

CONTROL BY MINORITY SHAREHOLDINGS IN MERGERS

BY

MLUNGISI PHUNGULA

STUDENT NUMBER: 10655639

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SUPERVISOR: CORLIA VAN HEERDEN

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CONTROL BY MINORITY SHAREHOLDINGS IN MERGERS

A study of the extent and the impact of Section 12(2)(g) of the Competition Act, No 89 of 1998, in merger transactions.

by

Mlungisi Phungula

ABSTRACT

The purpose of the study is to ascertain the meaning and ambit of section 12(2)(g) of the Competition Act 89 of 1998.

The main question that the study will focus on is in which instances a firm can be said to control another firm by having the ability to materially influence the policy of that firm in a manner comparable to a person who, in the ordinary commercial practice, can exercise an element of control referred to in section 12.

The study will look at:

- (a) the South African competition law and policy;
- (b) the Competition Act and its application;
- (c) merger definition and regulations;
- (d) the concept of control and definition of control; and
- (e) the scope of application of 12(2)(g) of the Competition Act.

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CHAPTER 1

INTRODUCTION

1.1 Background

South Africa, like most developed and developing countries in the world, has developed laws which seek to promote competitive behavior and preventing anti-competitive behavior. This set of laws have evolved over time and this evolution continues as is the nature of jurisprudence. In South Africa, competition laws or anti-trust rules, as they are sometimes called in other jurisdictions like the United States of America, are currently set out in the Competition Act No. 89 of 1998 (the “Act”).

1.2 Purpose of Competition Law

Competition Policy is a regulatory tool which seeks to address market failures by maintaining or creating the foundations for effective functioning markets¹. In essence competition policy aims to emulate free market conditions by creating regulatory institutions and procedures or laws that will ensure equal opportunities for all businesses, stimulate economic efficiency and protect consumers².

Competition policy includes both economic policies adopted by government aimed at enhancing competition in the local and international markets, such as trade policy³, deregulation⁴ and privatization⁵ and it also includes competition law.

While it is difficult for any government in the world to ensure that the playing fields are equally balanced for all the players in the economy to stand the same chance of success, it is submitted that the purpose of the South African competition law was meant to achieve this end. It is submitted that the purpose of the South African competition law is threefold: Firstly, it is to level the playing field for different competitors to compete fairly in their respective markets. Secondly, it is to protect consumers so that they get value for their money in terms of lower

¹ Neuhoﬀ *et al* *A Practical Guide to the South African Competition Act* (2006)(hereinafter Neuhoﬀ)11.

² Ibid.

³ A government’s trade policy regulates how trade is conducted in foreign countries.

⁴ Deregulation is the process whereby governments remove restrictions on business with the intention to enhance competition, productivity and efficiency and low prices overall.

⁵ Privatisation refers to the transfer in ownership from the public sector to the private sector.

prices for quality goods. Thirdly, it is to reverse the imbalances of the past created by apartheid in order to bring about social justice.

Having said this, it is submitted that although there are elements of social justice in the South African competition law, its main purpose is commercial in nature. That purpose is to prevent anti-competitive behavior and promote competitive behavior among players in the economy. Other objectives may be either incidental or peripheral to this main purpose.

Neuhoff argues this point as follows:

“One of the main reasons for government’s involvement in the market-place is that free markets do not always produce the socially efficient qualities of goods at socially efficient prices. In other words, free markets sometimes fail and require governments to intervene in an attempt to improve market outcomes for consumers. Competition policy is a regulatory tool which seeks to address market failures by maintaining or creating the foundations for effective functioning markets. In essence, competition policy aims to emulate free market conditions by creating regulatory institutions and procedures or laws that will ensure equal opportunities for all businesses, stimulate economic efficiency and protect consumers. Competition law is designed to create a level playing field where both big and small business can compete fairly and effectively.”⁶

1.3 Purpose of the South African Competition Act of 1998

The South African Competition Act was designed to formalize the position of the Republic of South Africa in competition law matters. Thus the South African Competition Act does not have a distinct purpose from that stated under paragraph 1.2. above.

Neuhoff remarks that the Competition Act aims to achieve the traditionally accepted competition-law goals of lower prices and greater choice for consumers. However, unlike competition legislation in most other countries, the South African Competition Act includes in its aims aspects that are referred to as macro-economic or wider public-interest goals, such as the

⁶ Neuhoff 12.

promotion of employment and expansion of the ownership stakes of historically disadvantaged persons in the economy⁷.”

Theron⁸ indicates that the South African Competition Act is aimed at regulating competitive issues in a more consistent manner than in the past. In this regard, she states that the South African economy has been characterized by high levels of concentration in many industries and competition policy creates a healthy business environment that is conducive to competitiveness and economic growth. It is submitted that this view expresses both economical and social use of the South African competition law.

According to the preamble of the South African Competition Act, “ the Act is aimed at providing for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court; and for related matters”.

Section 2 of the Act states that the purpose of the Act is to promote and maintain competition in the Republic in order:

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South African;

⁷ Neuhoff 13.

⁸ Theron, N, “The economics of competition policy: Merger analysis in South Africa”, *Journal of South African Studies* (69) December 2006

- (d) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership ; in particular to increase the ownership stakes of historically disadvantaged persons⁹.

Based on the above extract from the Competition Act, it is submitted that the legislature's intention was to use the legislation not only to address economic issues but also to bring about social justice. It is further submitted the purpose of the Act is broad. It is however clear that the aim of the legislature, in promulgating the Act, was to create and promote a competitive economic environment among enterprises.

The purpose of the Act was confirmed in the Competition Appeal Court by Davis JP in *Distillers Corporation (South Africa) Ltd v Bulmer (SA) Pty Ltd*¹⁰, when he remarked:

“The application sections of the Act thus provide a clear indication of the purpose of chapter 3, namely that transactions which are likely to substantially lessen competition should be carefully examined by the competition authorities. This interpretation is supported by the preamble to the Act which provides, *inter alia*, that the Act ‘restrain particular trade practices which undermine a competitive economy and establish independent institutions to monitor economic competition’. Section 2 of the Act provides that the purpose of the Act is to promote competition in the Republic. It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong-pointer in favour of a broad interpretation to section 2 of the Act”.

⁹ S2 of the Act.

¹⁰ *Distillers Corporation (South Africa) Ltd v Bulmer (SA) Pty* (94/FN/Nov00) [2001] ZACT 13 (19 April 2001)

David Lewis, the previous chairman of the Competition Tribunal, poignantly remarked that competition laws are required because, simply put, firms confronted by competition have a powerful imperative, indeed the most powerful imperative driving the market economy, to eliminate their competitors. When this drive translates into producing superior products at lower prices, the competition authorities will applaud. Lower prices and superior products are, after all the promise, of competition.

However, the drive to eliminate competition translates into colluding with ones' competitors, or, into a dominant firm abusing its dominance by excluding its rivals or potential rivals from the market by any of a number of well documented restrictive practices, then the competition law authorities will prosecute the perpetrators. These are the competition rules that proscribe anti-competitive conduct – for example, collusion or tying arrangements or refusal to deal – on the parts of firms, especially dominant firms.

As indicated, the focus of the Competition Act is commercial in nature. As far as reversing the imbalances of the past, according to Eric Burgeat¹¹ “ one of the elements of South Africa's peaceful revolution over the last decade was reform of its competition policy institutions. The previous system had supported the previous economic system, characterized by autarky, protection, government direction, and high concentration. The new system promised to use competition policy to correct the faults of the old system and promote policy goals of employment and empowerment”.

1.4 Application of the Competition Act

According to section 3(1), the Competition Act applies to all economic activity within, or having an effect within the Republic, except:

- (a) collective bargaining within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995);

¹¹ E. Burgeat, *Competition Law and Policy in South Africa, an OECD Peer Review* (2003). Eric Burgeat is a director of Centre for Co-operation with Non-Members of the OECD.

