

Control

A comparative analysis of the correlations between section 12 of the Competition Act 89 of 1998 and section 2 of the Companies Act 71 of 2008.

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Control: A comparative analysis of the correlations between Section 12 of the Competition Act 89 of 1998 and Section 2 of the Companies Act 71 of 2008.

Outline

This dissertation undertakes an investigation into the correlations between the provisions of the Competition Act 89 of 1998 and that of the Companies Act 71 of 2008 with regards to what each of the aforementioned Acts defines as “control”.

There is a symbiotic relationship between the domains of corporate law and competition law. The latter depends significantly on the provisions of the former when interpreting the scope and application of certain of its provisions, notably in the context of mergers. This relationship has been extensively complicated by the repeal of the Companies Act 61 of 1973 and the inception of the Companies Act 71 of 2008.

This dissertation embarks on a discussion of the most prevailing similarities between section 2 of the Companies Act 71 of 2008 and section 12 of the Competition Act 89 of 1998. While discussing these similarities, the implications which the repealed Act has on competition law will also be canvassed and the author will attempt to reach clarity on the best manner forward.



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Index of key terms

“**Competition Act**” – means the Competition Act 89 of 1998;

“**Firm**” – includes a person, partnership or a trust;¹

“**New Companies Act**” – means the Companies Act 71 of 2008; and

“**Old Companies Act**” – means the Old Companies Act 61 of 1973 (now partially repealed).

¹ Section 1(xi) of the Competition Act.



1. Chapter 1 – An introduction

1.1. An uneasy relationship

Christison and Williams noted in an article, while discussing the unsuccessful bid by Harmony Gold Mining Company Ltd. to takeover Gold Fields Ltd., that there is an uneasy relationship between corporate law and competition law.² While discussing the reasoning behind the unsuccessful bid by Harmony Gold Mining Company Ltd. to acquire control of Gold Fields Ltd., the authors undertook to discuss, albeit briefly, the tension between the two aforementioned fields of law. Their observations in the article briefly unpacked the obligations of the board of a company and/or its managers in light of the backdrop of the purpose underlying competition law. To paraphrase, corporate law in the narrow sense (not taking into consideration the principles of competition law), does not require the board of a company to avoid actions that are anti-competitive. It is the purpose of the board to act in the company's best interest, which for the major part, leads to attempts to maximise profits and, thereby, build shareholder's wealth.³ It must be emphasised, as the article rightly does, that the discharge by the board of its duties in the best interests of the company is not necessarily synonymous with maximising shareholder wealth.⁴

Competition law's main priority on the other hand is to ensure a fair and competitive market for a company to operate in. Competition law may, therefore, strain a company's efforts to maximise profits to ensure that the company's actions are not prejudicial to the welfare of the broader economy. Examples hereof are the provisions of the Competition Act and, more specifically Chapter 2 thereof, which provides for the various practices that firms are prohibited from engaging in to alleviate anti-competitive conduct within the markets.⁵

The attempt by the board of a company to maximise profits and, thereby, shareholder wealth may, therefore, seem legitimate in all other areas of law, however, fall well short of

² Christison, AL & Williams, RC (2008) "The Harmony – Goldfields Take-Over Battle" *South African Law Journal* (Vol 125 Issue 4) pp. 790-822; *Infra* par 2.3.1 for a discussion of the facts of the matter.

³ Sections 76(3)(a) and (b) of the New Companies Act and Principle 2.14 of the KING III Report; Van Tonder (2015) "An Analysis of the Directors' Duty to Act in the Best Interests of the Company, Through the Lens of the Business Judgment Rule" *Obiter* p 712.

⁴ Christison & Williams, *supra* p. 791.

⁵ Chapter 2 discusses the various actions/omissions of companies in horizontal and vertical relationships that are deemed "prohibited practices" in the field of competition law.

the objects and principles of competition law. An example hereof is the notion of predatory pricing where a dominant firm lowers the prices of its products below its marginal or average variable cost in order to drive competitors from the market as prohibited by section 8(d)(iv) of the Competition Act. This strategy *prima facie* does not seem like an act in the best interest of the company, as the company's profits will effectively decrease as a result of sustained lower pricing. However, as soon as the company's competitors are driven out of the market, the company will be in a position to raise its prices above what would be deemed fair and equitable as the customers will have no alternative but to procure from the company in question.⁶

While noting the tangible tension between these respective fields of law as observed by Christison and Williams's, one has to question the capability of these fields of law to coincide.⁷ Put differently, is it possible for two seemingly synonymous provisions originating from the legislation of the two respective fields of law in question, to pull in the same direction, notwithstanding that their goals may not necessarily be in line?

