policy of the juristic person in a manner comparable ...”

Control for Companies Act purposes is relevant in the obligation set out in Section 123 of the Companies Act to make a mandatory offer where a party acquires at least 35% of the voting securities of a company . The threshold of 35% is deemed control. The important question is whose securities must be aggregated to determine whether the 35% threshold has been crossed? In this regard the securities held by the following parties must be aggregated : the acquiring party; related parties and inter-related parties of the acquiring party; and persons acting in concert with the acquiring party.

It will be seen from the foregoing that in merger control, the Competition Act definition is wider in that Section 12(2)(g) has a potentially broad sweep.

The Companies Act, although it does not have the breadth of Section 12(2)(g) (save in the case of Close Corporations), is potentially wider in that it includes the three categories of persons referred to [in the aforementioned] paragraphs ... above.

As regards merger control for company law purposes, the 35% threshold is conclusive.

The only issue that arises is whether there are concert parties whose shares may be taken in account. This is a factual enquiry to be answered in each case.

For competition law purposes, the 35% threshold is not relevant.

In an acquisition of securities of more than 35% or less than 35%, control may be achieved dependent on the application of the principles set out in Section 12(2)(g) to the shareholder profile of the company concerned. Thus, in a company where there is a large number of shareholders with relatively small shareholdings, control may be achieved with less than 35%. Conversely, in a company with a smaller number of large shareholders, control may only be achieved with more than 35%.

There are sometimes debates in the competition law space relating to the relevance of shares held by related and concert parties.

Thus, you will see that the concepts of control in company law and competition law are based on different philosophical and policy considerations. The tests for measuring control are designed to achieve the different policy and philosophical objectives.

ENS competition department

1. I don't believe so. Apart from the fact that part of the Companies Act definition of "control" derives from the Competition Act, I regard them as discreet pieces of legislation - each subject to its own case law, jurisprudence and policy drivers. Of course, the jurisprudence may overlap, from time to time, but the essential approach to each section must be informed by the broader statutory context in which it exists.

With this in mind, the Competition Act serves a fundamentally different purpose to the Companies Act (in general); and the "control" provisions in each serve fundamentally different purposes (in particular).

2. In commenting on the definition of "control" in the Competition Act only, I do not believe that it is lacking in definition. If anything, it is too complicated, in my view, and could be reduced substantially. Given the nuances applicable to "control" from a competition law perspective, my preference is for a simply worded, broad definition that is given meaning, over time, in case law, policy documents and guidelines.

3. No, in my experience there is no statutory gap/lacuna/loophole being ab(used) by forms to escape their merger notification obligations.

4. I cannot comment on this.

5. –

6. In my experience, missed merger notifications tend to fall into one of the following categories:

a. Bona fide errors, where the missed merger is occasioned by ignorance of the obligation; mistaken interpretation of the applicable law; or mistaken application of the applicable facts.

b. Deliberate decisions to ignore merger notification obligations owing to the commercial exigencies of the transaction (usually time related).

c. Deliberate decisions to ignore merger notification obligations owing to an apprehension that the transaction will ultimately be prohibited or subject to onerous conditions.

7. It could be. The category of missed merger in (c) above may be indicative of underlying anti-competitive behavior.

8. The prospect of paying an administrative penalty of up to 10% of your annual turnover is a compelling deterrent, in my view. It is also not the only remedy at the disposal of the Competition Authorities.

- See also the possibility of divestiture orders (section 60(1)(a)); and declaratory orders rendering parts of the impugned merger agreement void (section 60(1)(b)).

- Attached are the Commission's draft guidelines outlining its proposed approach to missed mergers.

9. • International trends suggest that criminal sanctions for individuals involved in cartel activity are the only effective means of dissuading firms from engaging in such conduct. The financial rewards arising from a well-run cartel tend to overshadow existing sanctions (such as financial penalties and divestiture orders). I am inclined to agree.

- In this context, SA's introduction of criminal sanctions for cartel behavior is neither radical nor controversial.

- That being said, the legislation introduces significant practical and legal problems, which militate against its effective implementation. These problems include - (i) different evidentiary standards; (ii) constitutional concerns; and (Hi) institutional concerns (i.e. the capacity constraints and limited specialist expertise of the investigating and prosecuting authorities).

10. • The answer varies from jurisdiction to jurisdiction. The US, for instance, has a commendable and effective track record.

- For the most part, however, the criminalization of cartel activities is a relatively new phenomenon, with the consequence that there is not a wealth of case law / jurisprudence available.

- In addition, this sanction is not invoked with any great frequency in those jurisdictions where it does exist.

Norman Manoim

1. I don't think of this as a gap. The notion of control serves different purposes under the respective Acts and hence we shouldn't expect the definitions of control to be the same. In competition law a change of control can mean a change in the behavior of the firm in the market which may have implications for competition and hence its concept of control is wider than that in company law. For Competition law a change in de facto control is as important, if not more important than a change in de jure control .
2. For reasons advanced above I don't think so.
3. There are firms who have failed to notify a merger and when this has been uncovered, have used as a fact in mitigation that because the change in control did not amount to a change in control in company law i.e. they did not own more than 50% plus one of the shares or they didn't have control over the board, that they did not know this was a notifiable change of control in competition law. If you look at the Competition Tribunal website and search cases on failure to notify mergers you would find some examples.
4. There are reasons that firms seek to evade notifying a merger but this is not influenced by the gap between company law and competition law. Because a firm may not implement a notifiable merger without prior clearance from the competition authorities which may take some time to come through, firms may seek to evade notification for strategic reasons. For instance there may be rival bidders for the same firm (See Bidvest Adcock) or a hostile takeover.(Harmony Goldfields,)
5. I see no problem here see my comment under question one.
6. See answer under 4. In other instance firms may not know they have to notify because a change of de facto control as opposed to de jure control is often opaque or uncertain. For instance under section 12(2)(g) de facto control is very widely defined and unsurprisingly there are instances where firms did not

consider that control had changed but others considered it had. (see the Caxton v SABC and Multichoice cases both Tribunal and CAC decisions.)

7. Strangely enough this is seldom the reason. Most are driven by the need to get a merger through quickly for the reasons I explained earlier. I can think of only two cases where there was probably and anticompetitive motive both involving health care mergers. One involving Netcare as the acquiring firm and the other Life Health care. Both cases are on our website I cannot recall now which the target firms were.
8. They are sufficient but I think penalties for failure to notify mergers have not benefitted from having to follow the same penalty factors for prohibited practice cases in terms of section 59 of the Act. I think we should look at merger penalties by applying different considerations that are a better fit for considering failures to notify.
9. Whilst I support criminalizing cartel conduct I think the present provisions will not work. Nor do I believe the NPA has the skills or the capacity to prosecute cartel cases. Countries that have two different authorities enforcing against cartels – the competition authority against the firm applying a civil burden of proof and the prosecuting authority against the individual applying a criminal law standard have generally been far less successful than the US DOJ where the same institution does both.
10. I am not aware of any that do for a failure to notify.