- (b) to collective agreement, as defined in section 213 of the Labour Relations Act, 1995;
- (c) the rules of a professional association to the extent that they are exempted in terms of schedule 1;
- (d) acts subject to or authorized by public regulation; or
- (e) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

If one interprets the provisions of section 3 of the Act insofar as the application of the Act is concerned, it is submitted that they have the following effects:

- (a) a firm might not be a South African registered firm but if it conducts economic activities in South Africa the Competition Act applies to that firm; and
- (b) likewise, a South African registered firm might conduct its business activities internationally. However if some of its economic activities have an effect in the Republic the Competition Act will apply to that firm.

With regard to effect (a), in a matter which involved *Cedant v Galileo*¹² the Competition Commission found that the merger involving the two entities did not have an adverse effect in South Africa; and therefore the merger was approved. Briefly the facts were that Cedant Corporation, an international property company which provides vacation exchange or timeshare services to timeshare owners through its subsidiary Resort Condominiums International (“RCI”), acquired control over the electronic reservation system of an American company known as Galileo. The concern regarding this acquisition was that Cedant would be able to leverage Galileo’s market power in its computerized reservation system into Cedant’s activities (vertically). However, the Commission approved the merger on the following basis:

¹² *Cedant v Galileo* [Comp/M2510]

- (a) Galileo had no physical presence in South Africa, although it operated in South Africa through its exclusive distributor, Galileo Southern Africa;
- (b) the relevant product markets of the parties differed distinctly from those of the international analyses. The only product sold by Galileo in South Africa was GDS, a software product sold primarily to travel agents and which could not be regarded as a substitute for the products sold by Cedant;
- (c) no public interest issues arose as a result of the merger, because both parties were based in the United States of America, although Cedant has subsidiaries in South Africa; and
- (d) there would be no adverse impact on the employees of Cedant in South Africa, as the employees of Galileo SA will be absorbed into the business of RCI SA on the same terms and conditions as those of Galileo.

Thus it appears that when the Competition Commission decides on whether or not to grant a decision to merge it takes into account additional factors.

1.5 Purpose of merger law

It is submitted that merger law is aimed at preventing establishment of dominant firms which will substantially lessen or prevent competition in the relevant markets of the economy. It is further submitted that merger law concerns the evaluation of specific types of transactions which fit the description provided for in section 12 of the Act. Merger law does not concern itself with those transactions that do not fit into the said description and which, therefore, the legislature never intended to regulate. Once a transaction is regarded as a merger the due notification process as stated in sections 13 to 18 of the Competition Act must be followed.

However, it is important that stakeholders avoid giving an overly wide definition of a “merger” in order to avoid bringing every transaction under the ambit of merger regulations. Having said that, it is of more importance to bring those transactions which fit the description of merger

transactions before competition authorities in order to avoid sanctions which may be imposed in cases on non-compliance .

It is context David Lewis¹³ stated “firstly, it is not possible, or desirable, to regulate all aspects of conduct (referring to economic conduct). Hence nothing prevents a monopolist, or, in the parlance of our legislation, a dominant firm, from charging a monopoly price. Indeed, provided that entry barriers are sufficiently high and that the monopolists pricing strategies did not encourage new entry, a monopoly price is precisely what would be charged. In areas of major public interest monopolistic conduct is overridden right down to the regulator setting price. But I think that everyone would agree that it would be highly undesirable for the competition authority to assume the role of a price-setting agency. Thus in order to forestall the necessity for excessively interventionist regulation such as price setting, the preferred strategy is to prevent, wherever possible, the mergence of anti-competitive structures, where these structures arise through mechanisms other than the provision of superior products”.

1.6 Scope and focus of dissertation

The main focus in this dissertation is section 12 of the Competition Act which deals with mergers, and in particular section 12(2)(g) which deals with control by minority shareholders in a merger transaction.

Merger is one of the very important chapters of the Competition Act and it receives a lot of attention from both competition authorities and authors. However, it is submitted that even though that is the case, the scope and application of section 12(2)(g) has not yet received sufficient attention thus justifying it as the primary focus of this dissertation.

What is interesting about section 12(2)(g) is that it is broad. For this reason section 12(2)(g) might cover cases which merging parties never thought that might fall within the ambit of the merger regime of the Competition Act. In such situations they might consequently omit to notify the competition authorities of the intended merger. The consequences of such omissions might

¹³ Lewis “ Why merger regulation?- a response to our critics” (June 2001)

be dire for the merging entities, especially where the merger has already practically been implemented and it is then detected and prohibited by the competition authorities.

CHAPTER 2 REGULATION OF MERGERS

2.1. Rationale for merger regulation

In order to understand section 12(2)(g), firstly, it is imperative to understand its basis. The purpose to chapter 3 of the Competition Act is to regulate merger transactions. Neuhoﬀ remarks that merger regulation is an attempt to proactively regulate the structure of the economy and markets in order to ensure that markets function optimally¹⁴. In essence, the rationale for merger regulation stems from the proposition in economic theory that the likelihood of anti-competitive market conduct and bad economic performance is greater in markets that exhibit certain structural characteristics such as a few participants, high barriers to entry, customers with little bargaining power and little product innovation¹⁵. Accordingly merger regulation is an attempt to prevent market structures from developing that may enhance the ability of firms to abuse either unilateral or co-operative market power to the detriment of consumers¹⁶.

Sutherland & Kemp, argue that “transfer of control between firms may affect the structure of the markets. These changes in the structure may have important consequences for the competition in the relevant markets. It is difficult and disruptive for the competition authorities to change markets once they are established. Accordingly, competition authorities worldwide supervise mergers. Merger law attempts to prevent the creation of anti-competitive market structures through mergers¹⁷”.

From the above statements there is a clear commonality about the purpose of merger law and that is: it is designed to prevent ant-competitiveness in relevant markets of the economy. The question that therefore arises is how competition authorities pre-empt the anti-competitiveness of a merger. In *Mondi Ltd v Kohler Cores*¹⁸ the Tribunal stated that:

¹⁴ Neuhoﬀ 179.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Sutherland & Kemp, ”*Competition Law of South Africa*” (2009) 12 .

¹⁸ *Mondi Ltd v Kohler Cores*¹⁸ and Tubes 06/LM/Jan02

“No amount of reliable evidence will remove the predictive or “probabilistic” element in merger adjudication. This is explicitly recognized in the Act, which enjoins us to determine the “likely” consequences of a transaction before us. The Act provides explicitly for a regime where the effect of a merger is assessed prior to its implementation. The necessary implication of this regime is that the adjudication is *a priori*, not *post hoc*. Since the merger has not taken place at the time of adjudication and indeed may not take place at all, an element of prediction regarding what may happen after implementation is inherent in the statutory design. Fortunately, significant advances in the economic theory, particularly game theory, have eased the task of prediction-based on observations of past behavior and on the rational responses of profit maximizing firms to a given set of incentives we are able to make predictions from a strong scientific basis”.

In essence the Tribunal’s view in the above case is that it will always be difficult to pre-empt anti-competitiveness of a merger. Thus predictions based on the experiences shall always be used.

2.2 When does a merger occur?

A merger takes place when two or more independent businesses combine. For a merger to take place the combining businesses must have been independent of each other before the merger¹⁹. Therefore, restructuring of related businesses cannot be said to be a merger. A merger may take place by either mutual consent or through a hostile takeover.

Neuhoff²⁰ states that a merger occurs where control is, or will be, acquired or established. A firm that already has control over another firm cannot again merge with that firm. A change in the quality of control of one firm over another will be irrelevant to competition law as a change in control is a once-off affair.

¹⁹ Neuhoff 177.

²⁰ Ibid.