To answer this question, one will first have to consider the purpose of the respective Acts. This will create the necessary backdrop regarding the intention of the legislature when interpreting the legislation in each of these fields. The aim is to shed light on the intention of the legislature and accordingly, to lay down the foundation to understand the possible application of these provisions.

1.2. The origins and purpose of the Competition Act 89 of 1998

The Competition Act partially commenced on 30 November 1998 while the remaining provisions of the Act commenced on 1 September 1999.⁸ Before the inception of the

⁶ In *Nationwide Airline (Pty) Ltd. / South African Airline (Pty) Ltd. (SAA) Case 92/IR/Oct00* p. 10 the Competition Tribunal explained predatory pricing as follows: "Viewed in isolation selling below cost for a sustained period is simply tantamount to commercial suicide. Such a strategy then must, perforce, be predicated on a calculation by the alleged predator that it will be able both to survive a sustained period of pricing its product below cost and, moreover, that this period will be succeeded by one in which the successful predator will be able to price above cost, that is, monopolistically, in order to recoup, indeed over-compensate for, the losses sustained in the period of predation."

⁷ Christison & Williams *supra*.p. 791.

⁸ Sections 1-3, 6, 11, 19-43, 78, 79 & 84 of the Competition Act commenced on 30 November 1998.

Competition Act, however, competition was regulated by the Maintenance and Promotion of Competition Act 96 of 1979, which provided the Minister of Trade and Industry with the power to appoint a Competition Board to adjudicate on competition related matters.⁹ Neuhoff notes that the Maintenance and Promotion of Competition Act, however, failed to address provisions that are explicitly prohibited, and states that notwithstanding the fact that certain anti-competitive practices were subsequently declared illegal, the Act made no provision for the compulsory enforcement thereof nor merger control.¹⁰

The lack of provisions in the previous Competition Act, and the need for conformity with international best practices, gave rise to the recognition required to control business conduct that hinders an efficient and competitive economy. After an extensive exercise of hearings, written submissions and representations made to Parliament, and with the assistance of developed countries' experiences and practices within the field of competition law/anti-trust laws not limited to Canada, Australia and Europe, the 1998 Competition Act was passed and became effective as discussed above.¹¹

In light of the above, the preamble of the Competition Act recognises and states that, *inter alia*, the Act aims to correct the past wrongs of the apartheid era, which “resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans”.¹²

Neuhoff points out that the South African Competition Act goes beyond the traditional goals of competition law, namely that of achieving lower prices and greater choice for consumers, by also focussing on macro-economics and public-interest goals.¹³

As indicated above, the Competition Act's focus is on the economy and restoring the wrongs of the past. This clearly emphasizes the point made above that the efforts of a board, to

⁹ Neuhoff, M *et al* *A Practical Guide to the South African Competition Act* (2006) (hereinafter referred to as “Neuhoff”) p. 12.

¹⁰ *Ibid* p. 12; Neuhoff mentions that the following practices were declared illegal: resale price maintenance; collusion on prices; trading terms and market division and bid rigging.

¹¹ *Ibid* p. 12.

¹² Preamble of the Competition Act.

¹³ Neuhoff *supra* p. 13; These include the promotion of small to medium sized enterprises, Black Economic Empowerment, the interests of labour and the ability of firms to compete in international markets.

maximise a company's profits, may be prohibited by the Competition Authorities if such efforts would undermine the provisions of the Competition Act (and the precedence created in terms thereof).

1.3. The origins and purpose of the Companies Act 71 of 2008

The preamble of the New Companies Act states that its intention is to “provide for a consistent and harmonious regime of business incorporation and regulation; and to provide for matters connected therewith”. Cassim notes that company law has a significant impact of the economy and, in particular, commercial activities.¹⁴

Cassim further states that a company can either promote and facilitate a commercial enterprise, or it can restrict it. He continues to emphasise the importance of a precise and clear body of corporate law as it lays at the heart of a prosperous economy. The Old Companies Act, along with its approximately 42 amendments, was deemed to be bulky, complex and full of conflict.¹⁵

Cassim points out that many of the traditional company concepts and doctrines were based on that of nineteenth century England and have since adoption been abandoned or substantially modified.¹⁶

It was clear that the Old Companies Act become obsolete in an ever evolving business world. Enter the New Companies Act, which came of effect on 1 May 2011, after substantial amendments were made by the Companies Amendment Act 3 of 2001 to the initial draft, which was signed into law on 8 April 2009.

