



**THE DETERMINATION OF MERGER IMPLEMENTATION FOR
PURPOSES OF MERGER CONTROL WITHIN THE AMBIT OF
SOUTH AFRICAN COMPETITION LAW**

by

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Submitted in fulfilment of the requirements for the degree

(LLM in Mercantile Law)

In the Faculty of Law,

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Date: 17 November 2015

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ACKNOWLEDGEMENTS

To my Supervisor, Prof. C van Heerden thank you for your understanding, guidance, patience and assistance with my dissertation.

Thank you to Chifwiri Nyirongo and Francis Waswa, for keeping me motivated and supporting me in this journey.

This dissertation is dedicated to my son, Tumish Austin Mashego, with lots of love.

ABSTRACT

The Competition Act 89 of 1998 (Competition Act), contains merger review provisions that establish a mandatory merger filing regime for merger transactions that meet the statutory definition of a merger as well as the prescribed thresholds for notification.¹ The mandatory merger requirements are contained in section 13(1)(b) and section 13A(3), of the Competition Act. These sections prohibit any party from implementing a merger without the approval of the respective competition authority. Section 13 and 13A read with 59(1)(d)(vi) grants the Competition Tribunal (Tribunal), a competition regulator that is established in terms of section 26(1) of the Act, the power to impose an administrative fine on the parties that contravene the provisions of sections 13 and 13A. Section 59(2) reads, “An administrative penalty imposed in terms of subsection (1) may not exceed 10% of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year.”

The prescribed administrative fine is the same as the fine that the Tribunal might impose on companies that are found guilty of engaging in prohibited practices contained in Chapter 2, which relates to, *inter alia*, cartel conduct² or abuse of dominance³ or price discrimination.⁴ By not making a distinction between the fines imposed for anti-competitive conduct under chapter 2, the Competition Act illustrates

¹ The respective authorities are known as the Competition Commission, the Competition Tribunal and the Competition Appeal Court. See section 2 for details of the respective competition Authorities.

² A cartel is defined as an organization created from a formal agreement between a group of companies that can either be producers of a good or service, to regulate supply in an effort to regulate or manipulate prices. Section 4 describes the conduct which the competition authorities might consider to be a cartel.

³ Section 7 defines a dominant firm as a firm that has at least 45% of the market or at least 35% of that market or where it can be shown that the firm has market power. The conduct which is regarded as an abuse of dominants is contained in section 8 of the Competition Act.

⁴ The provisions regarding price discrimination are contained in section 9 of the Competition Act.

how important it is for merging companies to not implement the merger transaction without the approval of the competition authority.

Despite the possibility of sanctions by the Tribunal and the imposition of a maximum fine of 10%, of the companies' turnover of the previous financial year, the Competition Act does not provide a definition or an explanation of what "implementation" means. A definition of the term "implementation" is important for two reasons, firstly it helps the merging companies to avoid conduct that contravenes section 13 and 13A(3) and secondly, it ensures that the competition authorities are able to effectively use merger review to prevent conduct that facilitates or creates anti-competitive markets. The question that this dissertation seeks to answer is, what does implementation means for purpose of merger review?

This dissertation considered the merger review provisions that are applied in the European Union's (EU) legislations and the case law of the European Commission (EU) to find out how the term "implementation" has been defined in the EU. A comparison of the EC merger control regime and the South African merger control regime assisted to identify possible similarities and differences that might assist to find the definition of the tern implementation. This dissertation identified factors, in the considered EU decisions, which are important for merger review in the South African context as these factors assist to understand how the merging companies might avoid contravening the South African Competition Act in the context of a merger.

The factors identified in the EU decisions include, *inter alia*, "merger agreement," "control," "jurisdiction" and "effects" in South Africa. Although these factors are not exhaustive, the competition authorities need to consider all factors together when

determining what implementation means. When applying the above factors to South African merger review it can be concluded that, “implementation” for purpose of merger review entails the enforcement of the terms of a merger agreement or terms of reference of the merger agreement, to the extent that such conduct constitute control either by way of majority shares or by way of influencing the business of the company being acquired. The enforcement of such merger agreement terms must take place in South Africa and do not necessarily need to have any direct effects on competition.

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CHAPTER 1

INTRODUCTION

The provisions regulating competition law in South Africa are contained in the Competition Act 89 of 1998 (Competition Act), in respect thereof the interpretation can be found in the decisions by the respective competition authorities,⁵ which are established by the provisions in the Competition Act. The Competition Act came into operation in 1999,⁶ and its establishment updated the competition regulation in South Africa to meet the international standards⁷ that are implemented by regulators and courts in developed countries such as the United States of America (USA), Canada and European Union (EU).

What is important to note about competition law is that competition provisions have a direct impact on the economic activity and growth, of the respective country. It is thus essential that the competition provisions are structured in a way that they do not hinder trade or create insurmountable barriers to entry⁸ for new entrants in any market. This is achieved by having clear competition law principles that will be enforced by specialised authorities that have defined responsibilities applicable to the enforcement of such provisions.⁹ Since compliance with competition law is mandatory, the competition provisions should establish appropriate sanctions and

⁵ The respective authorities are known as the Competition Commission, the Competition Tribunal and the Competition Appeal Court. See section 2 for details of the respective competition Authorities.

⁶ Some of the provisions of the Competition Act came into effect in 1 September 1999.

⁷ The ICN Merger Working Group: Investigation and Analysis Subgroup ICN Merger Guidelines Workbook Prepared for the Fifth Annual ICN Conference in Cape Town April 2006.

⁸ Barriers to entry consist of high start-up costs or other obstacles that prevent new competitors from easily entering an industry or area of business. Barriers to entry benefit existing companies already operating in an industry because they protect an established company's revenues and profits from being whittled away by new competitors. Source: Investopedia <http://www.investopedia.com/terms/b/barrierstoentry.asp#ixzz3q12nAqKt>.

⁹ Department of Trade and Industry. 1997. Proposed Guidelines for Competition Policy A Framework for Competition, Competitiveness and Development. [Online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/04390_competition_policy_guidelines.pdf [Accessed 2014-08-06].

remedies for instances where the provisions of the competition law are infringed.¹⁰ In order to avoid the unlawful and abusive application of the competition law provisions by the competition authorities, competition law must contain provisions to facilitate effective review mechanisms. This review mechanism will also create a strong and credible competition law regime.¹¹

However, since South Africa is a developing country, its competition regulation needs to do more than regulate competition. The competition law provisions must also seek to rectify anti-competitive¹² conditions such as, monopolistic markets which were created by the laws that existed during the apartheid regime.¹³ In addition, the provisions must establish mechanisms to monitor assess and prohibit conduct that might re-establish market conditions that are conducive to anti-competitive. Merger regulation is one of the tools that the competition regulators use to prevent conduct that might facilitate anti-competitive conduct.

Merger regulation refers to the provisions, within a statute or regulations, that regulate the conduct of companies, which the respective competition authorities consider as a merger or an amalgamation for purpose of the application of the competition law.¹⁴ In the Competition Act, provisions concerning merger regulation are a preventative measures as they ensure that companies do not used mergers to creation platforms that facilitate anti-competitive behaviour such as abuse of

¹⁰ Whish, Chapter 20 par 2.

¹¹ Ibid.

¹² Department of Trade and Industry. 1997. Proposed Guidelines for Competition Policy A Framework for Competition, Competitiveness and Development. [Online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/04390_competition_policy_guidelines.pdf [Accessed 2014-08-06].

¹³ International Competition Network. 2006. ICN Merger Working Group: Investigation and Analysis Subgroup. [Online] Available from; <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>.

¹⁴ Whish, Chapter 20 par 2.

dominance and coordinated conduct.¹⁵ Further, the preventative measure of merger regulation eases the burden on the competition authorities, as prosecuting behavioural conduct is more costly given that the damage has already been done.¹⁶

The preventative element of merger review is entrenched in section 13(1)(b) and section 13A(3) of the Competition Act, which prohibits any party from implementing different categories of mergers¹⁷ without the respective competition authority's approvals. The inclusion of "must notify" in section 13A (1) creates a mandatory notification requirements on any party to an intermediate merger¹⁸ or a large merger.¹⁹ However, sections 13A does not only create a mandatory notification requirement of mergers but it also imposes a restriction on the implementation of such mergers as appears from the wording of section 13A(3).

The words "may not implement" that are contained in section 13A(3) might suggest that the respective parties have a discretion to decide whether to implement the merger. However, the prohibition in section 13A(3) has to be read with 59(1)(d)(vi) which grants the Competition Tribunal (Tribunal) authority to sanction the parties that implement a merger without the respective authority's approval, by imposing an administrative fine. The Tribunal is a competition regulator that is established in terms of section 26 (1) that has, *inter alia*, judicial and administrative functions under the Competition Act. Section 59(1)(d)(vi), of the Competition Act, reads as follows:

'(1) The Competition Tribunal may impose an administrative penalty is only-
(d) if a party to a merger have –

¹⁵Chapter 2 of the Competition Act.

¹⁶ Lewis, D. 2001. "Why merger regulation? – A response to our critics". [Online] Available from: www.lexusnexus.co.za [Downloaded 2013-09-05].

¹⁷ Section 11 of the Competition Act.

¹⁸ Section 11(5)(b) of the Competition Act.

¹⁹ Section 11 "(5) (c) of the Competition Act.

(vi) proceeded to implement the merger without the approval of the Competition Commission or Competition Tribunal as required by the Act

Section 59 (2) of the Competition Act curbs the administrative penalty, referred to above, to a maximum of 10% of the companies' annual turnover and its exports during the companies' preceding financial year. A similar maximum penalty can be imposed by the Tribunal for contraventions of provisions under chapter 2 of the Competition Act. The fact that the Tribunal may impose a maximum fine on firms which implement mergers prior to the relevant approvals illustrates the importance of compliance with provisions contained in section 13 and 13A of the Competition Act. These provisions also show that the merging companies do not have a choice but to avoid conduct that might be perceived as implementation without the respective competition authority's approval.

Despite the possibility of sanctions by the Tribunal and imposition of a maximum fine of 10%, of the companies' turnover of the previous financial year, the Competition Act does not provide a definition or an explanation as to what is meant by "implementation." A definition of the term "implementation" is important for two reasons, firstly it helps the merging companies to avoid conduct that contravenes section 13 and 13A(3) and secondly, it ensures that the competition authorities are able to effectively use merger review to prevent conduct that facilitates or creates anti-competitive markets. The question that this dissertation seeks to answer is, what does implementation means for purpose of merger review?

CHAPTER 2

THE HISTORICAL BACKGROUND OF THE COMPETITION ACT

2.1. Historical background of the Competition Act

When the current Government came into power in 1994, it identified a need to curb anti-competitive conduct of dominant firms as well as to eliminate coordinated conduct of companies that operated in markets which were identified as concentrated and monopolistic.²⁰ In this respect, the government resolved to review the competition policies in South Africa.²¹ Previously, the Regulation of Monopolistic Conditions Act 24 of 1955 and the Maintenance and Promotion of Competition Act 96 of 1979 were some of the legislations that were established by the legislature as a means of correcting market conditions that facilitated monopolistic conduct.²² However, the Government recognised the imperfections of these former Acts, as they did not address the uneven competitive landscape of South Africa and did not facilitate trade between South Africa and other Southern African neighbouring countries.²³

Since competition regulation is directly linked to the economic activities within South Africa, the Government tasked the Department of Trade and Industry (DTI) to construct guidelines²⁴ and framework which would inform the enactment of the new

²⁰ Burgeat, E. 2003. "Competition Law and Policy in South Africa, An OECD Peer Review 2003". [Online] Available from: www.oecd.org/DAF/Competition [Downloaded 2014-05-15].