2.3 Types of mergers

From an economic perspective, the Competition Act regulates three types of mergers, namely horizontal, vertical and conglomerate mergers.

(a) Horizontal mergers

Horizontal mergers occur when firms operating at the same level of the supply chain selling substitutable products in the same geographic area merge²¹. Thus it is a merger between two direct competitors eg two retail clothing chains²².

(b) Vertical mergers

A vertical merger entails the integration of parties in a vertical relationship, such as a manufacturer and its distributor²³.

(c) Conglomerate mergers

Conglomerate mergers cover all other types of mergers that are neither horizontal nor vertical in nature²⁴. These are transactions that take place between parties that have no apparent economic relationship such as a mining company that acquires a motor manufacturer²⁵.

Horizontal mergers usually give rise to the most serious competition law concerns because they involve removal of one competitor by another, thus reducing the number of competitors in the market, increasing the market share of the merged entity and market concentration , and reducing customer choice²⁶. In the absence of factors that constrain the ability of the merged entity to abuse market power, horizontal mergers thus may enhance unilateral market power²⁷.

The case of *Bidvest v Paragon*²⁸ illustrates how the Competition Commission tends to approach different types of mergers in relation to their markets. The facts of the case were briefly as follows: Bidvest, through its wholly owned subsidiary Lithotech Limited, wanted to acquire Paragon. Lithotech and Paragon were both active participants in a range of areas in the printing industry. Their primary focus was wider business forms market, which included printing various

²¹ Ibid.

²² Ibid.

²³ Neuhoff 178.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Neuhoff 179.

²⁷ Ibid.

²⁸ *Bidvest Group Limited and Paragon Business Communication Limited (56/LM/Oct01 [2002] ZACT 1(16 January 2002) .*

types of business forms, direct mail printing, laser printing, finishings and labels. They also offered complementary services, such as warehousing, picking and packing, distribution and procurement services. The proposed merger raised concerns for both customers and competitors.

The Competition Commission found that the parties would be dominant post-merger in four of the six relevant markets. Furthermore, in most of these markets, the parties have significantly larger market shares than their competitors, essentially being the only competitors. So, taking this into consideration, the Competition Commission came to the conclusion that if the transaction is allowed to take place it would substantially prevent or lessen competition in the relevant markets. Any efficiency or other precompetitive gains that might arise would not offset the anti-competitive effects of the transaction.

However, the Commission recommended, and subsequently, the Tribunal approved a large and horizontal merger involving Massmart Holdings Limited, Jumbo Cash & Carry and Sip n' Save. Briefly the facts were that Massmart owns and controls several subsidiaries that are active mainly in the retail and wholesale of grocery, general merchandise and liquor products. These stores were CCW Wholesalers, Makro, Game and Dion. Massmart also owns a voluntary buying association, Shield Buying and Distribution. On the other hand, Jumbo, Brown and Weirs Cash & Carry stores are wholesalers of groceries and some general merchandise.

The Commission found the relevant markets to be wholesale grocery items, general merchandise and liquor. Furthermore, it found the geographic market to be wider than the local one. It therefore held that the merger is not likely to substantially prevent or lessen competition in all of the relevant markets. The parties will not have the market power, as their post merger combined market shares would be relatively low. The parties are unlikely to have market power, as customers have countervailing power as well as the ability to discipline price.

The Tribunal considered two markets, *viz*, the grocery products wholesale market, in selected geographical areas, and the liquor retail and wholesale trade in selected geographical areas. The Tribunal was of the view that the transaction would not substantially diminish competition in the grocery products wholesale market. In the liquor retail and wholesale markets, the Tribunal

found that there were no clear indications that there was a prima facie cause for concern. It therefore upheld the Commission's recommendation that the merger would not lessen competition in the relevant markets. Furthermore, no public interest issues arose from the merger and no jobs will be lost as a result of the merger.

2.4 Merger notification

Section 13(1) of the Competition Act provides that any party to an intermediate or large merger must notify the Competition Commission of that merger no more than seven days after the earlier of:

- (a) the conclusion of the merger agreement;
- (b) the public announcement of a proposed merger bid; or
- (c) the acquisition by any one of the parties to that merger, of a controlling interest in another.

Mergers are further differentiated into three categories, viz, small, intermediate and large mergers. There are specific procedures applicable when dealing with each of the categories. The differentiation is mainly based on combined turnover, assets or turnover and assets of the merging firms. A small merger takes place if a combined annual turnover and/or assets is equal or less than R560 million and either the turnover or the asset value of the transferred firm or firms in the Republic equal or is less than R80 million. An intermediate merger takes place if any combination of the turnover or assets of the acquiring and transferred firms in the Republic equals or is less than R6.6 billion, and either the turnover or the asset values of the transferred firms in the Republic equals or is less than R190 million. A large merger occurs if combined annual turnover and/or assets of the merging firms are above than R6.6 billion or the transferred firm value is above R190 million.²⁹

Small mergers only need notification if the Competition Commission deems it required to do so. On the other hand, the competition authorities should always be notified if intermediate or large

²⁹ Sutherland & Kemp, *Competition Law of South Africa*, (2009) 12.

mergers occur. This shows the significance of merger law and the need by the competition authorities to regulate mergers.

2.5 Definition of merger

Section 12 of the Competition Act provides that a merger means the direct or indirect acquisition or direct or indirect establishment of control by one or more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or another person, whether that control is achieved as a result of:

- (a) purchase or lease of the shares, interest, or assets of that competitor, supplier, customer or other person;
- (b) amalgamation or combination with that competitor, supplier, customer or other person: or
- (c) any other means”.

It is submitted that this definition of a merger as stated above contains two important elements, which are:

- (a) acquisition or establishment of control; and
- (b) after the merger, the interest, right or the entity acquired must constitute a business or part of a business of the acquiring business after the merger.

It therefore further submitted that if any of the above elements is lacking a transaction which purports to be a merger cannot be said to be a merger for purposes of the Competition Act.

With regards to element (a) of acquisition and establishment of control, in *Gold Fields Ltd v Harmony Gold Mining Co Ltd*³⁰, Lewis P held that:

“Previous decisions of the Tribunal have demonstrated that sensitivity to the prospect of merging parties structuring transactions with specific intent of evading regulatory oversight and, in this way, undermining the objectives and administrative of the Act. This has underpinned – appropriately in my view-an expensive view of control, a perspective endorsed by the Competition Appeal Court. I believe that this decision has been approached from this perspective and am confident that it is no way represents a relaxation of the Tribunal’s commitment to ensure that the procedures of the Act are respected so as to enable effective regulation of merger activity. However I am also of the view that this transaction has served to highlight a second danger and that is that the management of the target companies³¹ may well seek to use the provisions of the Competition Act to chill hostile mergers, in fact to prevent their own shareholders from exercising the rights that attach to their share in the ownership of the company in question”.

Element (a) lacks clarity and requires further scrutiny. The exercise of scrutinizing element (a) will be undertaken by considering the content of section 12 (2) of the Act.

2.6 Section 12(2) of the Competition Act

In terms of section 12(2) of the Competition Act, a person is deemed to control a firm if that person:

- a) “beneficially owns more than one half of the issued share capital of the firm;

³⁰ *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 559/2004) [2004] ZASCA 106; [2005] 3 All SA 114 (SCA) (26 November 2004)

³¹ For the purpose of this dissertation a “target company/firm” means a firm which will as a result of a merger be taken over. The firm that acquires the target company/firm as a result of the merger is the “acquiring company/firm”.

- b) is entitled to cast 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 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, No. 61 of 1973;
- 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, 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 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)".

From an overview of section 12(2)(a) to 12(2)(f) it is submitted that control is deemed to have been assumed by another firm over the other if either one or both of the following elements are there:

- (a) the ability of the acquiring firm to have or to control majority of directors, trustees or members of the acquired firm, depending on the form of entity; and
- (b) one firm is a holding firm and the other is a subsidiary of that holding firm.