The New Companies Act aims to be a body of modern corporate law for a modern commercial society.¹⁷ The preamble enshrines the purpose of the New Companies Act, which is to provide for a foundational framework of law to enable and regulate the incorporation of juristic persons and provide them with the necessary rights, obligations,

¹⁴ Cassim, FHI *et al Contemporary Company Law (Second Edition 2012)* p. 3.

¹⁵ Cassim *supra* p. 3.

¹⁶ *Ibid.*

¹⁷ *Ibid* p. 2.

prohibitions and remedies to function in a manner to promote sustainable economic growth.

1.4. The focus and methodology of this dissertation

The main focus of this dissertation is to interpret section 2 of the New Companies Act against the backdrop of the precedence set by section 12(2) of the Competition Act.

It is prevailingly clear that the Competition Act cannot be applied without the support of its corporate law counterpart. As soon as one attempts to address the various instances of control, as illustrated by the legislature in section 12(2) of the Competition Act, one will realise that there is an unavoidable topic of concern. This is as a result of the repeal of the Old Companies Act (which the Competition Act still refers to) and the replacement thereof by the New Companies Act, which commenced on 1 May 2011. This repeal and replacement has created much uncertainty in determining which Act should be consulted when applying the provisions of the Competition Act. This is due to the fact that the Competition Act mentions, and depends on, the Old Companies Act numerous times. However, without directions or guidance from the legislature and/or the Competition Authorities, the public is left blind as to which version of the Companies Act should apply.

The focus of this dissertation is thus two-fold: first it will use competition precedence to determine the scope and application of section 2(2) of the New Companies Act and secondly it will highlight major issues when interpreting the provisions of the Competition Act in light of the replaced Old Companies Act.

Section 12 of the Competition Act will be dissected to determine the scope and application thereof in light of relevant company law provisions. Once a solid interpretational foundation has been established, the scope and application of section 2 of the New Companies Act, in light of its older sister provision of section 12(2) of the Competition Act, will be determined.

The approach that will be taken breaks down and unpacks the provisions of both section 12 of the Competition Act (with reference to Chapter 2 hereof) and section 2 of the New



Companies Act (with reference to Chapter 3 hereof). Further, the implications of each, in light of the above, will be discussed.

1.5. A comparative indication of the provisions in question

In order to contextualise the discussion that follows, it is apt to first glance over the provisions of section 12(2) of the Companies Act and section 2 of the Companies Act insofar as they relate to the illusory concept of “control”:-

Competition Act 89 of 1998 – Section 12	Companies Act 71 of 2008 – Section 2
<p>12. Merger defined</p> <p>(1) For the purpose of this Chapter, “merger” means the direct or indirect acquisition or direct or indirect establishment of control, by one or more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or other person, whether that control is achieved as a result of –</p> <p>(a) purchase or lease of the shares, interest, or assets of that competitor, supplier, customer or other person;</p> <p>(b) amalgamation or combination with that competitor, supplier, customer or other person; or</p> <p>(c) any other means.</p>	<p>2. (1) For all purposes of this Act—</p> <p>(b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and</p> <p>(c) a juristic person is related to another juristic person if—</p> <p>(i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);</p> <p>(ii) either is a subsidiary of the other; or</p> <p>(iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).</p>
<p>(2) A person controls a firm if that person-</p>	<p>(2) For the purpose of subsection (1), a</p>



	person controls a juristic person, or its business, if—
(a) beneficially owns more than one half of the issued share capital of the firm;	
(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;	(a) in the case of a juristic person that is a company— (ii) that first person together with any related or inter-related person, is— (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise;
(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;	(a) in the case of a juristic person that is a company— (ii) that first person together with any related or inter-related person, is— (bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;
(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);	(a) in the case of a juristic person that is a company— (i) that juristic person is a subsidiary of that first person, as determined in accordance



	with section 3(1)(a);
(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust;	(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or
(f) in the case of a close corporation, owns the majority of members' interest, or controls directly, or has the right to control the majority of members' votes in the close corporation; or	(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;
(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a)-(f).	(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).

2. Chapter 2 – Control in terms of the Competition Act 89 of 1998

2.1. An introduction to merger regulation

To better understand the intricacies of the Competition Act, with regards to the aspects of “control” in the context of merger regulation, it is crucial to address the rationale behind merger regulation. For the purpose of this discussion, Neuhoff’s layperson’s definition of a merger will be used as a point of departure: “[A] merger takes place when two independent companies combine their businesses”.¹⁸

Sutherland and Kemp remark, while discussing the contrast between Chapter 2 of the Competition Act (prohibited practices) and Chapter 3 of the Competition Act (merger regulation), that Chapter 2 is normally applied retrospectively while the application of Chapter 3 is a proactive exercise.¹⁹ The provisions of the Competition Act, which regulate the merger notification procedure, require that firms notify the Competition Commission before the actual implementation of the intended merger.²⁰ Sutherland and Kemp accordingly state that the Competition Authorities may have to consider the history of the relevant market, while a look into the future may be required to consider the implications of prohibited practices.²¹

This assists the Competition Authorities to determine the possible effects on the relevant market that a merger may have prior to the implementation thereof. Specifically, this alleviates the risk of the Competition Authorities ordering companies to “unscramble” the proverbial egg by declaring that a merger is anti-competitive *after* the implementation thereof and forcing the merged parties to return to the *status quo*.