²¹ Department of Trade and Industry. 1997. *Proposed Guidelines for Competition Policy A Framework for Competition, Competitiveness and Development*. [Online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/04390_competition_policy_guidelines.pdf [Accessed 2014-08-06].

²² International Competition Network. 2006. *ICN Merger Working Group: Investigation and Analysis Subgroup*. [Online] Available from; <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>

²³ Competition Commission of South Africa. Available from <http://www.compcom.co.za/about-us/> [Accessed 2014-05-05].

²⁴ Department of Trade and Industry. 1997. *Proposed Guidelines for Competition Policy A Framework for Competition, Competitiveness and Development*. [Online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/04390_competition_policy_guidelines.pdf [Accessed 2014-08-06].

competition legislation.²⁵ The DTI, *inter alia*, identified the following policies that should underline the new competition legislation:

- a) A clear reflection of how much foreign investment competition policy attracts, since international firms seek to take advantage of local strengths and market opportunities.
- b) The building of a more balanced Southern African regional economy through competition policies that enhance the ability of South Africa to incorporate other Southern African countries' output into South Africa.

These principles informed the Government's decision to enact the Competition Act, which was considered as a means to bring about changes to the overall regulation of competition in South Africa. The Competition Act prescribes provisions that govern conduct of companies that trade in South Africa.²⁶ The Competition Act created three statutory bodies with exclusive powers of enforcing the Competition Act. In the introductory chapter it was indicated that effective enforcement of competition provisions could be eased by placing the enforcement rights on institutions that specialises in competition. This feature is recognised in the preamble of the Competition Act that recognises the need to "establish independent institutions to monitor economic competition."

2.2. The establishment of Competition Authorities

The provisions dealing with the establishment and functions of the competition authorities are contained in Sections 19 to Section 36 of the Competition Act. Section 19 of the Competition Act, establishes the Competition Commission (Commission) with *inter alia*, investigative functions,²⁷ the power to grant exemption

²⁵ Section 13 (5)(b) and section 14 (1)(b) of the Competition Act.

²⁶ Burgeat, E. 2003. "Competition Law and Policy in South Africa, An OECD Peer Review 2003". [Online] Available from: www.oecd.org/DAF/Competition [Downloaded 2014-05-15].

²⁷ Section 21 (1) (c) of the Competition Act.

for certain prohibited practices,²⁸ the power to prosecute companies that engage in prohibited conduct,²⁹ the power to assess merger activities as well as adjudicative functions³⁰ on specific merger provisions contained in the Competition Act. Section 26(1) establishes the Tribunal (Tribunal) whereas section 36(1) establishes the Competition Appeal Court (CAC). The Tribunal and the CAC are granted *inter alia*, judicial and administrative functions, under the Competition Act.³¹ The decisions of the Competition Authorities, as published on their respective websites³² demonstrate that the respective Competition Authorities are exercising their powers, in terms of the Competition Act, by enforcing the provisions contained in Chapter 2 and Chapter 3.³³

An example of the Commission's innovative enforcement of the Competition Act occurred in 2011, when it devised and published an invitation to companies in the construction sector, to come forth and "confess" their anti-competitive conduct, as part of its fast-track settlement initiative.³⁴ This initiative illustrates how the Commission enforces the provisions of the Competition Act towards the fulfilment of the DTI recommendations of competition enforcement provisions for the prosecution of conduct that affect the South Africa's wellbeing.³⁵ In the fast-track settlement policy, the Commission invited companies who have been party to collusive practices, prohibited under Section 4 of the Competition Act, in bidding for projects in

²⁸ Section 5 of the Competition Act.

²⁹ Section 21 (1) (c) of the Competition Act.

³⁰ See sections 21 (1) (e) of the Competition Act.

³¹ See section 27 (1) and section 38 (1) of the Competition Act. Hereinafter reference to Competition Authorities incorporates the Commission, Tribunal and CAC, unless indicated otherwise.

³² See <http://www.compcom.co.za/merger-and-acquisition-activity-update/> and <http://www.comptrib.co.za/search/SphinxSearchForm?Search=EU>.

³³ Explained fully under paragraph 2.3.1.

³⁴ Competition Commission of South Africa website <http://www.compcom.co.za/cartels-3/>.

³⁵ Bugeat, E. 2003. "Competition Law and Policy in South Africa, An OECD Peer Review 2003". [Online] Available from: www.oecd.org/DAF/Competition [Downloaded 2014-05-15].

the public and private sectors to apply for settlement with complete and truthful disclosure of information regarding collusion.³⁶ This initiative resulted in the conclusion of a number of settlements in a four year period.³⁷

2.3. Conduct regulated under the Competition Act

In order to implement the goals identified in the guidelines of the DTI and to ensure that the competition provisions do not hinder free trade,³⁸ the application of the Competition Act is restricted in section 3(1) of the Competition Act. Section 3(1) states that, the Competition Act applies to “all economic activity within, or having an effect within the Republic.”³⁹ It is important to note that the Competition Act also identifies economic conduct that does not fall within its application in section 3(1)(a) to (e).

The Competition Act also prescribes the conduct that falls within its application in chapter 2 and chapter 3. The conduct, prescribed in the Competition Act, can be classified into two categories, namely (a) prohibited conduct, which is behaviour that is not allowed in terms of the Competition Act and (b) preventative conduct, which is conducts that needs to be assessed by the Competition Authorities to identify its possible effect on competition. Most competition regimes provide for provisions that prohibit restrictive agreements and unilateral abusive behaviour of dominant companies. In South Africa, the same provisions are found in Chapter 2 and Chapter 3, of the Competition Act, that contain provisions that seeks to “remove or reduce the distorting effects of excessive economic concentration and corporate

³⁶ Makhaya, T (Deputy Commissioner, Commission) 2013), Construction firms settle collusive tendering cases with R1.5 billion in penalties, media release, Dti Campus, Pretoria, 24 June, viewed 06-08-2014.,

³⁷ Ibid.

³⁸ Whish Chapter 20 page 799.

³⁹ Refer to the judgement in the American Natural Soda Ash Corporation , CHC Global (Pty) Ltd vs the Commission, Batswana Ash (Pty) Ltd, Chemserve Technical Products and the Minister of the DTI, 12/CACA/Dec01. Further details are contained in Chapter 4 of this dissertation.

conglomeration, collusive practices, and the abuse of economic power by firms in a dominant position”⁴⁰

2.3.1. Restrictive practices

The conduct contained in Chapter 2 comprise of horizontal,⁴¹ vertical⁴² as well as unilateral conduct⁴³ of companies in the market. Anti-competitive conduct commonly exists in markets characterised by few firms or in markets where there is only a single dominant company.⁴⁴ Chapter 2 is divided into three parts; the first part contains provisions that prohibit conduct between companies in a horizontal relationship as well as companies in vertical relationship, that have the effect of substantially preventing or lessening competition. The second part contains provisions that prohibit a dominant firm from abusing its dominance⁴⁵ and from discriminating based on price.⁴⁶ The third part contains provisions that grant the Commission powers to grant exemptions. The sections that are relevant for this dissertation are those contained in section 4, section 5, section 8 and section 9 read with the definition sections⁴⁷ and sections that relates to the application of the Competition Act.⁴⁸

⁴⁰ Department of Trade and Industry. 1997. *Proposed Guidelines for Competition Policy A Framework for Competition, Competitiveness and Development*. [Online] Available from: http://us-cdn.creamermedia.co.za/assets/articles/attachments/04390_competition_policy_guidelines.pdf [Accessed 2014-08-06].

⁴¹ See section 4 of the Competition Act.

⁴² See section 5 of the Competition Act

⁴³ See section 6 of the Competition Act.

⁴⁴ International Competition Network. 2006. *ICN Merger Working Group: Investigation and Analysis Subgroup*. [Online] Available from; <http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>

⁴⁵ Section 6, section 8 and of the Competition Act.

⁴⁶ Section 9 of the Competition Act.

⁴⁷ Section 7 of the Competition Act.

⁴⁸ Section 3 of the Competition Act.

The provisions of section 4 and section 5 only apply to companies in a horizontal relationship or in a vertical relationship. Section 1(xiii) defines horizontal relationships as a relationship between competitors whereas section 1(xxxiii)(ii) defines vertical relationships as a relationship between a company and its suppliers and or customers or both. Sections 4 and 5 prevent companies from coordinating their conduct either through a cartel⁴⁹ or through conduct that has the effect of lessening and preventing competition. The conduct regulated under these sections exists in concentrated markets as well as in markets where the merging parties enjoy a dominant position.⁵⁰ However what can be noted with the provisions under chapter 2 is that the provisions regulate conduct that happened or the conduct that the parties are engaged in at the time of prosecution.

The aim of competition regulation is to prosecute companies that engage in conduct that hinder competition as well as to prevent companies from creating conditions that might facilitate conduct prohibited under Chapter 2 of the Competition Act. Whilst the main goal of companies is to maximise profits and the existence of competitors in the markets hinders this profit maximising efforts.⁵¹ Therefore, companies tend to find ways of ensuring growth sustenance either through generic growth or through mergers.⁵² Therefore, the Competition Act also contains provisions concerning merger regulations.

⁴⁹ A cartel is a collection of businesses or countries that act together as a single producer and agree to influence prices for certain goods and services by controlling production and marketing.

⁵⁰ Whish Chapter 20 page 799.

⁵¹ Lewis, D. 2001. *"Why merger regulation? – A response to our critics"*. [Online] Available from: www.lexusnexus.co.za [Downloaded 2013-09-05].

⁵² Lewis, D. 2001. *"Why merger regulation? – A response to our critics"*. [Online] Available from: www.lexusnexus.co.za [Downloaded 2013-09-05].

2.3.2. Merger regulations

The need for competition between South African companies and international companies is significant to ensure growth of the South African economy.⁵³ Mergers may facilitate such competition and growth. However, not all mergers have positive effects, as is evidenced by the number of mergers prohibited or approved with conditions by both the Tribunal and the Commission. The Competition Authorities are able to prevent situations which might lead to anti-competitive effects, through merger regulation. Section 12A and section 13(3) of the Competition Act, requires Competition Authorities to determine whether a merger is 'likely to substantially prevent or lessen competition'. Merger regulation requires a forward looking approach which is aimed at preventing anti-competitive conduct as opposed to the regulation of prohibited practices which prevent and prosecute existing and conduct that existed between competitors or companies in a vertical relationship.⁵⁴

As indicated in the first chapter, the preventative measures of merger review as contained in the Competition Act are entrenched in section 13 and section 13A of the Competition Act which prescribes the aspects related to the notification and implementation of mergers in South Africa. The Competition Act limits its application by prescribing the pre-notification requirements. A merger will fall within the application of the Competition Act if it satisfies the requirements contained in sections 11 and section 12. The Competition Act requires that there should be a change in control of the company or assets acquired and that the merger should meet the prescribed thresholds.⁵⁵

⁵³ Ibid.