However, there are cases where on face-value and through application of sections 12(2)(a) to 12(2)(f) one may not come to the conclusion that a merger has occurred. One such example is the

sale of book debt by one firm to another. In *Commission v Edgars Consolidated Stores Ltd*³² the Tribunal however found that the purchase of book debts constituted a merger in the said circumstances.

It is interesting to note that in the above case the transfer of a book from one firm to the other was through a sale agreement and not a perfection of security, which is common in lending transactions. However, it is submitted that the Competition Commission would have come to the same decision had the case been about a creditor that perfected its security, a cession of a book debt, provided that book debt formed a major part of the debtor firm's business. This perfection of security would still have be regarded a merger.

2.7 Control

The legislature has recognized that there are instances where control is not captured in section 12(2)(a) to section 12(2)(f) of the Competition Act and has thus included section 12(2)(g) as a catch-all provision to deal with any deficiencies³³. Neuhoff remarks that it is noteworthy that section 12(2)(g) relates to the mere ability on the part of a person to exercise material influence and not necessarily exercise the actual influence on the policy of a firm³⁴. Thus , if such a person has the ability to materially influence the policy of a firm, such person would be taken to have control notwithstanding that the person never in fact exercised such an ability³⁵.

The concept of control was given a broad interpretation in *Bulmer SA (Pty) Ltd and Another /Distillers Corporation (SA) Ltd and Others*³⁶. In this matter the competition authorities were required to consider whether the acquisition by Distillers of the assets and liabilities of Stellenbosch Farmers Winery (SFW) , to create Distell Ltd, amounted to a merger under the Competition Act. The merging parties had argued that merger notification was unnecessary as there had been no change in the ultimate control of either company. The basis for this argument was that Distillers and SFW had three common shareholders namely KWV, Rembrandt and SAB, which each held 30% of the voting equity in the merging firms by virtue of a voting pool arrangement.

³² *Competition Commission and Edgars Consolidated Stores Ltd and Others* (95/FN/Dec02) [2003] ZACT 19 (24 March 2003)

³³ Neuhoff 207.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Case 94/FN/Nov00 and Case 08/CAC/May 01.

The Competition Commission accepted this argument, but two competitors of the companies sought an interdict to restrain the merger. The matter was taken to the Competition Tribunal, which recognized that the obligation to notify may not apply in situations where ultimate control remains unaffected, in particular where firms concerned form part of a single economic unit. The Competition Tribunal's rationale was that in the case of firms which form part of a single economic unit, a "change in the direct form of control is illusory and has not altered the substance of control that both antedates and postdates the transaction." In determining whether a structure is indeed a single economic entity, the Competition Tribunal advocated a cautious approach, and in this instance it found that it was necessary for the shareholders to have a "common controlling mind" in order for the ultimate change of control argument to succeed. Consequently, evidence of some concerted action between the three shareholders was required to indicate that they formed a single controlling mind. However, the Competition Tribunal found that the parties had not demonstrated a factual and/or legal framework to indicate that the shareholders acted in concert on a regular basis to control the alleged group. Accordingly, the single controlling consciousness test was not met and the transaction was held to be notifiable.

In an appeal against the Tribunal's decision, the Competition Appeal Court similarly regarded the transaction as notifiable. It however reached the same conclusion as the Tribunal without expressly supporting the dictum of the Tribunal. On the contrary, the Competition Appeal Court dismissed the argument that only where ultimate control changes does the transaction constitute a merger and stated that the Act makes no express provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of a merger.

The Competition Appeal Court further held that section 12(1) which provides the definition of a merger, must be broadly interpreted so as to allow a wide range of potential merger transactions to be examined by the competition authorities. Moreover, the Competition Appeal Court held: "...the purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities a wide range of transactions which could result in an alteration of the market structure and in particular reduce the level of competition in the relevant market."

In view of this interpretation the Competition Appeal Court held that prior to the proposed transaction, the merging parties were separate legal entities, separately listed on the JSE, controlled by different boards of directors and had totally different operating structures. Therefore the transaction was held to fall within the meaning of section 12(1) of the Competition Act in that there was an acquisition of control pursuant to a transaction by which Distillers acquired the assets of SFW.

Neuhoff³⁷ explains that in terms of the Competition Act a merger includes a proposed merger as well. According to the author, this does not extend the meaning of control. Instead, it merely

³⁷ Neuhoff 210.

means that a merger will not only take place where there is an actual transfer of control but also where the establishment of control is proposed.

It is submitted that it is difficult to see how a proposed merger can amount to an actual merger. Firstly, at the time when a merger is only a proposed merger, and not having taken place, there are no attributes that flow, as a result of the merger, for the benefit of the proposed acquiring firm. Secondly, the proposed merger might not eventual materialize, because the merging parties might decide not to proceed with it, for instance, if it is a friendly merger, if it is a hostile merger, the party taking over might see no worth in continuing with the take-over or the competition authorities might reject it.

Neuhoff uses the case of *Gold Fields Ltd v Harmony Gold Mining*³⁸ to substantiate the point about proposed merger made above. In this case the Appeal Court held that a proposed merger was more than a transaction to conclude a merger. The court found that a firm's intention to merge – especially if publicly expressed- constitutes a proposed merger.

In *Johnnic Holdings Ltd v Hosken Consolidated Investment Ltd*³⁹, the Tribunal however stated that a mere conclusion to merge was not sufficient to constitute a proposal. It stated that a proposal in order to constitute a merger is:

“really nothing more than it says, namely a proposal, whether bilateral, as in a friendly merger, or unilateral, as in a hostile merger, where the proposal may come as a nasty shock to the target company when it is revealed. All large mergers are in a sense proposed mergers, within the terminology of the Act, until they receive the approval of the Tribunal or the CAC, since if they have not yet been implemented a prohibition on the merger will mean that the merger never comes into being. (If a change in control has already been implemented at the time when the competition authorities rule on the matter, such premature implementation, in contravention of section 13A(3), would in all likelihood be visited with penalties under section 59(1)(d)(iv) and could possibly lead to divestiture under section 60 Of the Act.) “

³⁸ *Gold Fields Ltd v Harmony Gold Mining* Appeal 43/CAC/Nov04 27 January 2005 .

³⁹ *Johnnic Holdings Ltd v Hosken Consolidated Investment Ltd*, CT65/FN/Jul05.

It is submitted that the view expressed by the Tribunal in *Johnnic Holdings Ltd v Hosken Consolidated Investment Ltd* above reflects the intention of the legislature as to how the merger regime in terms of the Competition Act should be applied in dealing with a merger proposal.

2.8 Conclusion

It has now been established that a merger occurs when the business or part of a business conducted by a firm is transferred to the control of another firm or firms. It has also been shown what the Act deems to be control, and that this concept is clear except for one instance, namely Section 12 (2)(g) which is the subject of investigation in this dissertation.

CHAPTER 3 THE ASPECT OF “CONTROL”

3.1 Control in terms of the South African competition law

The definition of a merger and what mergers and merger regulations entail have been defined in the previous chapter. It is thus clear that one cannot define a merger without referring to “control”. In fact “control” is the measure of a merger. Neuhoﬀ aptly remarks in this regard: “Section 12 (1) determines that a merger occurs when one or more firms directly or indirectly acquire direct or indirect control over the whole or part of the business of another firm. The meaning of the expression “control” is crucial to this definition “. ⁴⁰

The concept of control in relation to a merger however remains problematic. When can it be said that one firm has taken control of the other firm and therefore that a merger has occurred? As has been stated in chapter 2 of this dissertation section 12 (1) provides for the following ways of assuming control:

- (a) purchase or lease of the shares, interest, or assets of that competitor, supplier, customer or other person;
- (b) amalgamation or combination with that competitor, supplier, customer or other person: or
- (c) any other means

Subparagraph (a) and (b) firstly attempt to list the types of firms which control may occur, *viz*, among competitors, with a customer and suppliers. But it can be seen that this list can never be exhaustive. As the result both of them end with the phrase “other person”.