Neuhoff’s observations compliment the proactive perspective mentioned by Sutherland and Kemp by stating that “merger regulation is an attempt to proactively regulate the structure of the economy and markets in order to ensure that markets function optimally”.²²

¹⁸ Neuhoff *supra* p. 177.

¹⁹ Sutherland and Kemp *Competition Law of South Africa* (2009) (hereinafter referred to as “Sutherland and Kemp”) pp. 8-9.

²⁰ Section 13A(3) of the Competition Act prohibits firms from implementing intermediate or large mergers before the relevant Competition Authority has given its required approval (with or without conditions).

²¹ Sutherland and Kemp *supra* pp. 8-9.

²² Neuhoff *supra* p. 179.

The observations of both Neuhoff and Sutherland and Kemp, as discussed above, are concretised in the matter of *Mondi Ltd./Kohler Cores and Tubes (a division of Kohler Packaging Ltd.)* where the Competition Tribunal noted that no amount of evidence can do away with the “predictive or ‘probabilistic’ element in merger adjudication”.²³ The Competition Tribunal emphasised that merger adjudication is an exercise to determine the “likely” consequences that a merger may have and, therefore, “a prediction regarding what may happen after implementation is inherent in the statutory design.”²⁴ The exercise of predicting such consequences is reliant on economic theory and includes predictions based on past behaviours.

It can, therefore, be stated with confidence that merger regulation is a proactive exercise to ensure that mergers do not result in a substantial prevention or lessening of competition within a market. The aforementioned, however, is not without qualification as the Competition Act goes beyond granting authoritative and investigative powers to the Competition Authorities. This is due to the aspects mentioned in section 12A of the Competition Act, which the Competition Authorities must have regard to when tending to a merger notification. Section 12A states that a merger, which is likely to substantially prevent or lessen competition, may still be approved if the merging parties can show that “technological, efficiency or other pro-competitive gain” will outweigh the substantial prevention or lessening of competition.²⁵ The section further provides that another important consideration is whether it can be justified in terms of public interest grounds. This links to the intentions of the Competition Act of South Africa to correct our past wrongs (as contained in the preamble and discussed above).²⁶ The section, further, continues to elaborate on the aforementioned considerations, a discussion of which is beyond the scope of this dissertation.

Davis JP effectively summarises this in *Distillers Corporation (South Africa) Ltd. v Bulmer (SA) (Pty) Ltd*:

²³ Case 06/LM/Jan02 – Reasons for Tribunal Decision (Non-Confidential version) par 24.

²⁴ *Ibid* par 24.

²⁵ Section 12A(1)(a)(i) of the Competition Act.

²⁶ Section 12A(1)(b) and par 1.2 of the Competition Act.

“The applicable sections of the Act thus provide a clear indication of the purpose of chapter 3, namely that transactions which are likely to substantially lessen competition should be carefully examined by the competition authorities. This interpretation is supported by the preamble to the Act which provides, inter alia, that the Act ‘restrain particular trade practices which undermine a competitive economy and establish independent institutions to monitor economic competition’. Section 2 of the Act provides that the purpose of the Act is to promote competition in the Republic. It follows that the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation to section 12 of the Act.”²⁷

On the whole, the purpose and scope of merger control centres around the government recognising the need to proactively regulate corporate structures in the markets in order to maintain a healthy, fair and competitive economy.

2.2. A competitive approach to mergers

2.2.1. Section 12(1) of the Competition Act – A merger defined

Section 12(1) of the Competition Act sets out what would constitute a merger. Subparagraph (a) states that a “merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm”. Section 12(1)(b), by using the term “may be achieved in any manner”, provides an open list of how a merger can be achieved, including, but not limited to purchasing or leasing shares, assets or an interest of another firm or by amalgamating, or otherwise combining, with a another firm.