⁵⁴ Jones and Sufrin Chapter 2 page 95 par. 4.

⁵⁵ Section 11 of the Competition Act.

The first step requires that the transaction must be a merger as defined in section 12(1). The second step requires that the transaction must result in a change in control over the firm being acquired. Section 12(2)(a) to (g), lists situations that constitute control for purpose of merger control. One or more of these situations must apply for a change of control to exist for purpose of the Competition Act.⁵⁶ After determining that a transaction is a merger as defined in terms of section 12(1), the respective companies must take a further step, contained in section 11, by determining the category of the merger. Section 11 classifies mergers into three categories, namely: small mergers, intermediate mergers and larger mergers.

The different categories of mergers are based on the thresholds set by the Trade and Industry Minister and published in the Gazette.⁵⁷ The thresholds are not related to the value of the transaction or the purchase prices paid for the acquisition but are determined by using the assets and revenue of the respective companies. The Commission has investigative powers over intermediate mergers.⁵⁸ Small mergers fall within the Commission's jurisdiction if the merging companies voluntarily notify such a merger or the Commission instructs the respective companies to file the merger in terms of section 13. The Commission can either approve, with or without conditions, or prohibit intermediate and small mergers.⁵⁹

The Tribunal has adjudicative powers over large mergers⁶⁰ provided all the merger conditions prescribed under section 12, of the Competition Act are complied with.⁶¹

⁵⁶ Refer to the decisions in the Ethos Private Equity Fund IV and the Tsebo Outsourcing Group (Pty) Ltd , 30/LM/Jun/03 discussed in detail in Chapter 4 of this dissertation.

⁵⁷ The Minister of Trade and Industry published a notice in the Government Gazette on 6 March 2009 raising the merger thresholds and the filing fee for their notification which was effective from 01 April 2009. Lower threshold R 560million R 80million, higher threshold R 6.6billion R 190million.

⁵⁸ Ibid.

⁵⁹ Section 14 of the Competition Act.

⁶⁰ Section 11 (5) (c) of the Competition Act.

⁶¹ Ibid.

The Tribunal's jurisdiction was also entrenched in the High court's decision in a case between *Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd and others (Seagram case)*⁶² wherein the CAC held that section 3(1) gives the Tribunal exclusive rights to adjudicate over cases that are brought under chapter 2 and chapter 3 of the Competition Act.

For purpose of this dissertation, it would be assumed that the mergers considered meet the requirements contained in section 11 and section 12 of the Competition Act. In the instance of small mergers, it will be assumed that the merging companies meet the requirements of section 13. If a company has identified that the merger falls within the application of the Competition Act, it would have to submit documents in the prescribed forms to the Commission for investigation and or adjudication. Failure to notify the merger carries sanctions prescribed in section 59, therefore, the merging companies need to ensure that the steps taken during the negotiation process do not contravene the Competition Act. As indicated in the introductory chapter, the term "implementation" is not defined in the Competition Act.

This dissertation will determine the meaning of the term "implementation" by means of the following steps:

- a) A consideration of the European Unions' (EU) legislations and the European Commission's (EU) decisions on how to interpret the term implementation
- b) A comparison of the EC decisions and Competition Authorities and see what the principles found in the EU competition regime might be applied in South Africa to determine what implementation means for merger review
- c) Lastly, the conclusion chapter will consider the recommendations on how to apply the EC decisions in South Africa competition regime

⁶² [2001] 1 All SA 484 (C).

The next chapter will identify the merger filing requirements under the Competition Act and the Rules issued by the Commission and also the challenges that the Competition Authorities face in respect to identifying what implementations entails.

CHAPTER 3

THE COMPETITION LAW PRINCIPLES APPLIED IN THE EUROPEAN UNION COMPETITION LAW

3.1. Introduction

The preamble of the Competition Act contains provisions that recognise that the Competition Act must give effect to the international law obligations of the South Africa. In addition, section 233 of the Constitution of the Republic of South Africa (Constitution),⁶³ states that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law. The above provisions show that international law play a role in the interpretation of the legislative provisions of the Competition Act. Decisions of foreign competition authorities may assist to interpret what the term “implementation” means for purpose of merger review under the South African competition law regime. The Competition Act has only been in operation for only 15 years and has influences from foreign jurisdictions therefore it is fitting to conduct a comparative assessment of certain selected countries which have more than 15 years of competition enforcement.

For purpose of this dissertation the relevant principles applied by the European Union (EU) will be considered. The reason for considering the EU competition regime is that the regime applies a centralised competition enforcement system that provides a ‘one-stop shop’ analysis for mergers and the respective competition authorities have provided guidance on how to interpret the term “implementation” for purpose of merger review. The competition law provisions of the EU grants the European Union Commission (EU Commission) exclusive jurisdiction to enforce

⁶³ The Constitution of the Republic of South Africa 1996.

provisions on mergers that may have effects on more than one member state.⁶⁴ The decisions of the EU Commission has influenced the decisions of the Tribunal as seen in the case of *Sappi Fine Papers (Pty) Limited v the Competition Commission (Sappi case)*,⁶⁵ wherein the Tribunal used the decisions of the EU to determine how the theory of tying and bundling can be applied in South Africa.⁶⁶

The important questions to answer after considering the statutory framework and precedent set under the EC are (i) how the relevant regulations and statutes have defined implementation for purpose of merger review and (ii) how the courts have interpreted the provisions of the relevant regulations and statutes. Answers to these questions will help to identify and highlight factors that need to be considered when interpreting what implementation entails for merger review in South Africa.

A brief summary of the background and development of the EU's competition principles will assist to give context and background to how the legal principles have been applied to interpret what implementation means for merger review.

3.2. Applicable EU legislation

The EU has a competition law regime that dates back to the 1950s and as such the EU competition authorities have applied their competition provisions for a much longer time than the Competition Authorities in South Africa. It is thus submitted that the respective decisions by the EU competition authorities and statutory precedents can provide guidance as to the interpretation of the concept of "implementation" for purpose of merger review.

⁶⁴ Regulation 1/300.

⁶⁵ 62/CR/Nov01.

⁶⁶ Page 15 paragraph 14.

The developments of the competition provisions under the EU have resulted in the enactment of a number of regulations and statutes that contain provisions for merger review. These regulations include pieces of legislations which will be considered in detail in this chapter:

- a) The Treaty (Treaty of Rome of 1957)
- b) The Regulations (European Community Council Regulation No. 4064)
- c) The Council Regulation No. 139/2004 of January 2004 (Merger Regulation)
- d) The Commission Regulation No 802/2004 of April 2004 (Implementation Regulation)

The discussion will include an overview of the background and economic conditions that influenced the development of the various EU competition law regulations and its application.⁶⁷ This dissertation will also take into account the decisions of the respective competition authorities to understand how these authorities interpreted legislation.

3.4. EU case law

The case of *A. Ahlström Osakeyhtiö v. Commission (Wood Pulp Case)*⁶⁸ was identified as the first case under the European Communities (EC) wherein the competition authorities considered the meaning of the term “implementation” for competition law enforcement.⁶⁹ The decision of the European Court of Justice (ECJ) in the *Wood Pulp case* will be considered and specifically, the factors identified by the ECJ will be discussed. In the *Wood Pulp case*, the ECJ considered the applicability of the “economic effects” doctrine in competition review enforcement.⁷⁰

⁶⁷ Jones and Sufrin Chapter 2 page 118.

⁶⁸ [1993] ECR I1307.

⁶⁹ Russo, Schinkel, Gunster and Garre Chapter 2 page 28.

⁷⁰ Vedder c. 1987 A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law [Online] Available from: <http://www.ejil.org/pdfs/1/1/1142.pdf> [Downloaded 2014-12-16]. The economic effect doctrine was also considered by the Tribunal, in South Africa, in the case of American Natural Soda Ash

The provisions of the *Wood Pulp* case were also applied in later decisions of the EU Commission in the *Electrabel/Companies Nationale du Rhône* (Electrabel Case)⁷¹ and the *Samsung Electronics Co Ltd and the AST Research, Inc.* (*Samsung Case*).⁷² In these decisions the EU Commission demonstrated how the principles identified by the ECJ in the *Wood Pulp* case might be applied, by the competition authorities in merger review to identify instances where the merging parties have implemented a merger in contravention of the applicable competition law.

3.5. Historical development of the EU competition law

The EC provisions that were designed to regulate commercial transactions (including competition) between member states were first created in the 1950 when the Treaty of Rome 1957 (Treaty of Rome) formed the three European Communities.⁷³ These were the European Coal and Steel Community (ECSC), the European Atomic Energy Community a (Euratom) and the European Economic Community (ECC). The Treaty of Rome was amended⁷⁴ several times to adapt to the changes and development of economic activities in and between the various EC member states. However, the first regulatory provision that specifically dealt with mergers and acquisitions was established by the EC in the European Community Council Regulations No. 4064 (Regulations 4064).⁷⁵ This regulation did not amend the Treaty of Rome, but merely added to the provisions that were contained in the Treaty of Rome.⁷⁶

Corporation, CHC Global (Pty) Ltd vs Commission, Botswana Ash (Pty) Limited, ChemServe Technical Products and The Minister Of DTI 12/CAC/DEC01.

⁷¹ COMP/M.4994.

⁷² [1999] OJ L225/12.

⁷³ Jones and Sufrin Chapter 2 par. 4.

⁷⁴ *ibid.*

⁷⁵ Elliott, Acker and Van Bael & Bellis page 199 par. 1.

⁷⁶ Jones and Sufrin Chapter 2 par. 4.

Other developments to competition regulations under the EC Competition regime occurred during the establishment of the EU⁷⁷ through the Treaty on European Union (TEU)⁷⁸ that came into force in 1993 as well as the Treaty on the Functioning of the European Union (TFEU)⁷⁹ (Hereinafter, the TEU and the TFEU will collectively be referred to as the EU Treaties). The TEU is the official treaty that was signed by the various member states of the EC⁸⁰ which repeals the Treaty of Rome by establishing the European Union that comprises of the entire member states that are signatories to the treaty. The TFEU is a treaty that contains the functioning provisions and the member status of the various member states.⁸¹ The EU Treaties replaced and succeeded the European Communities and from its inception the EC Member states were renamed the EU Member States.⁸²

3.5.1. The EU Competition Authorities

The EU Treaties created the foundation of the competition provisions that are currently enforced by the EU Commission and the member states. In addition, the EU Treaties established the various competition authorities as well as prescribed the jurisdictions and powers of each authority. These enforcement authorities are, (i) the Council (ii) the EU Commission (iii) the Advisory Committee on Restrictive Practices

⁷⁷ The EU comprises of three pillars (i) the existing three Communities, (ii) the cooperation in the Common Foreign and Security Policy, and (iii) cooperation in Justice and Home Affairs.

⁷⁸ Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁷⁹ Ibid.

⁸⁰ The member states comprises of Her Majesty The King Of The Belgians, Her Majesty The Queen Of Denmark, The President Of The Federal Republic Of Germany, The President Of Ireland, The President Of The Hellenic Republic, His Majesty The King Of Spain, The President Of The French Republic, The President Of The Italian Republic, His Royal Highness The Grand Duke Of Luxembourg, Her Majesty The Queen Of The Netherlands, The President Of The Portuguese Republic, Her Majesty The Queen Of The United Kingdom Of Great Britain And Northern Ireland The Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Republic of Poland, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden have since become members of the European Union.

⁸¹ Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁸² Ibid.

and Dominant Positions (ACRPDP) and the Advisory Commission on Concentrations (ACC).⁸³

The Council is the ultimate legislative body with its functions including the adoption of the various laws that govern competition law regulation.⁸⁴ However, the bulk of competition enforcement functions are conferred to the EU Commission through Regulation 17 and Regulation 1/3003. Article 17 of the TEU contains the provision regarding the establishment of the EU Commission. The Commission is the executive branch of the EU, and is entrusted with the tasks of (i) ensuring that the provisions of the Treaty and the regulations, directives and decisions of the Community institutions are applied and (ii) submitting proposals to the Council and to the European Parliament for legislative action.⁸⁵ Article 85 of the TEU and TFEU, provides that the EU Commission shall ensure the application of Articles 81⁸⁶ and 82⁸⁷ of the Treaty of Rome, and shall investigate any suspected infringements of the principles laid down therein and bring any such infringements to an end. The Commission operates in accordance with its own Rules of Procedure, the most recent of which were adopted in November 2000.⁸⁸

In competition cases, the Court of First Instance exercises jurisdiction at first instance in actions brought against the EU Commission by natural or legal persons pursuant to Article 230 EC (actions for annulment), Article 232 EC (failure to act) and Article 229 EC (review of penalties imposed by the Commission).⁸⁹ The EU

⁸³ Jones and Sufrin Chapter 2 page 95 par. 4.

⁸⁴ Ibid.

⁸⁵ Jones and Sufrin Chapter 2 page 95 par. 4.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Jones and Sufrin Chapter 2 page 94 par. 3.

⁸⁹ Ibid.

Commission takes its decision by considering the advice from the ACRPDP and the ACC.⁹⁰

3.5.2. The EU Regulations

The EU competition enforcement review acknowledged the need to have a single entity that will enforce the various provisions of competition law. This is evident from the existence of sole jurisdiction conferred to the EU Commission where a merger has a ‘community dimensions.’⁹¹ The community dimensions exist when a merger has an effect⁹² in a number of jurisdictions (member states) or which may require multiple notifications in a number of states. This concept of “community dimension” provides a *one-stop-shop* advantage, which is widely regarded as an essential part of keeping the regulatory costs associated with cross-border transactions at a reasonable level.⁹³ In respect to merger review, the Merger Regulation states,

“The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentration should as a general rule, be reviewed exclusively at Community level, in application of the “one-stop shop” system and in compliance with the principle of subsidiarity. Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member State.”

In addition, the EU Commission's exclusive jurisdiction to consider such mergers is an important element in providing a level playing field’ for the concentrations that were bound to result from the completion of the internal market.⁹⁴ This principle is

⁹⁰ idid.

⁹¹ Commission of the European Communities. 2009 staff working paper accompanying the communication from the commission to the council: *Report on the functioning of Regulation No 139/2004*.

⁹² Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁹³ Commission of the European Communities. 2009 staff working paper accompanying the communication from the commission to the council: *Report on the functioning of Regulation No 139/2004*.

⁹⁴ Jones and Sufrin Chapter 2 page 95 par.5.

widely accepted as the most efficient way of ensuring that all mergers with a significant cross-border impact would be subject to a uniform set of rules.⁹⁵

The division of jurisdiction between the EU Commission and the member states necessitated that the legislature set out provisions that would distinguish and define the roles and jurisdictional boundaries between the various competition authorities.⁹⁶

The provisions containing pre-requirement for merger notification between the EU Commission and the member states also provides clear boundaries between the various authorities to prevent any authorities from acting *ultra vires*. As indicated, the focus of this study will be on the competencies of the EU Commission to assess merger transactions. It is worth noting the domestic regulations governing competition control may be different in each Member State as each state has the competency to enact individual competition laws applicable to that member state. In the instance where the jurisdiction falls within the member states the EU Commission's role is to ensure that the member states' national laws comply with the principles set out in the EU Treaties.⁹⁷

3.5.3. The competition enforcement by the EU Commission

The provisions of the Merger Regulation confer exclusive authority on the EU Commission over mergers that have effects in more than one member state. The question of which authority has jurisdiction arises at a very early point in the notification procedure as it identifies the aspects that relate to compliance with merger review.⁹⁸ Therefore, the respective legal representatives of the companies that wish to merge (or acquisitions) need to familiarise themselves with all applicable

⁹⁵ Ibid.

⁹⁶ Elliott, Acker and Van Bael & Bellis page 199 par. 1.

⁹⁷ See the provisions in Article 1(4) of the EC Merger Regulation.

⁹⁸ Elliott, Acker and Van Bael & Bellis page 199 par. 1.

laws including the provisions in the competition legislation.⁹⁹ The EU Treaties have a number of provisions on how the various member states had to facilitate competition to ensure that companies compete fairly by not engaging in anti-competitive conduct.¹⁰⁰ However, the EU Treaties do not have direct merger regulation and provisions as such the notifications well as regulatory conduct related to mergers can be found in the Merger Regulations.

The provisions relating to the merger notification requirements under the EU Competition law are contained in the Merger Regulations as complemented by the Implementation Regulations. The EU follows a mandatory pre-notification regime which places an obligation on merging parties to notify their transaction prior to its implementation.¹⁰¹ However, as with a number of competition regimes in various jurisdictions, certain requirements have to be met before such companies can notify to the relevant competition authorities. Clear provision in legislations assist both the affected parties and the enforcing authority to apply and comply with such regulations.¹⁰² Further, the pre-notification requirements, contained in the Merger Regulations, assist the respective regulators to identify the respective authority that has jurisdiction to assess the merger transaction.¹⁰³

As indicated above, the EU competition regime follows the mandatory merger notification requirement as set out in the Merger Regulations. This means that a party to a merger may not implement such transaction (provided it meets the threshold requirement) without the approval of the relevant authority. The Merger Regulations sets out two aspects that establish the respective authority's jurisdiction.

⁹⁹ Regulation 1/300.

¹⁰⁰ Jones and Sufrin Chapter 2 page 95 par.5.

¹⁰¹ Elliott, Acker and Van Bael & Bellis page 204 par. 1.

¹⁰² Ibid.

¹⁰³ Ibid.

Firstly, the operation to be examined must bring about a structural change (i.e. the said transaction must be a merger or acquisition wherein there is a change in control (concentration)) and secondly, this change must have such characteristics that it should be handled by the Union (Union Dimension).¹⁰⁴ The Union Dimension and the concentration are defined in the Merger Regulations.

The “union dimension” refers to the thresholds that must be determined based on the merging parties’ turnovers. Therefore the merging parties need to calculate their respective thresholds by using the formula contained in Article 1(1) to (3) of the Merger Regulation namely:

- “4. Concentration has a dimension where;
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5, 000 million,
 - (b) the aggregate [Union]-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate [Union]-wide turnover within one and the same Member State
3. A concentration that does not meet the thresholds laid down in paragraph 2 has a [Union] dimension where:
- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
 - (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
 - (c) in each of the three Member States included for the purpose of (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million”

At first glance the thresholds may be mistaken to be similar to that of the South African Competition Act i.e. threshold calculations that determine the size of the

¹⁰⁴ Whish, Chapter 20 par 2.

transaction as one of the aspects that determines the jurisdiction of the respective competition authority. However there are differences, as the thresholds under the South African Competition Act the thresholds are calculated based on the turnover and asset values generated within South Africa whereas the thresholds under the EU Merger Regulation calculated based on the worldwide turnover of the merging parties reflecting the general economic and financial power of the merging parties.¹⁰⁵ The thresholds still have similar effects in that they serve as a measure of prescribing the merger cases to be determined by the courts.

Article 4 requires that merger transactions that meet both thresholds need to be notified to the EU Commission (pre-merger notification). However, transactions that do not meet the mandatory notification requirement do not escape the notification requirement as such transactions may meet the thresholds of the respective Member States where the merging companies operate.¹⁰⁶ This means that although the EU Commission may not have jurisdiction to assess the respective merger, such merger might still be assessed at the Member State level under the merger laws applicable to such state. The Merger Regulations and Implementation Regulations¹⁰⁷ provide exceptions in terms of certain transactions that do not meet the thresholds may be notified to the European Commission.¹⁰⁸ This means that the mandatory notification to the EU Commission takes precedents over jurisdiction by member states.

¹⁰⁵ Commission of the European Communities. 2009 staff working paper accompanying the communication from the commission to the council: Report on the functioning of Regulation No 139/2004.

¹⁰⁶ Whish, Chapter 2 par. 1.

¹⁰⁷ The Commission Regulation No 802/2004 of April 2004.

¹⁰⁸ Commission of the European Communities. 2009 staff working paper accompanying the communication from the commission to the council: Report on the functioning of Regulation No 139/2004.

According to the Implementation Regulations, the parties to a merger may incur fines for failure to notify the transaction.¹⁰⁹ In addition, the Merger Regulations provides that the EU Commission may impose a fine that does not exceed 10% of the merging parties' aggregate worldwide turnover if, whether or negligently, they fail to notify the merger.¹¹⁰ Therefore, the parties may not implement their transaction without the required approval by the EU Commission. The consequences of implementing a merger transaction prior to obtaining the required approval from the EU Commission indicates the importance of understanding and knowing the meaning of "implementation" for purposes of merger review under the EU competition regime. Although the regulations referred to above do not contain a definition of the term implementation, the EU Case law does provide some guidance in this matter.

3.6. The EU case law

The consideration of the court's decision in the *Wood Pulp case* will bring in context the reasoning in subsequent court decisions. The decisions by the EC Commission after the establishment of the Merger Regulations and the Implementation Agreement are also considered to determine how the EU Commission interprets implementation for merger reviews. The Court's decision in the merger between *Samsung Case* as well as the *Electrabel Case* will be considered in this respect.

3.6.1. The Wood Pulp case

The *Wood Pulp case* is one of the first cases wherein the jurisdictions of the courts under the initial competition provisions contained in the Treaty of Rome were debated in the ECJ. As indicated above, the Treaty of Rome did not have express

¹⁰⁹ Article 14(2) of the Merger Regulation.

¹¹⁰ Article 14(2) of the Merger Regulation.

provisions governing merger regulation, however, the *Wood Pulp case* is still relevant because it established the factors that must be considered by the EU Commission when determining what “implementation” entails in the enforcement of competition law provisions.