Subparagraph (c) is a general and wide provision. It seeks to capture instances of assuming control that are not covered under paragraphs (a) and (b), and which could not have been

⁴⁰ Neuhoﬀ 207.

contemplated by the legislature. The ways of assuming control by one firm over the other are not exhaustive in terms of section 12(1), so are the ways of demonstrating control in terms of section 12 (2).

Control may be either direct or indirect, in terms of section 12(1). It does not pose a problem to identify direct control. It is indirect control that is not so clear. In *Distillers Corporation (SA) Ltd Stellenbosch Farmers Winery Group Ltd* ⁴¹the Tribunal held that only immediate owners of assets could be regarded as their direct controllers.

According to Neuhoff, it is conceivable that indirect control may exist even in a situation where it is not held through a person that would otherwise be regarded as a controller.

As stated in the previous chapter when defining a merger, control can be said to have occurred if one or more of the following scenarios prove to exist, in terms of section 12(2) if other firm:

- (a) beneficially owns more than one half of the issued share capital of the firm;
- (b) is entitled to cast 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 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, No. 61, 1973;
- (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, to appoint or change the majority of the beneficiaries of the trust;

⁴¹ *Distiller Corporation (SA) Ltd Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003

- (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 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)".

3.2 The scope of assuming control under section 12(2)(g)

It is submitted that Section 12(2)(g) is a generic provision. One therefore needs to establish instances which it covers and its limitations.. To put it differently, one needs to establish instances which it may be said that control has been established in terms of section 12(2)(g).

It appears that the legislature recognized instances where control cannot be captured by the provisions of section 12(2)(a) to 12(2)(f) of the Act. Hence there was a need to have a provision that would attempt to capture instances of control that could not have been contemplated by the legislature.

It is submitted that Section 12(2)(g) deals with the ability on the part of the other firm to exercise material influence. According to the provisions of the section it is not necessarily the actual exercise of this material influence that give rise to control. This means a firm may have this ability but not exercise it and will still be regarded as a firm that controls the other firm and therefore a merger would be said to have take place. The mere availability of this power is sufficient to prove control for the purposes of section 12(2)(g).

However, it should be noted that the Act offers little help in determining aspects of material influence. It is therefore important to consult both local and international precedents in order to be able to determine material influence.

Later on in this dissertation comparative international precedents will be examined. It is important to note that the term “decisive influence” is commonly used by international competition authorities. It is also submitted that decisive influence is not limited to direct control, as compared to material influence. Furthermore, the elements of control provided by section 12(2) need not to co-exist for a merger to be said to have occurred. It is sufficient to show that one of the elements of control under section 12(2) exists. Having said that, it must be noted that there are instances where they may co-exist.

According to Neuhoff the term “control” as used in section 12 (1) is not defined anywhere in the Act and is one of the serious flaws of section 12⁴². As yet, the competition authorities have not decided what the term “control” really means. This has led to a formalistic and literalistic approach to the concept. In the *Bulmer* –case discussed above, it was merely accepted that the transaction in that case achieved control within the language of the expression control as described in section 12(1). The Appeal Court simply concluded that the transaction falls within the meaning of section 12(1) in that there “ was an acquisition of control pursuant to a transaction by which first appellant (D) acquired the assets of the second appellant “. ⁴³

The list under section 12(2) is also not exhaustive, more so since it includes section 12(2)(g), which as has been above, is a catch-all section. . This was confirmed by the Tribunal in *Ethos Private Equity Fund IV/Tsebo Outsourcing Group*⁴⁴ and also in *Caxon and CTP Publishers & Printers Ltd v Naspers Ltd*⁴⁵.

In the *Bulmer* -case ⁴⁶, the Tribunal further held that section 12(2) has a more mundane relationship to section 12(1). The circumstances listed in section 12(2) all have in common some examples of indirect control that might be exercised over a firm. Section 12 (1) provides for a merger to be accomplished through the acquisition or establishment of direct or indirect control.

⁴²Neuhoff 207.

⁴³ *Ibid.*

⁴⁴ *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd* 30/LM/Jun03 .

⁴⁵ *CTP Publishers & Printers Ltd v Naspers Ltd* 16/FN/Mar04 .

⁴⁶ *Bulmer SA (Pty) Ltd v Distillers Corporation (SA) Ltd* 94/FN/Nov00 101/FN/Dec00.

Since direct control is notionally uncomplicated the legislature did not need to state instances for it. The same can however not be said of the concept of indirect control with the result that the legislature opted through section 12(2) to give some examples to provide clarity. Hence the choice of the language that precedes the list: “a person controls a firm if...” Section 12(2) sets out the most commonly occurring situations to be found within the boundary of the meaning of control. The term “control”, as used in section 12(2), must be interpreted in the light of the wording of that provision but section 12(2) will be ancillary to that inquiry, although section 12(2) is not determinative in establishing the meaning of the word control.

The finding of the Tribunal in the *Bulmer-case* suggests that the whole of section 12(2) contains examples in terms of which indirect control may take place. It may therefore be concluded from the above decision that control in terms of section 12(2)(g) cannot cover direct control. Therefore instances and circumstances that one may look at in terms of section 12(2)(g) will not be instances and circumstances that give rise to direct control but they will be instances which show indirect control.

Having shown that section 12(2), especially section 12(2)(g) provides for instances under which indirect control may take place, it is submitted that section 12(2)(g) goes further than that. It is submitted that it was meant to cater for instances where minority shareholders in an acquiring firm can be said to have assumed control of the acquired firm or target firm.

This view is supported by Neuhoff when the author states that the ability of a minority shareholder to control a firm has mostly arisen in the context of shareholders’ agreements as well the *de facto* ability of minority shareholders to determine the outcome of shareholder meetings⁴⁷. A minority shareholder will be deemed to control a firm if, for example, it is likely to achieve a majority at the shareholders meeting, given that the remaining shares are widely dispersed⁴⁸. In such a situation it is unlikely that all that all the smaller shareholders will be present or represented at the shareholders meeting⁴⁹.

⁴⁷ Neuhoff 209.

⁴⁸ Ibid.

⁴⁹ Ibid.

Neuhoff remarks that a minority shareholder may also, for example, by means of a shareholders' agreement, acquire the right to veto the adoption of important policies within the company, or be required to give its consent to material strategic decisions such as adoption of the budget or the business plan, or the appointment of senior management⁵⁰. The competition authorities may in these circumstances take the view that such a shareholder enjoys sufficient control over the company to control the firm for the purposes of section 12 of the Competition Act.⁵¹

The reason for the view that the above remark supports the argument submitted above is that other than catering for instances where control is indirect, section 12(2)(g) was also meant to cover instances where minority shareholders can be said to have control, is the usage of the phrases "material strategic decisions", "adoption of budget or the business plan". These phrases cover what section 12(2)(g) envisages and are used in relation to minority shareholders. It is submitted that majority shareholders do not need the provisions of section 12(2)(g) to be said to have control of a firm since their position of control is most of the time clear.

Next to be considered is "material influence". It is submitted that the concept of "material influence" is important in the interpretation and application of section 12(2)(g). The attainment of control in terms of this subparagraph is through a firm's ability to materially influence the policy of another firm in a manner comparable to a firm having the ability to control the majority of directors, trustees or members, or a firm having control over its subsidiary. Neuhoff argues that material influence underlies the concept of control and is central to section 12(2)(g), the most general part of section 12(2) "Control" should be interpreted in a similar manner. This approach would give effect to the role which control should play in merger law.