In the *Wood Pulp case* the ECJ had to review the EC Commission’s decision regarding a cartel between 41 producers of bleached wood pulp and trade associations (collectively referred to as the Wood Pulp Producers).¹¹¹ The Wood Pulp Producers were international companies incorporated in the United States of America (USA). These Wood Pulp Producers had concluded a number of Agreements, outside the EC, which affected the supply of wood pulp into the EC Community.¹¹² The ECJ had to review the decision of the EC Commission wherein the EC Commission had imposed fines against the firms.¹¹³ The main ground for the challenge was the jurisdiction of the EC Commission to impose the fines as the Wood Pulp Producers alleged that the conduct was not “implemented” in the EC. The Court of Justice considered a number of factors however, for the current consideration focus will be placed on the court’s decisions regarding the interpretation of “implementation.”¹¹⁴

The ECJ placed emphasis on the fact the EC Commission had jurisdiction over agreements that were ‘implemented’ in the EC.¹¹⁵ The ECJ established three factors the competition regulators must consider to determine the meaning of “implementation” for the provision of the competition legislation to apply. The first

¹¹¹ Wood Pulp, [1982-85].

¹¹² Ibid at 1 1, 547-54.

¹¹³ Vedder c. 1987 A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law [Online] Available from: <http://www.ejil.org/pdfs/1/1/1142.pdf> [Downloaded 2014-12-16].

¹¹⁴ Vedder c. 1987 A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law [Online] Available from: <http://www.ejil.org/pdfs/1/1/1142.pdf> [Downloaded 2014-12-16].

¹¹⁵ Ibid.

factor is that the parties' actions must enforce clauses contained in an agreement concluded by the parties.¹¹⁶ The second factor is that the parties must enforce the clauses of the agreement within the EC.¹¹⁷ The last factor is that the conduct of the parties to enforce the provisions in the agreement must have an effect on competition in the member states.¹¹⁸

3.6.1.1. The interpretation of the judgement of the *Wood Pulp* case

When applying the ECJ's decision in instances of merger regulation, it is observed that it is the merging companies' actions that determine whether or not the parties have implemented a merger. However, the conduct of the merging companies in relation to the terms of the merger agreement that is important. Therefore, a mere conclusion of an agreement by the merging companies does not constitute implementation but the enforcement of the provisions of the agreement and the effects of such enforcement that indicates whether the companies have implemented the merger for purpose of competition enforcement. The subsequent provisions on the Merger Regulations evidence this and the Implementation Regulations wherein the parties are not prohibited from concluding merger agreements prior to obtaining approvals from the respective authority. The enforcement by the courts of the mandatory notification under the Merger Regulations and the Implementation Regulations is discussed below.

3.6.2. The Samsung case

In the *Samsung case*, the EU Commission considered the interpretation of "implementation" under the applicable provisions contained in the Merger Regulations and the Implementation Regulations. The facts of the case were that the

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

transaction was a merger between Samsung and AST Research, Inc. Samsung was acquiring sole control over AST Research, and therefore, there was a change in control resulting from the merger.¹¹⁹ The EC Commission had to consider whether the parties had contravened the provisions of Article 4(1) and Article 7(1) of the Merger Regulation by implementing the merger without the required approval by the EC Commission.¹²⁰ Samsung had failed to notify the merger in terms of Article 4 of Merger Regulation.¹²¹ The EC Commission accepted that the merger was a concentration in terms of Article 4(1)(a) and secondly that the merger had a Union Dimension in terms of Article 4(1)(b) of the Merger Regulations.¹²²

The EC Commission did not define what implementation entails but certain factors may be highlighted from the EC Commission's decision. Firstly that the EC Commission considered the content of the rights conferred to Samsung. Secondly the EC Commission considered whether Samsung had exercised its rights conferred by the shares it has acquired from AST Research.¹²³ Lastly, the effect of the exercise of such rights on the operation over AST Research and ultimately on competition. The EC Commission's decision in the *Samsung case* reflects the Court of Justice's decision in the *Wood Pulp case* by considering the merging parties' actions in the enforcement of the terms of the agreement. In this case, the Samsung exercised its rights by voting and nominating board members on the board of AST Resource.¹²⁴ The actions of Samsung meant that it was involved in the day to day operations of AST Research.¹²⁵ However, it can be noticed that the EC Commission did not

¹¹⁹ Samsung IV/M.920 par. 1.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Samsung IV/M.920 par. 4.

¹²³ Samsung IV/M.920 par. 3.

¹²⁴ Samsung IV/M.920 par. 7 (c).

¹²⁵ Ibid.

require that such conduct have an effect on competition. The effects of such conduct on competition only became relevant when determining the culpability of the parties. Therefore, the EU Commission held that the enforcement of the provisions relating to control in the agreement constituted merger implementation for merger review and contravention of Article 4 and 7 of Merger Regulations and Implementation Regulations.

3.6.3. The Electrabel case

On 10 June 2009 the EC Commission imposed a fine on Electrabel for having implemented a concentration with a community dimension before it was notified to and approved by the Commission in breach of Article 4 and Article 7(1) of Merger Regulation.¹²⁶ On 23 December 2003 Electrabel, a Belgian electricity company that belongs to the French group Suez acquired shares in Compagnie Nationale du Rhône (CNR, France) which was considered to be the second largest electricity company in France.¹²⁷ Electrabel increased its existing share in CNR's capital to 49.95% and its voting rights to 47.92%.¹²⁸ The EC Commission found that Electrabel had exercised its rights in terms of the shareholders' agreement prior to obtaining approvals from its approval.¹²⁹ Therefore, Electrabel contravened provisions of Article 4 and Article 7(1) of Merger Regulation. The EC Commission followed the decision in the *Samsung case* by considering the conduct of Electrabel in enforcing its right conferred by its acquisition shares and states:

“According to its well-established decision-making practice, the Commission considers that, based on the level of attendance at CNR's shareholder meetings in previous years and the fact that CNR's remaining shares are

¹²⁶ COMP/M.4994 par 1.

¹²⁷ COMP/M.4994 par 2.

¹²⁸ COMP/M.4994. par 3. 4

¹²⁹ COMP/M.4994. par 1.

widely dispersed, with 47.92 % of the voting rights Electrabel was certain to have a stable majority at CNR's shareholder meetings. Electrabel therefore acquired de facto sole control over CNR on 23 December 2003.”

3.7. Conclusions of the EU Competition merger regulation

The EU competition regime is similar to the South African competition law regime in that both jurisdictions apply the mandatory merger notification system. The EU merger provisions prescribe the mergers that fall within its application. The EU competition provisions apply to mergers that bring about a concentration and that have a union dimension. In addition the merger must have an effect in a number of jurisdictions (member states). The EU Merger Regulations also prescribes that the merger must meet both thresholds need to be notified to the EU Commission (pre-merger notification).¹³⁰ Failure to comply with the EU Merger Regulations might result in a fine of up to 10% of the merging companies' revenues. In terms of the EU merger provisions, companies that meet all the above mentioned requirements must ensure that they do not implement their merger without the EU Commission's approval. Therefore, it is equally important that the merging companies know what the term “implementation” means in merger review under the EU Commission. The decisions by the ECJ and the ECU Commission in the *Wood Pulp case*, *Electrabel case* and *Samsung case* shed a light to this question asked in section 3.1. of this chapter.

The first question was how the relevant regulations and statutes have defined “implementation” for purpose of merger review. It was established that the Treaty of Rome and the subsequent Merger Regulations and Implementation regulations do not clearly define what implementation means. However, the developments under

¹³⁰ Article 4 of Merger Regulations.

the court decisions provide guidance in the interpretation of what “implementation” means. The *Wood Pulp case*, the *Samsung case* and the *Electrabel case* provided factors to be considered which point to what the courts would consider as conduct that constitute implementation for merger review. The *Wood Pulp case* established that the ‘effects doctrine’¹³¹ applies when interpreting what implementation entails. The following factors assist in this regard:¹³²

- a) The contents of the agreement concluded by the merging parties
- b) Whether the provisions of the agreement confers any control on the acquiring firm over the target firm
- c) The actions taken by the merging parties in the enforcement of the agreement
- d) Where the merging parties enforced the agreement
- e) The effects of the merging parties’ actions on completion

It is important to note that this is not an exhaustive list.¹³³ The Commission may consider other factors in its interpretation of implementation for merger review. Now that there is guidance from the EU competition law the next question to answer is how this may be applied under the South African Competition law regime. Chapter 4 will assess the implication of incorporating the EC Commission and Court of Justice’s application in the Competition Act. The practical implementation will also be considered.

¹³¹ See judgment of the European Court of Justice, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85. A. *Ahlström Osakeyhtiö and others v Commission* [1988] E.C.R. 5193.

¹³² *Ibid.*

¹³³ *Ibid.*

CHAPTER 4

THE COMPARATIVE CONSIDERATION OF THE EU AND SOUTH AFRICA

4.1. Introduction

This chapter considers how the factors established by the decisions of the EU competition authorities, as discussed in the preceding chapter, can be applied in South Africa to determine the meaning of the term “implementation” in merger review. As a starting point, the notification procedures of the EU and South Africa will be considered. A comparison of the procedural requirements of both jurisdictions will assist in identifying the common aspects in respect to the information before these jurisdictions. In determining what implementation entails the EU Commission used the information submitted by the merging companies when the transaction was notified and therefore it is essential to know if there are any similarities in the information considered for purpose of merger review, by the Competition Authorities in South Africa and the EU Commission.

The factors identified by the EU courts contain concepts which are important for merger review in the South African context as these factors assist to understand how the merging companies might avoid contravening the South African Competition Act. The aforementioned concepts which will be discussed include, *inter alia*, “merger agreement,” “control,” “jurisdiction” and “effects” in South Africa. The Competition Act contains definitions of some of the aforementioned concepts but the actual application and interpretation of these concepts are found in the decisions of the Competition Authorities. In this respect, the second part of this chapter will consider the definitions found in case precedents to determine how these concepts are

interpreted in South Africa. The last part of this chapter will illustrate how the decisions of the EU Commission can be applied in South Africa in the context of merger regulation.

4.2. Procedural merger notification requirements

4.2.1. South Africa competition regime

As indicated in the introductory chapter, the mandatory notification requirements are contained in sections 13 and section 13A, of the Competition Act. These sections prevent the merging companies from implementing a merger prior to the determination by the Competition Authorities. The companies that wish to merge and that meet the notification threshold¹³⁴ require an approval or conditional approval from the Competition Authorities prior to implementing the merger. The Commission issues its decision through a certificate,¹³⁵ in the prescribed form, approving the merger with¹³⁶ or without conditions.¹³⁷ Similar provisions are contained in section 14A, for the Tribunal and for the CAC in section 17(3)(a) and (b). The Competition Authorities may also prohibit a merger,¹³⁸ in which case the merging companies would be barred from implementing the transaction. Failure to comply with the notification requirement of the Competition Act might result in the Tribunal imposing

¹³⁴ The threshold are the determined by the Minister of DTI in terms of section 1 (1) of the Competition Act. According to the information published by the Commission, a merger must be notified of all intermediate mergers and acquisitions if the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R80 million. If the combined annual turnover or assets of both the acquiring and transferred / target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred / target firm is at least R190 million, the merger must be notified to the Competition Commission as a large merger. See <http://www.compcom.co.za/merger-thresholds/> accessed 15-05-2015.

¹³⁵ The Commission issues a Form, known as Notice CC 15 "Merger Clearance Certificate whilst the Tribunal issues a Notice CT 10 Merger Clearance Certificate.

¹³⁶ Section 14 (1)(ii) of the Competition Act.