⁵⁰Neuhoff 210.

⁵¹*Ibid.*

According to Neuhoff section 12(2) does not operate negatively⁵², The mere fact that a transaction does not fall within section 12(2) does not mean that it is not a merger.

Neuhoff continues by indicating that section 12(2) (g) is expressed in more general terms than other provisions. It is a default provision in the sense that it will apply only to situations that do not fall within section 12(2)(a) to 12(2)(f). It is suggested that some of the *lacunae* in the more specific definitions of control can be filled by utilizing section 12(2)(g).⁵³

The Tribunal in the *Bulmer*- case demonstrated that control can be established even when it can be exercised in a once off event.⁵⁴

The matter of *Gold Fields v Harmony Gold Mining Company Limited*⁵⁵ also illustrates this point. In this case the Appeal Court found that the two firms together gained control over another firm because they agreed to vote together on a significant resolution affecting the target firm and that this was covered by section 12(2)(g).

What about gaining control of a firm by a creditor who enjoys benefit of holding security instruments where such security is over major assets of the firm? It is submitted that in this premise it cannot be said that that creditor has control over the debtor firm merely because of the existence of the security instruments. However, if the creditor, as a result of the debtor firm's indebtedness, has similar abilities as purported in terms of section 12(2)(g) it can be said that that creditor has control. For instance, if a firm, because of its position as a creditor, has the ability to determine business plans, appointment of senior management, etc that creditor can be said to have assumed control of the debtor firm in terms of section 12(2)(g), and therefore a merger has occurred.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ *Bulmer SA (Pty) Ltd v Distillers Corporation (SA) Ltd* 94/FN/Nov00 101/FN/Dec00

⁵⁵ *Gold Fields v Harmony Gold Mining Company Limited* 43/CAC/Nov04 27 January 2005

Neuhoff holds the view that the granting of security by means of instruments that could provide control once the security is called up and will not constitute control for the, purposes of section 12(2)(g), before that security is perfected⁵⁶. The author says in such cases, control will be established only once the creditor defaults and the security is called up. She however warns that creditors should take note that merger regulation may make it difficult for creditors to realize their securities. In other words the fact that control is gained through perfecting of security does not excuse the parties from observing merger regulations.

3.3 Conclusion

In this chapter the concept of control, in relation to the concept of merger, was defined and interpreted. The ways in which one firm can assume control over another firm were also considered. As the concept of control for purposes of section 12(2)(g) has however not been definitively defined in the Competition Act or South African case law , it is submitted that a comparative examination of the way in which the concept of control has been dealt with in foreign jurisdictions may add value to the interpretation of the concept of control.

⁵⁶ *Ibid.*

CHAPTER 4 COMPARATIVE JURISDICTIONS AND THE CONCEPT OF CONTROL

4.1 Introduction

Europe is one of the regions which South Africa considered when it drafted its Competition Act. Consequently the manner in which the merger law is interpreted and applied in the European Community can be of assistance in the interpretation and application of the South African Competition Act.

David Lewis⁵⁷, acknowledged the need of referring to and guidance offered by international jurisprudence when applying and interpreting the South African competition law when he stated, “our statute, the Competition Act, explicitly allows considerable room for reasoned interpretation. It allows this latitude because it is a law regulating economic structure and conduct. Although a wealth of international jurisprudence and the considerable theoretical and empirical basis of economics guide us, no one would pretend that competition regulation is an exact science”.

4.2 The European Community

In terms of regulations relating to merger law in Europe, in *Council Regulation (EEC) 4064/89*⁵⁸ it is provided that in determining whether persons already control a particular undertaking, or whether control of another undertaking is acquired-arises where it is possible to exercise ‘decisive influence’ on an undertaking. The Merger Control Regulation, indicates that this may arise through the ownership (or right to use) all or part of the assets of an undertaking, or through rights or contracts which confer decisive influence on the composition, voting or decision of the organs of an undertaking. For the purposes of the Merger Control Regulation, the ability to exercise this decisive influence may be created by rights, contracts, ‘or any other means, which,

⁵⁷ Lewis “Why merger regulation?” - a response to our critics (June 2001).

⁵⁸ Council Regulation (EEC) 4064/89, art 3(1), OJ [1990] L 257/14)

whether jointly or separately and taking account both of factual and legal circumstances, create that ability.⁵⁹

It is submitted that the control referred to above is not limited to indirect control. It is further submitted that control includes even direct control. The concept of decisive influence is used as a test to establish any form of control.

It should be noted that control may be acquired not only by those persons who hold (or are entitled to) rights under the relevant contracts, but also by those who have the power to exercise such rights.

This is a relevant argument when one compares it with the argument advanced earlier in this dissertation that if a person has the ability to materially influence the policy of a firm, such person would be taken to have control notwithstanding that the person never in fact exercised such ability. This means it is the “ability” and the power that is relevant and not whether or not the person has ever exercised that ability and power.

Just as in terms of section 12(2)(g) with regards to material influence, the Merger Control Regulation emphasizes the concept of ‘decisive influence’ as central in defining control. In *Council Regulation (EEC) OJ [1990]*⁶⁰ it was stated that while it is not difficult to establish whether outright acquisitions are caught by the Merger Control Regulation, cases of minority acquisitions caught by the Merger Control Regulation can be less easy to identify and can give rise to serious difficulties, given the sanctions for failure to notify.

The Council could not find that decisive influence existed for the purposes of the Regulation, where a holding of less than 25% of the voting rights in a company was being acquired, but there have been exceptions.

⁵⁹ For easy understanding, the term “undertaking” used in the above paragraph will have the same meaning as a “firm” used in the Act.

⁶⁰ Council Regulation (EEC) OJ [1990] ⁶⁰L 257/14 .

The exception to this view is found in *Case IV/M258 CCIE/GTE OJ*⁶¹ where it was held that 19% shares of voting rights was sufficient to confer on CCIE exclusive control over EDIL.⁶²

It is submitted that this means that the acquirer firm can have as low as 19% shares of the acquired firm but if it can be shown that the voting rights are sufficient to confer decisive influence and therefore exclusive control on the acquired firm that would be sufficient to demonstrate that there is control of one firm by the other.⁶³

It is further submitted that just like material influence in terms of section 12(2)(g), decisive influence can also be established by other means employed by the acquiring firm. It is further submitted that the acquiring firm may through a management contract or by acquiring exclusive rights to a process of key significance of the other firm for example, be said to have decisive influence.

The case of *Credit Suisse/Nikko/MSA*⁶⁴ illustrates the above point. In this case the Commission found that before the operation Nikko Europe, although it owned no shares, exercised sole control over MSA as a result of loans, share options, a veto over strategic commercial actions and control of the board of directors. By operation a subsidiary of Credit Suisse acquired shares in MSA, some of the options and joint veto with Nikko Europe. By reason of the veto rights which they held Nikko Europe and Credit Suisse were able to exercise decisive influence over MSA.⁶⁵

⁶¹ *IV/M258 CCIE/GTE OJ* [1992] C 225/14

⁶² The EC Merger Regulation Control of Concentrations between Undertakings [Official Journal L 024 of 29.01.2004] January, 29 (24): January 2004 .

⁶³ For the purposes of this discussion the acquirer firm is the entity that assumes control over the business of the other firm, and the acquired firm is the entity which its business is controlled by the acquirer. A natural person can also be an acquirer.

⁶⁴ *Case IV/M1273 Credit Suisse/Nikko/MSA*

⁶⁵ The EC Merger Regulation Control of Concentrations between Undertakings [Official Journal L 024 of 29.01.2004] January, 29 (24): January 2004 .