¹³⁷ Ibid.

¹³⁸ Ibid.

a maximum fine of 10% of the company's turnover for the previous financial year, as prescribed in section 59 (1)(d) of the Competition Act.¹³⁹

The Competition Act prescribes forms, issued in terms of section 13 and 13A as well as supporting documents that must be submitted to the Commission. The Rules for the conduct of proceedings in the Competition Commission (Competition Rules) do not prescribe which company must submit the merger filing, but allows for the acquiring company or the target company to make a joint filing in terms of Rule 27 or a separate filing in terms of Rule 28. Rule 27 prescribes the forms that the merging companies must submit as well as indicating which party should submit the information. Rule 28 caters for instances where joint notification is not possible such as hostile takeovers.¹⁴⁰

The Minister of Trade and Industry, prescribes the Form CC 4 (1) (Merger Notice) and Form CC 4 (2) (Statement of Merger Notification) (collectively referred to as the Merger Forms) as the forms that have to be submitted to the Commission together with the merger filing.¹⁴¹ There are three categories of information that the merging companies should submit to the Commission, namely (i) the information regarding their individual control structures, (ii) the details of the transaction and (iii) the details regarding the effects of the merger transaction on competition.

Commission Rule 30(1) states that the Commission may, within 5 business days after receiving a large Merger Notice and 10 business days after receiving an intermediate merger notice to deliver a "Notice of Incomplete Filing" which is known

¹³⁹ Ibid.

¹⁴⁰ In the case of a separate filing, either of the merging parties should approach the Commission to obtain permission to file separate notifications of the merger.

¹⁴¹ The Merger Forms prescribe the mandatory information and documentation that the merging companies should submit to the Commission to comply with the merger filing requirements.

as Form CC13(2).¹⁴² This form has the effect of ‘stopping the clock’¹⁴³ and resetting the filing date of the merger filing.¹⁴⁴ The initial period for consideration of the merger does not begin until the merging parties have satisfied all notification requirements set out in the Form CC13 (2) or prescribed in terms of the Merger Forms.¹⁴⁵ The Commission may deliver a Notice of Complete Filing, Form CC13 (1),¹⁴⁶ once the merging companies have submitted all the documents required in the Form CC 13 (2). However, if neither the Form CC13 (1) nor Form CC13 (2) is delivered within the statutory period the filing will be deemed to be complete and the Commission would then be obliged to assess the merger. Therefore, it is in the merging companies best interest to submit the complete and correct documents to the Commission.

The Commission offers the merging companies guidance on the type of documents that should be provided in the merger filing by means of guidelines and commentaries published in the 6th issue of the Practitioners’ Note on Complete Merger Filing.¹⁴⁷ The Practitioners Notes contain commentaries and interpretation provisions that explains the terms and documents that are required in the Merger Forms. Thus the Practitioners Note is a tool that the merging companies can use to ensure that they submit the correct documents to the Commission.¹⁴⁸

The documents that are required by the Commission during the merger filing include, *inter alia*, board minutes, board packs, emails, letters, management minutes,

¹⁴² It is a notice issued by the Competition Commission in terms of section 13 A of the Competition Act.

¹⁴³The notice is issued in terms of Competition Commission Rule 30. The merging companies have the right to appeal to the Competition Tribunal against any determination of the Commission set out in the Form CC 13 92) Notice.

¹⁴⁴ Practitioner’s Notes accessed on <http://www.compcom.co.za/wp-content/uploads/2014/09/Complete-filing-notice-Mch-2010.pdf> . Accessed on 10-02-2015.

¹⁴⁵ Rule 24 of the Competition Rules.

¹⁴⁶ <http://www.compcom.co.za/file-a-merger/> accessed 2015-03-01.

¹⁴⁷ (Council Regulation No. 139/2004 of January 2004).

¹⁴⁸ The Commission has not issued any subsequent Practitioners’ Note concerning the filing requirement for mergers and as such the Practitioner’ Note is the only note that provides guidance on the completeness of a merger filing.

strategy documents, business plans and an agreement that the merging companies have concluded for the merger.¹⁴⁹ The EU decisions considered under chapter 3 of this dissertation,¹⁵⁰ identified “agreements” and “merger documents” as important documents that the competition authorities need to consider see what the merging companies have done towards the merger.¹⁵¹ These documents are also prescribed in the Merger Forms and defined in the Practitioner’s Notes.

The Practitioner’s Note stipulates that the merging companies must provide any documents that explain how the merger would take place by stating whether the acquiring company would acquire assets, share or other interests.¹⁵² In addition, it describes merger agreements as all agreements including the sale of shares or business agreements and the draft or final shareholder’s agreement (if applicable) it requires the copies supplied to the Commission be signed copies if available.¹⁵³

4.2.2. The EU merger regime

Merger notification in the EU is done by submitting the prescribed forms are issued in terms of the Implementing Regulation.¹⁵⁴ The Implementation Regulation prescribes three forms, Form CO (used for standard merger notifications), Short Form CO (used for simplified merger notifications)¹⁵⁵ and Form RS (used for referral

¹⁴⁹ The Information is prescribed on Schedules 1 to 5 of the Form CC 4 (1) AND Form CC 4 (2).

¹⁵⁰ Refer to the *Wood Pulp Case*, *Electrabel* and the *Samsung Case*.

¹⁵¹ European Court reports 1993 Page I-01307. Accessed on [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61985CJ0089\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61985CJ0089(01)).

¹⁵² Note 5 of the Practitioner’s Note.

¹⁵³ Note 14 and Note 13. The Practitioner’s Notes also describes documents assessing the competition conditions as any reports (prepared in the ordinary course of business and not specifically relating to proposed transaction) held by the merging companies that assess the markets in which they compete.

¹⁵⁴ (Commission Regulation No 802/2004 of April 2004)

¹⁵⁵ A simplified merger review is a procedure that allows companies to use a shorter notification form for merger that are unlikely to raise competition problems. This notification procedure allows companies to have their merger transactions analysed and completed without the EU Commission issuing a notice of further information.

requests).¹⁵⁶ The Implementation Regulation is read with the Merger Regulation that contains the main rules and procedural aspects such as *inter alia*, notification and deadlines for the EU Commission to finalise its investigation. In addition to the prescribed forms, the EU Commission holds a pre-notification meeting prior to the merging companies submitting the merger for review.¹⁵⁷ The pre-notification meeting is a procedure that allows the EU Commission to advise the merging company on the information that would be required in the merger filing.¹⁵⁸

As a means of ensuring that the merging companies do not contravene the mandatory notification provisions, the EU Commission has also issued the Best Practice on the Conduct of the EU Merger Control Proceedings (EU Practice Note).¹⁵⁹ The EU Practice Note serves as a guideline that assists merging companies by explaining the importance of pre-notification meetings, as well as explaining the information that the merging companies should submit to the EU Commission prior to submitting a formal notification.¹⁶⁰ The EU Commission uses the pre-notification meeting to determine whether the merging parties' have contravened the provisions of the competition regulations by assessing the actions taken by the merging parties towards finalising the transaction.

The EU Commission Notification Forms require the merging parties to submit more detailed documentation than the South African Merger Forms as the investigation under the Short Form procedure takes place with very little interaction with other

¹⁵⁶ The introduction section of Form RS describes this form as a form that specifies the information that requesting parties must provide when making a reasoned submission for a pre-notification referral under Article 4(4) or (5) of Council Regulation (EC) No 139/2004.

¹⁵⁷ Merger Regulations.

¹⁵⁸ EU Commission advises the notifying parties to systematically provide a substantially complete draft Form CO before filing a formal notification.

¹⁵⁹ <http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf> . Accessed 06-06-2015.

¹⁶⁰ Paragraph 1 of EU Practice Note.

market participants.¹⁶¹ The documents required under the EU Notification Forms include, *inter alia*, detailed sales data of the merging parties, final transaction agreements, the offer documents for public bids, a copy of all the studies conducted on behalf of the merging parties and all the minutes of shareholders and board meetings.¹⁶²

What can be observed by the pre-notification requirements of the EU Commission and the South African Commission is that both authorities rely on the information submitted by the merging companies to determine, *inter alia*, the competitive effects of the merger and to identify the conduct of the merging parties which might be perceived as contravening the act. The information gathered by the competition authorities is important as there is a trade-off between the quantity or quality of information initially filed with the respective authority and the time such authority finalises investigations. The information filed with the Commission should ideally enable the Commission to narrow the legal and factual issues as early as possible.

4.3. Comparative analysis of the procedural requirements of the South African merger regime and the EU merger regime

Both the South African Competition Act and the EU Merger Regulations prescribe forms that must be submitted in a merger filing. Both jurisdictions require that the merging companies provide documents that explain the details of the transaction and the effect that the merger might have on competition. As indicated above, the EU Notification forms require the merging companies to submit extensive documentation with the information concerning the transaction and the details of the markets where the merging companies compete.

¹⁶¹ Paragraph 5 of EU Practice Note.

¹⁶² *Ibid.*

However, there is a difference in the timelines governing the investigative procedures undertaken by the EU Commission and the South African Commission when assessing mergers under their respective competition laws. Section 14, of the Competition Act, prescribe timelines for the Commission within which to issue their decisions regarding a merger.¹⁶³ Section 14(1) states that the Commission has 20 business days, once the merging companies have complied with the notification requirement, to issue a certificate in the prescribed form, approving the proposed merger, either with or without conditions. Section 14 (1)(a) grants the Commission the right to extend the investigation period by a maximum of 40 business days by issuing an extension certificate. The Competition Act does not prescribe a timeline for the Tribunal.

The EU provides for a simplified merger review procedure that allows the EU Commission to assess and clear the merger based on the documents submitted by the merging companies within 25 working days from the date when the merger transaction was filed.¹⁶⁴ The merger regulation under the EU competition regime takes place in two stages.¹⁶⁵ The first stage is conducted under the FORM CO short form provisions. In terms of the Form CO short form procedure, the EU Commission has an initial 25 working days to analyse the information provided by the merging parties and to decide whether to clear (i.e. approve) the merger or to “initiate proceedings.”¹⁶⁶ To “initiate proceedings” means that the EU Commission has decided to conduct an in-depth investigation the possible effects of the proposed merger on competition.¹⁶⁷ Should the EU Commission “initiate proceedings” it has 90

¹⁶³ Section 14 (1) prescribes 20 business days with an option to extend for an additional 40 business days.

¹⁶⁴ Form CO page 1 par 1.

¹⁶⁵ Elliott, Acker and Van Bael & Bellis page 208 par. 6 to page 2010 par 8.

¹⁶⁶ Form CO page 1 par 3.

¹⁶⁷ Elliott, Acker and Van Bael & Bellis page 209 par 6.

working days to finalise its investigation.¹⁶⁸ The 90 business days is automatically extended by 15 business days if the merging parties offer remedies after the 55 business days after the second phase of the investigation is initiated.¹⁶⁹ In addition, upon request of the merging companies the review process can further be extended by 20 business days. Therefore, the EU Commission would have 125 days to finalise its merger investigations and to issue its decisions should it “initiate proceedings.”

Despite the difference in the timelines that both the EU Commission and the Commission have to analyse merger transactions, there are similarities in the documents required for merger review. The merging companies are required to submit, *inter alia*, detailed sales data, final transaction agreements, the offer documents for public bids, a copy of all the studies, concerning the competitive landscape and due diligence conducted of on their behalf and minutes of shareholders and board meetings.¹⁷⁰ Both the EU Commission and the South African Commission have the power to request additional information from the merging parties.¹⁷¹

The above information shows that, although there are some differences in the notification requirements and the number of days for the investigation the EU Commission and the South African Commission have, there are also similarities in the information considered by these authorities when assessing mergers. The next section considers how the South African competition authorities can use the information provided by the merging parties in the merger filing to determine whether the merging parties have implemented transaction in contravention of section 13 or section 13A, of the Competition Act.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Schedule 2 of the Merger Notice.

¹⁷¹ Section 13B of the Competition Act.

4.4. The application of EU findings in Competition Law

The EU Commission's decision in the *Wood Pulp case* and subsequent decisions¹⁷² indicates that merger implementation for purpose of merger review, can be determined by considering the actions of the merging companies during the conclusion of the merger. Specifically, implementation can be determined by considering the actions of the merging companies in enforcing the provisions of the merger agreement.¹⁷³ It is worth noting that the factors found in the ECJ's decision in the *Wood Pulp case* is not an exhaustive list,¹⁷⁴ therefore the Commission may consider other factors in its interpretation of what constitutes implementation for merger review. As indicated in Chapter 3,¹⁷⁵ the following factors were identified from the ECJ decision in the *Wood Pulp case*:

- a) The contents of the agreement concluded by the merging parties
- b) Whether the provisions of the agreement confers any control on the acquiring firm over the target firm
- c) The actions taken by the merging parties in the enforcement of the agreement
- d) The location where the merging parties enforced the agreement
- e) The effects of the merging parties' actions on competition

These factors will be considered individually below. The analysis will also include the CAC and Tribunal's decisions regarding how the various aspects may be interpreted in order to understand what the various concepts mean for merger review in South Africa.

¹⁷² Discussion of the *Electrabel Case* and *Samsung Case* in Chapter 3 par 3.6.2 and 3.6.3.

¹⁷³ Andrew N. Vollmer and John Byron Sandage *The International Lawyer*, Vol. 23, No. 3 (Fall 1989) American Bar Association Stable URL: <http://www.jstor.org/stable/40706311> Accessed: 18-03-2015.

¹⁷⁴ Ibid.

¹⁷⁵ Chapter 3par 3.6.1.

4.4.1. The contents of the merger agreement

The EU Merger Forms require that the merging companies submit a copy of the merger agreements which are defined as “all merger agreements including the sale of shares or business agreements and the draft or final shareholder’s agreement.”¹⁷⁶

The Merger Forms do not require final copies of the agreement as opposed to the EU Commission’s Notification Forms that require that the merging companies submit final copies of the merger agreements.¹⁷⁷ It is submitted that the requirement to submit merger agreements suggests that the mere conclusion of a merger agreement does not constitute merger implementation.

The South African Tribunal considered the important of having an agreement that contains provisions concerning the merger by considering the contents of a merger agreement in the *Gold Fields Limited vs Harmony Gold Mining Company Limited and the Competition Commission (Gold Field case)*.¹⁷⁸ In this case, Harmony Gold Mining Company Ltd (Harmony) intended to acquire control over Gold Fields Ltd (Gold Field) in terms of section 12 (2)(g) of the Competition Act.¹⁷⁹ The merger was a hostile takeover launched by Harmony in October 2014, and involved two bidding stages, defined as ‘the early settlement offer’ and the subsequent defined as ‘the subsequent offer’.¹⁸⁰ The Tribunal had to consider whether the contents of an agreement and conduct of the merging companies could constitute

¹⁷⁶ Paragraph 6 of Practitioner’s Notes accessed on <http://www.compcom.co.za/wp-content/uploads/2014/09/Complete-filing-notice-Mch-2010.pdf> Accessed on 10-02-2015

¹⁷⁷ Elliott, Acker and Van Bael & Bellis page 205 par.3.

¹⁷⁸ Refer to case No. 43CACNov04.

¹⁷⁹ 43CACNov04 par 4.

¹⁸⁰ Ibid par 7.

“implementation.”¹⁸¹ In its judgment, the Tribunal indicated that “intent” does not justify a merger by stating that,¹⁸²

“Whilst the intention may have some evidential value in deciding whether a transaction is a merger it is by no means decisive of the issue. A good many buyers of shares may have ambitions to control a firm one day and if all purchases were to be notified as mergers once they have assumed this intent, any number of people would be jamming the highways to Pretoria to notify mergers to the Commission. Intent in the ‘air’ does not suffice.”

The Tribunal’s decision shows that the intentions of the merging companies need to be reduced to writing, into an agreement or an offer letter, for it to constitute a merger for competition review. In addition, the Tribunal held that the jurisdictional prerequisite for the Commission’s exercise of its powers is the date of implementation and not the date of completion of the transaction.¹⁸³ The Tribunal however, refrained from defining what implementation entails. Taking into account the decision in the *Gold Field* case it seems that the information contained in the merger agreement or the offer letter is important in to determining how the merger is to take place and the rights conferred to the acquiring company.

In the *Wood Pulp* case the EU Commission held that the contents of the companies’ agreement contain information that addresses the steps the companies would have to take to enforce the agreement.¹⁸⁴ The contents in the merger agreement are therefore, important as they assist the Commission to identify the conduct of the merging parties which constitute an acquisition of control, which is the following aspect to consider.

¹⁸¹ Ibid par 45.

¹⁸² Ibid.

¹⁸³ Ibid par 86.

¹⁸⁴The merger agreement might have provisions regarding the conduct of the companies during the negotiation of the merger as well as the rights of the acquiring company following the completion of the transaction.

4.4.2. Acquisition of control

The EU Commission's decision in the *Electrabel* case held that, for purpose of implementation, conduct of the acquiring company which can be construed as an exercise of control over the target company could constitute implementation.¹⁸⁵

Therefore, the Competition Authorities would have to identify the conduct of the merging companies that would constitute control for purpose of merger review under the Competition Act.

In the Competition Act, "control" is defined in section 12(2)(a) to (g), which gives examples of conduct that constitutes control for purpose of merger review. However, the definitions contained in section 12(2) are not simple to apply as can be seen in the Tribunal's decision in the *Gold Field* case. In the *Gold Field* case, the Tribunal relied on a decision by the CAC in the matter between *Distillers Corporation (SA) Ltd, SFW Group Ltd and Bulmer (SA) (Pty) Ltd, Seagram Africa (Pty) Ltd (Distillers case)*.¹⁸⁶

The *Distillers case* was the first case where the Tribunal and CAC determined what control means under the South African merger regime.¹⁸⁷ The CAC had to consider the correctness of the Tribunals' decision to accept that a change in control, in terms of section 12(2), does not exist in instances where the companies that ultimately control the merging companies did not change pre-merger and post-merger when the merger was taking place between subsidiaries.¹⁸⁸ The Tribunal held that, section 12(2) does not purport to define control and as such, it does not constitute an

¹⁸⁵ COMP/M.4994, page 53.

¹⁸⁶ 08/CAC/May01.

¹⁸⁷ 08/CAC/May01 page 2 par 3.

¹⁸⁸ [2001–2002] CPLR 36 (CAC) page 37.

exhaustive list.¹⁸⁹ Therefore, the Tribunal concluded that a merger between subsidiaries does not constitute a merger for competition review in accordance with the principles of merger review and as such did not rely on the EU Commission's concept of 'single economic entity'.¹⁹⁰

The CAC disagreed with the Tribunal's decision and held that merger review considered the change in the target company and not the ultimate controlling company.¹⁹¹ The Tribunal's decision in the *Distillers case* was also considered in the case between *Ethos Private Equity Fund IV and the Tsebo Outsourcing Group (Pty) Ltd (Ethos Case)*.¹⁹² In the *Ethos case*, the Tribunal had to decide whether a company could acquire control, for purpose of merger notification, even if the factual control provisions in the agreement remain unchanged.¹⁹³ In this case Ethos Private Equity Fund VI intended to acquire 50% of the issued shares in Tsebo, but according to the merging companies, the voting rights held by Ethos, would not confer control upon it, as it would require votes from the other shareholders to pass a resolution.¹⁹⁴ In the *Ethos case* the Tribunal recognised that multiple forms of control might exist at a time and held:

The wording of section 12(2), clearly contemplates a situation where more than one party simultaneously exercises control over a company... If more than one firm can simultaneously control another firm, it follows that more than one may acquire control and hence the concomitant obligation to notify. We have also in the past decided, consistent with the practice in other

¹⁸⁹ COMP/M.4994.

¹⁹⁰ Andrew N. Vollmer and John Byron Sandage *The International Lawyer*, Vol. 23, No. 3 (Fall 1989) American Bar Association Stable URL: <http://www.jstor.org/stable/40706311> Accessed: 18-03-2015. Section 4(5) of the Competition Act uses the term "single economic entity where the Competition Act exempts constituent firms within a single economic entity from the prohibitions in section 4(1) of restrictive horizontal agreements, decisions and concerted practices.

¹⁹¹ 08/CAC/May01Page 41.

¹⁹² 30lm/Jun/03.

¹⁹³ 30/LM/Jun03 paragraph 2.

¹⁹⁴ 30/LM/Jun03 paragraph 15.

jurisdictions, that a change from joint control to sole control triggers a notification.

The above decisions by the Tribunal show that the acquisition of control may take place in a number of ways. Therefore, the question of whether there is change in control for purpose of merger review can be answered through a factual exercise whether the Commission or Tribunal considers the activities or agreement of the merging parties towards the merger.

The EU Commission in the *Electrabel* case considered the activities of the merging companies when it held that the conduct of the acquiring company that can be construed as an exercise of control over the target company could constitute implementation.¹⁹⁵ The decision of the Tribunal in the *Ethos Case* suggests that these provisions might have a wide application in South Africa, as the Tribunal held that different types of control may be exercised by one shareholder.¹⁹⁶ This would be most relevant in joint venture or transactions concerning an increase in shareholding. In such instance the Competition Authorities of South Africa would have to check whether the acquiring company has taken any actions that might be perceived, by the Competition Authorities, as influencing the operations of the business. Such conduct would constitute an acquisition of control even if such shareholder does not hold more than 50% of the shares of the target company.

4.4.3. Jurisdiction

The EU Commission's decision in the *Wood Pulp* case held that the conduct of the companies has to have an effect within the European Community for the Act to

¹⁹⁵ Paragraph 53 to paragraph 53 page 55.

¹⁹⁶ COMP/M.4994.

apply. The EU Commission used the 'effects doctrine'¹⁹⁷ and held that even if the agreement was not concluded within the European Community, its enforcement had effects in the European Community and as such it had the necessary jurisdiction to consider the case.¹⁹⁸

The Competition Act's provisions regarding jurisdiction are contained in section 3(1) which were considered by the CAC in the matter between *American Natural Soda Ash Corporation, CHC Global (Pty) Ltd vs Commission, Botswana Ash (Pty) Limited, ChemServe Technical Products and The Minister Of DTI (American Soda Ash case)*.¹⁹⁹ The *American Soda Ash case* was one of the first cases referred to the Tribunal concerning cartel conduct in contravention of section 4 of the Competition Act.²⁰⁰ The Tribunal held that the Competition Act applies to all economic activity regardless whether the conduct has anti-competitive effects or not.²⁰¹ The interpretation by CAC widens the application of the Competition Act and as such any conduct by the merging companies in enforcement of the contents of the merger agreement may be considered under the Competition Act regardless whether such conduct is pro-competitive or anti-competitive.