Another decision which confirms that above judgment is found in *Renault/Volvo case*,⁶⁶. In this case the parties had established 25% cross-shareholdings in their car operations and 45% cross-holdings in their truck and bus activities. These activities were backed by the establishment of three joint committees responsible for general policy matters, cars and trucks and buses, respectively. The rights attaching to the minority holdings in the car sector were held not to confer decisive influence since:

- (a) the profit sharing arrangement did not ‘create a sufficiently strong common interest between the parties so as to force them to common decisions on a permanent basis in respect of all their car activities; and
- (b) the establishment of reciprocal board representation did not materially change the nature of the notified operation, nor would the joint committee in practice force the parties to reach common decisions.

On the other hand the reciprocal 45% holdings in the truck and bus operation were held to confer joint decisive influence. The equal sharing of losses and profits created a strong common economic interest, in turn forcing the parties as a practical matter to reach common decisions in the relevant joint committee. Taking into account the contemplated degree of operational integration, aimed at full-range complementary and specialization, this pointed towards an ‘irreversible reciprocal dependency’. Any split between the parties was likely to represent a major competitive setback incurring excessive economic cost.

Thus there are a number of ways to confer decisive influence and therefore control, which may lead to the competition authorities to say that a merger has taken place. All the instances mentioned in *Credit Suisse/Nikko/MSA* and *Renault/Volvo* cases are not specifically legislated. It is submitted that in the South African competition law jurisprudence these instances would fall within the ambit of section 12(2) of the Competition Act.

⁶⁶ *Renault/Volvo case*, OJ [1998] C 66/5

It is also submitted that another way of acquiring control by a minority shareholder is when the remaining shareholders are widely dispersed and as a result the minority shareholder enjoys special voting rights. This would afford a minority shareholder with decisive influence over the firm on matters such as substantial investments, annual budgets, business plans and senior management selection as these matters will always require the minority shareholder's approval".

This is also illustrated by the *Mazda/Ford case*⁶⁷. In this case Ford increased its shareholding in Mazda from 24.5 to 33.4%. Included in the transaction were certain rights over the business of Mazda (including the right nominate Mazda's president). As a result the Commission concluded that Ford had sole control over the whole of Mazda.

In *ELF/Enterprise case*⁶⁸, the minority participant held only one-third of the shares in the joint venture and appointed only one-third of the directors. Nevertheless, the additional rights to veto applications for petroleum licenses or exploration concessions, as well as rights of budgetary approval, were held to confer joint control.

In *SITA-Rhone Poulenc/Scori case*⁶⁹, the Commission held that there was no joint control, since some of the parties did not enjoy sufficient rights which can be said to confer control. In this case the other parties did not have right to veto in matters of business policy, strategy, budgets and corporate planning.

In the *Sacilor/ASD6 case*⁷⁰, the Commission held that the fact that certain decisions had to be taken unanimously did not stop the majority shareholder having sole control over the company, given that the decisions requiring unanimity related only to the safeguarding of certain fundamental rights of the minority shareholder and did not concern the management of the company.

⁶⁷ *Mazda/Ford case* (Case IV/M741 OJ [1996] C 179/3).

⁶⁸ *ELF/Enterprise case* (Case IV/MO88 OJ [1991] C 203/14).

⁶⁹ *SITA-Rhone Poulenc/Scori case* (Case IV/M295 OJ [1993] C 88/9).

⁷⁰ *Usinor Sacilor/ASD6 case* (Case IV/M073 OJ [1991] C 193/34) .

4.3 Canada

Canadian competition law has also had a great influence on the South African Competition Act. It therefore makes sense to look at how similar provisions that are applied in that jurisdiction.

Firstly, in terms of the Canadian Competition Act, section 91 of the Canadian Competition Act,⁷¹ a merger means the acquisition or establishment, directly or indirectly, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over of significant interest in the whole or a part of a business of a competitor, supplier, customer or other person⁷².

It is submitted that just like section 12(2)(g) of the South African Competition Act and the EC Merger Regulations, according to section 91 of the Canadian Competition Act the manner in which a merger can take place is specific. Section 91 provides for the ways in which control may take place which are: purchase or lease of shares, and amalgamation or combination (of significant interest in the whole or a part of a business). This legislation also tries to provide for what types of businesses can merge, *viz*: competitors, suppliers and customers, but it again provides for a catch-all scenario when it refers to *other person*. It is submitted that the reason for this is that the list of businesses that can merge cannot be exhaustive.

However, the Canadian legislation also provides that the acquisition and establishment of control can either be direct or indirect. Again, same as in terms of the South African Competition Act as well as the EC Merger Regulations, control plays a big role in determining whether or not there is a merger. Section 2(4) of the Canadian Competition Act defines control as:

“ (a) a corporation is controlled by a person other than Her Majesty if:

⁷¹ Competition Act R.S.C., 1985,c.C-34

⁷² Competition Act R.S.C., 1985,c.C-34

- (i) securities of the corporation to which are attached more than fifty per cent of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and
- (ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;
- (a) a corporation is controlled by Her Majesty in right of Canada or a province if;
 - (i) the corporation is controlled by Her Majesty in the manner described in paragraph (a),

or
 - (ii) in the case of a corporation without a share capital, a majority of the directors of the corporation, other than ex officio directors, are appointed by:
 - (A) the Governor in the Council or the Lieutenant Governor in Council of the province, as the case may be, and
 - (B) a Minister of the government of Canada or the province, as the case may be; and
 - (C) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than fifty per cent of the profits on dissolution”⁷³.

According to section 2(1) of the Canadian Competition Act the Act is applicable and binding on an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

⁷³ Competition Act R.S.C., 1985,c.C-34

4.4 Australia

Reference can also be made to the Australian competition law. Like all merger regulations, the Australian merger regulations are aimed at preventing lessening of competition. Section 95 AA of the Australian Competition and Consumer Act⁷⁴ states that: “this section prohibits a person acquiring shares in the capital of a corporate or assets of another person if the acquisition would have, be likely to have, the effect of substantially lessening competition in a market”.

According to section 95AT, a merger takes place when a person:

- (a) acquires shares in the capital of a body corporate; or
- (b) acquires assets of another person.

Based on the above references, it is submitted that there is a relation between the South African merger regulations and Australian merger regulations. However, unlike in the other jurisdictions mentioned above, it is interesting to note that there are no thresholds of what percentage of share acquisition may constitute a merger. The concept of a merger *per se* is not defined in the Australian Competition and Consumer Act. The Act also does not refer to control as a test to determine if a merger has taken place.

4.5 Conclusion

In closing, in this chapter the concept of merger was defined and interpreted according to the European, Canadian and Australian competition laws. Section 12(2) (g) of the South African Competition Act uses the term “material influence”, not “decisive influence”, which is used in the European Economic Community Council Regulations, and also used in the cases quoted under the discussion of the position in the European Community. Other than the fact the European Economic Community Council uses the term “decisive influence” even in cases where direct influence has to be established, it is submitted that there is no material difference in the interpretation and, therefore, the application of the term “decisive influence” used by the European Economic Community Council is equivalent to the term “material influence” used in

⁷⁴ Australian Competition and Consumer Act No. 51 of 2010

section 12(2) (g) of the Competition Act. Therefore, for the purposes of this dissertation the inferences drawn from the cases decided by the European Economic Council Commission referring to “decisive influence” will be taken to be in the same light as “material influence” used in section 12(2) (g). No competition law decision has been found in South Africa showing that there is a material difference between the two terms.

In the next chapter analysis will be given on the ways in which minority shareholders, in cases of merger, may be said to have control over another firm under section 12(2)(g), and also what the limitations to section 12(2)(g) are.