4.4.4. The enforcement of the agreement

In the *Electrabel case*, the EU Commission considered the conduct of the Electrabel in enforcing its right by considering the information contained in the board minutes submitted by the merging companies in the merger review. The EU Commission

¹⁹⁷ The ECJ in the Wood Pulp case accepted the effects doctrine as the consideration of the effect of the conduct of the merging parties within the Member States regardless of where the agreement between the parties was concluded. where the conduct of the parties would be Vedder c. 1987 A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law [Online] Available from: <http://www.ejil.org/pdfs/1/1/1142.pdf> [Downloaded 2014-12-16].

¹⁹⁸ Ibid.

¹⁹⁹ 12/CAC/DEC01.

²⁰⁰ Ibid at par 1.

²⁰¹ Ibid at par 31.

found that the actions taken by Electrabel, by voting at the shareholders meeting, constituted implementation.²⁰²

In South Africa in the *Gold Field case*,²⁰³ the Tribunal held that the actions of the merging companies during the shareholders' meeting could be used to determine if there has been a change in control.²⁰⁴ The Tribunal placed used the information contained in the board minutes to determine whether the acquiring company had exercised control over the target company.²⁰⁵ The Tribunal considered the testimony from the board members to determine how the provisions of the agreement were enforced. The Tribunal held that the actions of the board members, of taking part in the meetings of the target company, might be one of the factors that illustrates that the parties have enforced the provisions of the Competition Act.²⁰⁶ Other actions that would suggest that the merging parties have implemented the provision of the agreement would include, inter alia, the rebranding of the target company's business. The Competition Authorities would have to conduct a factual analysis of the merging parties' conduct after the conclusion of an agreement to determine whether the merging parties have enforced provisions of such agreement.

4.4.5. The effects of the merging parties' actions on competition

The CAC's decision in the *American Soda Ash case* applies when considering the applicability of the competitive effect of the merging companies' activities. The CAC's decision widens the scope of conduct which the Competition Authority may consider under the Competition Act.²⁰⁷ Therefore, the Competition Authorities do not need to

²⁰² 08/CAC/May01 page 41.page 55.

²⁰³ 43CACNov04.

²⁰⁴ 08/CAC/May01page 41.

²⁰⁵ Ibid.

²⁰⁶ 08/CAC/May01Page 41.page 55.

²⁰⁷ [2005] 1 CPLR 18 (CAC) Par 21.

prove that the merging parties' activities had a competitive effect in South Africa. The Competition Authorities' burden would be satisfied when evidence is given that the merging companies have taken steps to enforce the provisions of a merger agreement and therefore exercised "control."

4.5. The summary of the applications of the EU provisions in South Africa

The above assessment has found that the EU competition regime is similar to the South African competition law regime in that both jurisdictions apply the mandatory merger notification system. In addition, the similarities concerning the information required by the respective competition authorities are similar as both authorities require the merging companies to submit information that explains the transaction and how the transaction would be implemented as well as the competitive effects of the transaction. The documents required by the EU Commission and the South African Commission suggest that both jurisdictions consider similar facts when assessing mergers. This similarity is important as it shows that the provisions of the EU Commission might be incorporated into the South African merger reviews smoothly.

The first factor considered was what the South African Commission must consider when determining what implementations means for merger review. In the *Samsung case* and the *Electrabel case* the EU Commission held that details of how the merger would be concluded and the rights of the acquiring company are contained in the merger agreement or any documents that contains details of the transaction. The EU Commission used the identified documents to identify the conduct which might constitute the implementation of the merger. In South Africa the provisions and court decision regarding the merger documents is found in the *Distiller case* where the

Tribunal held that the intentions of the merging companies need to be reduced to writing, into an agreement or an offer letter, for it to constitute a merger for competition review.²⁰⁸ This decision shows that the Tribunal would consider information contained in merger documents, that explains the transaction, in order to determine whether the transaction before it constitute a merger that falls within the Competition Act. The Competition Authorities might use the same principles to identify conduct of the merging parties that would constitute a change in control.

After the competition authorities have determined what is being acquired from the information in the merger agreement or merger documents, the next step would be for the competition authorities to determine whether such provisions constitute control, for merger review. This factor was established by the EC Commission in the *Wood Pulp case* and applied in the *Electrabel case* where it held that conduct of the acquiring company which can be construed as an exercise of control over the target company, could constitute implementation.²⁰⁹

In South Africa, the Tribunal and the CAC interpreted the concept of “control” as defined in section 12(2)(a) to (g), of the Competition Act, in the *Distillers case*, the *Ethos Case* and the *Goldfields case*. What can be noted from these cases is that control can take place in different ways and that change in control, for purpose of the Competition Act, can also be inferred in instances of mergers that take place between a subsidiary and holding company. Once the Competition Authorities have identified the conduct that the merging parties prescribe, in their respective agreements, as an exercise of control over the company to be acquired, the next

²⁰⁸ [2005] 1 CPLR 18 (CAC) Par 43.

²⁰⁹ Paragraph 53 to paragraph 53 pages 55.

step is to determine whether the merging parties have taken steps enforced such provisions contained in the agreement.

In the *Wood Pulp case* and *Samsung case* the, ECJ and the EC Commission held that the conduct must have an effect in the member states. The Competition Act's provisions regarding jurisdiction are contained in section 3(1). The CAC in the *American Soda Ash case*²¹⁰ interpreted what the Competition Act means by "effects" in the Republic. The CAC in the *American Soda Ash case* held that the Competition Act applies to all economics activity regardless whether the conduct has anti-competitive effects or not.²¹¹ The interpretation by CAC widens the application of the Competition Act and as such any conducts by the merging companies in enforcement of the contents of the merger agreement may be considered, regardless whether such conduct is pro-competitive or anti-competitive, may be fall within the Competition Act.²¹²

What can be observed from the *Wood Pulp case* is that the factors²¹³ identified by the ECJ are cumulative. Therefore, in South Africa, the Competition Authorities to identify clauses in the agreement which explain how the merging companies would facilitate a change control,²¹⁴ whether the merging companies have taken steps to enforcement of such clauses.²¹⁵ The Competition Authorities must keep in mind that the conduct of the merging companies must have effect in South Africa.²¹⁶

²¹⁰ [2005] 1 CPLR 18 page 24.

²¹¹ Ibid.

²¹² [2005] 1 CPLR 18 page 30.

²¹³ Chapter 3 at par 3.6.1.

²¹⁴ 30/LM/Jun03 paragraph 2.

²¹⁵ Chapter 3 at par 3.6.2.

²¹⁶ Chapter 3 at par 3.6.1.

CHAPTER 5

CONCLUSION AND RECOMMENDATION

5.1. Introduction

The provisions regulating mergers in South Africa play a preventative role by requiring the merging companies that meet the notification requirement, to notify such merger transaction to the Commission and by preventing such parties from implementing the merger before obtaining the approval of the respective competition authority. The Tribunal might impose an administrative fine of companies that fail to notify a merger that is notifiable under the provisions of the Competition Act. However, Chapter 1 highlighted that the Competition Act does not define the term “implementation” for purpose of competition regulation. Under merger review, the definition of this term is important because it assists the merging companies, their legal representative and the Competition Authorities to know what conduct is constitute implementation and thus prohibited under the Competition Act.

5.2. Research overview

This dissertation needed to determine the meaning of the term “implementation” by considering the EU legislations and case law to understand how to interpret the term “implementation” in merger review. The decisions of the competition authorities in the EC case law and South African case law were compared to identify how the individual authorities interpret merger provisions in their competition legislations.

In Chapter 3, it was found that the EU case law use the information submitted by the merging parties during the filing to determine if the merging parties have implemented a merger. The case law considered were the decisions of the ECJ in the *Wood Pulp case* as well as the decisions by the EU Commission in the

Electrabel case and *Samsung case*. What was noted in the decisions was that the term “implementation,” for purpose of merger review, could be ascertained by taking into account the content of the merger documents submitted by the merging companies²¹⁷ during the filing or the documents regulating the conduct of the companies concerned.²¹⁸ Specifically, the EC Commission is only concerned with the actions of the merging parties within the EU Member States or actions that have a competitive effect within the EU Member States. In addition, such conduct must be linked to the enforcement of the clauses in the merger agreements.

The EU case laws illustrates that the determination of the “implementation” is a factual consideration, applied on a case to case basis. Under the EU case law the term “implementation,” for purpose of merger review, entails the enforcement of the clauses that confer control as defined in the competition legislation. The enforcement of such provisions, by the merging parties, is important to the extent that it constitute an exercise of control either by way of majority shares or by way of influencing the business. The enforcement of such merger agreement terms must take place in South Africa and does not necessarily need to have any direct effects on competition.

5.3. Recommendations

Section 1(2) of the Competition Act, states that the act must be interpreted in a manner that is consistent with the Constitution and gives effect to the purposes set out in section (2) and in compliance with the international law obligations South Africa. Since the both the EU and South Africa apply the mandatory merger notification regime the provisions used by the EC case law to determine the term

²¹⁷ Chapter 4 par 4.4.

²¹⁸ Ibid.

“implementation” may be applied under the Competition Act, in South Africa. As it is the case under the EU merger regime, the Competition Authorities, in South Africa need to determine whether they have jurisdiction to assess the merger by determining whether the merger meets the requirements contained in section 11 and section 12 of the Competition Act. Once it is determined that the merger meets the notification requirements under the Competition Act, the respective authority considering the merger may determine whether the merging parties’ have “implemented” the merger by looking at the wording of the clauses in the merger agreement to ascertain how the merging companies describe or define control. The decision in the *Ethos case*, considered in the preceding chapter, widens the definition of control under the Competition Act by indicating that control can exist in different instances at a time. Therefore, the Commission will have to consider the contents of the agreement in the context of the merger. The *American Soda Ash case*, the CAC also widened the application of the Competition Act to conduct of the merging parties that does not have a competitive effect in South Africa, which suggests that the Competition Authorities have a broad discretion in merger review.

The definition of the term “implementation” is important for two reasons, firstly it helps the merging companies to avoid conduct that contravenes section 13 and 13A(3) and secondly, it ensures that the competition authorities are able to effectively use merger review to prevent conduct that facilitates or creates anti-competitive markets. Therefore, the Competition Act must be amended to include the definition of the term “implementation” to establish certainty in the application of the provisions of the Competition Act.

5.3. Conclusion.

Based on the above recommendation it is apparent that the term “implementation,” for purpose of merger review can be defined by considering the facts of each case. Since merger happens when a company acquires control over another company or the business of another company, the actions of the merging parties that are relevant are those that result in the change of control. The enforcement of such merger agreement terms must take place in South Africa and do not necessarily need to have any direct effects on competition.

Word Count: 16 920

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