CHAPTER 5 ANALYSIS AND CONCLUSION

5.1 Introduction

In the previous chapters it was stated that the main purpose of the South African competition law and Competition Act is to provide for an environment in which participants in the economy, in relevant markets, can have equal opportunities. It does that by leveling the playing field for different competitors in order to enable them to compete fairly. Secondly, it is to rectify the imbalances of the past by creating an environment in which the economic position of the previously disadvantaged individuals can be advanced. Thirdly, it is to promote production of quality goods at socially efficient prices.

5.2 Purpose of the merger law

As indicated, the purpose of merger law is that of preventing establishment of dominant firms which will substantially lessen or prevent competition in the relevant markets of the economy. In essence, it is to prevent anti-competitiveness in the relevant markets of the economy.

5.3 “ Control” for purposes of section 12(2)(g)

As has been stated in chapter 3 of this dissertation that section 12(2)(g) is a catch-all section and it is therefore difficult to come up with an exhaustive list in instances in which it may be said that these are the only instances which section 12(2)(g) applies. As this study has shown, in legislating section 12(2)(g) the legislature’s intention was to create a clause that was going to be able to cover even instances that the legislature could not have anticipated by the legislature.

5.4 Control by minority shareholding

If one looks at each instance where a minority shareholder may be said to have assumed control of a firm the following submissions may be made:.. Firstly, if it can be shown that a firm has control of the other firm if the former has the ability to materially influence the policy of that

other firm. The concept of “the ability to materially influence” is very important for the purposes of this discussion.

What is required is mere ability to materially influence not the actual actioning of that ability. Therefore, for the purposes of section 12(2)(g) it suffices that a firm would have this ability even without exercising it.

It must further be remembered that section 12(2)(g) deals with indirect control, as it was established in chapter 3 of this dissertation.

Secondly, the elements of control listed under section 12(2) need not to co-exist before it can be said that control has been established. It is sufficient that one of the elements of control can be established. As it was stated in chapter 3 of this dissertation, if more than one of the elements of control can exist, again it will be said that a merger has occurred. In this case the merger would have taken place at the occurrence of the first instance that occurred, provided that they do not occur simultaneously.

It must be remembered the Act itself does not define control. So, to ascertain the meaning of control for the purposes of section 12(2)(g) we are guided by the whole section 12, decided cases, publications and foreign legislations.

Another way of determining if a minority shareholder has control of a firm is if it is likely for the minority shareholder to achieve a majority at the shareholders meeting. A minority shareholder may achieve this if the remaining shares are widely dispersed. This is because sometimes it is unlikely that all the smaller shareholders attend or are presented in the shareholders’ meeting.

Further, a minority shareholder may have control of another firm by means of a shareholders’ agreement. The shareholders’ agreement may incorporate the right to veto the adoption of important policies within the company. Although this principle works in a negative manner, however, it must be noted that proposals that are not in line with a party that possesses veto right may not be taken.

Also, the minority shareholder may also be required to give consent on material strategic decisions such as adoption of the budget or the business plan. He may also be required to give consent for the appointment of senior management of another company.

All of these are important decisions for any firm to make. However, the list of what constitute important decisions is also not exhaustive. There may be other important decisions that a minority shareholder may have powers to take or influence. But what is important is to look at the shareholders' agreement and ascertain if there are powers that a minority shareholder have and it exercised can place the minority shareholder in a position of control. It must be remembered that the minority shareholder need not to exercise that power. Furthermore, one needs to look at the nature of business the acquired firm is involved in and how important the minority shareholder powers are in the overall direction of the acquired firm and what the extent of those powers is.

It is submitted that those powers must be of such a nature that they are material in the livelihood or strategic direction of that firm for a minority shareholder to be said to have control of another firm otherwise it cannot be said that a minority shareholder has control.

Additionally, a firm may agree with another firm to vote together on a significant resolution. For the purpose of section 12(2)(g) that will constitute having the ability to materially influence important decisions of another firm and therefore giving that firm control. As said above, significance of the decision will depend on the decision in question and what that decision mean to the firm.

A creditor who as a result of a debtor firm's indebtedness enjoys security over the whole or significant part of the debtor firm's business cannot be said to have gained control over the business of the debtor firm for the purposes of section 12(2)(g), unless if the debtor firm defaults and the creditor perfects the security instrument. Thus, if a creditor who enjoys security over a significant part of a debtor's business decides to call up the security after the debtor firm has defaulted that creditor would have been able to assume control of the debtor firm.

5.4 Conclusion

This dissertation also looked at the concept of control and material influence according to foreign jurisdiction, in particular Europe, Canada and Australia.

When one looks at European merger regulations and the manner in which control may be assumed it becomes clear that the term “decisive influence” plays a big role as it is the case with South African position where concept of material influence plays a similar role.

However, contrary to the South African position “decisive influence” in terms of the European merger regulations is not only relevant when determining indirect control. The term is also relevant even when determining direct control. However, because it is relatively easier to determine direct control the competition authorities normally need not to embark on an extensive enquiry to determine direct control. Decisive influence, for the purposes of the Merger Control Regulations, is the ability to exercise control which may be created by such rights, contracts, or any other means, which, whether jointly or separately and taking into account both of factual and legal circumstances, create that ability. It is for this reason we are of the view that decisive control is not limited to only when determining indirect control.

Under the European regulations, control may be required not only by those who hold rights under the relevant contracts, but also by those who have the power to exercise such rights.

It is submitted that this means having rights to exercise control must also be accompanied by the power to act. The European Regulation Council acknowledged that it is difficult to identify cases in which minority acquisitions can be said to have taken place.

According to the European Regulation Council decisive influence may exist in cases where the shareholding is more than 25% of the voting rights in a company that is being acquired. This dissertation has shown that there are cases in which a 19 % shareholder was said to have assumed control.

A minority shareholder can be said to have a decisive influence through a management contract or acquisition of exclusive rights -a process of key significance to the other party. It is submitted that what is important is the behavior of that minority .It is further submitted that one of the ways to determining whether or not a minority shareholder has decisive influence is to assess behavior of that minority shareholder when it comes to significant matters of the acquired company.

In some of the cases quoted in chapter 4 which were decided upon by the Regulation Council, it was said that a minority shareholder may have a decisive influence if it has an arrangement or agreement with another shareholder and in terms of that agreement the minority shareholder together with its partner shareholder will have the power to influence material decisions of the acquired firm.

Just like the position taken in the South African competition law, a minority holding may confer decisive influence where the remaining shareholders are widely dispersed or where the holding is coupled with special voting rights or other protection. It is submitted that in such circumstances key decisions will require the minority shareholders' approval. This means that these minority shareholders hold the key when strategic decisions affecting the firm are taken.

This dissertation also dealt with the view of South African competition authorities with regards to proposed mergers. There are instances in which proposed mergers would fall under the ambit of section 12(2)(g), provided that such proposed mergers are not just a mention but there is seriousness in merging.

As stated above, it is submitted that unless certain steps to merge have been taken it is difficult to say that a proposed merger amounts to a merger and therefore fall within the ambit of section 12(2)(g).

In as much it is difficult to provide for an exhaustive list of instances which a minority shareholder can be said to have assumed control in terms of section 12(2)(g) it is also difficult to

state before hand instances in which the section cannot apply. Each case should be decided on its merits.

In conclusion, it is submitted that the instances highlighted will however provide assistance in determining whether a minority shareholder can be said to have assumed or will assume control of another firm. And, therefore if it has, a merger has taken place or will take place and as a result the parties need to notify the competition authorities.

The Companies Act⁷⁵ was also looked at in relation to control by minority in merger transactions. Chapter 5, Section 113 of the Companies Act deals with amalgamation or mergers. However, it is noted that in dealing with this issue the Companies Act does not look at the distribution of shareholding in a company. It is submitted that emphasis is rather placed on the liquidity and solvency tests. It is therefore submitted that the Companies Act does not change the conclusion made herein.

⁷⁵ Companies Act No. 71 of 2008