Neuhoff notes that the most important aspects regarding sections 12(1)(a) and (b) are that there must be an acquisition or establishment of control. Additionally, the asset, right or

²⁷ Case 2002 2 SA 346 (CAC) pp. 357-358; Sutherland and Kemp p. 8-11.



interest acquired by the acquiring firm from the target firm must constitute a business or at least part of a business.²⁸

Sutherland and Kemp severely criticise the legislature's failure to define the term "control" in the Act. They state that the fact that the Competition Authorities have yet to decide on a definitive definition for "control" has led to a "formalistic and literalistic approach to the concept" creating uncertainty for firms who have to determine whether transactions that they enter into would qualify as mergers.²⁹ This uncertainty may cause superfluous merger notifications (and, thereby, a squandering of notification fees paid out of fear of non-compliance), which could have been avoided if addressed by the legislature.

The legislature was not completely oblivious to the possible consequences of not defining "control" and attempted to provide some direction in section 12(2) with a list of instances where direct or indirect control is established. The Competition Tribunal, however, noted in the matter of *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd.* that the term "control" is a too elastic notion to confine the possible instances thereof to a closed list as per section 12(2).³⁰

To illustrate the *lacunae* of section 12(2), a stringent interpretation of "control" in terms thereof would indicate that it fails to encapsulate one of the most common methods in which firms merge, for instance, where a firm acquires the business of another by a sale of assets. This *lacuna* has not gone unnoticed, as the Competition Tribunal observed exactly that in the matter of *Bulmer SA (Pty) Ltd. v Distillers Corp (SA) Ltd.*³¹ The Competition Tribunal, however, accepted that control was established by the implications of section 12(1) and, thereby, avoided the conundrum left by the legislature.³²

The Competition Appeal Court in the matter of *Distillers Corp (SA) Ltd. v Bulmer SA (Pty) Ltd.* did, however, illustrate the relationship between sections 12(1) and 12(2):

²⁸ Neuhoff *supra* p. 206.

²⁹ Sutherland and Kemp *supra* pp. 8-14.

³⁰ Case 30/LM/Jun03 par 32.

³¹ Case 94/FN/Nov00 101/FN/Dec00 par 13-14.

³² *Ibid* p. 28.

“When we want to understand what control means for the purpose of section 12 we must interpret the language of section 12(1) and see the instances of section 12(2) as ancillary to but not determinative of that inquiry. To put it in another way section 12(2) sets out the most commonly occurring situations to be found within the boundary of meaning of control but it does not set the boundary - that must be done by reference to section 12(1) alone.”³³

2.2.2. The bright lines approach

One of the most distinct approaches to determining “control” developed by the Competition Authorities, is the “bright lines approach”.

The “bright lines” approach to determine control is not unique to South Africa, however, it became a part of the South African competition law precedence in the *Ethos* matter.³⁴ The notion is that if a firm previously did not have control over another firm, it will be deemed to acquire control if any of the instances of control described in the provisions of section 12(2) occurs.³⁵ For instance, it recognised that a shareholder who obtains more than 50% of the interest in a company or who can exercise the majority of the voting rights at a general meeting may cross the bright line.³⁶ The Competition Tribunal did, however, ensure to emphasise that section 12(2) did not only provide for bright lines and illustrated this but stating that “section 12(2)(g) is anything but ‘bright’.”³⁷

It must be kept in mind that the provisions of section 12(2) are not all equally concise in their application, for instance, section 12(2)(b) is far more clear than section 12(2)(g).³⁸ The application of the “bright lines” approach does, however, as stated in the *Ethos* matter, give clarity to both regulator and regulated.³⁹ One would, therefore, be wise to err on the side of

³³ Case 08/CAC/MAY 01 pp. 10-11.

³⁴ *Ethos supra* par 16.

³⁵ *Ibid* par 42.

³⁶ *Ibid* par 44.

³⁷ *Ibid* par 43.

³⁸ Refer the individual discussions of both *infra* par 2.3.2 and par 2.3.7 respectively.

³⁹ *Ethos supra* par 35.

caution when applying the “bright lines” approach to determine if control will actually be established by means of the various scenarios under section 12(2).

Sutherland and Kemp contend that the bright lines should be viewed when a proper and substantive concept of control can be considered.⁴⁰ This, however, calls for legislative intervention to provide for a definitive definition of control.⁴¹

It will be beneficial to note the following observations made by the Competition Authorities about the concept of “control”, an elaborate discussion of which is not undertaken in this dissertation:

- Control can be established jointly by two individual firms;^{42 43}
- Once a firm acquired control over another and notified same to the Competition Authorities, then it will not be obliged to notify again should it establish a secondary form of control over that same firm in terms of any of the other provisions of section 12(1) and (2);⁴⁴ and
- The various instances of control can easily overlap.⁴⁵

Considering the foundation framework set by establishing the purpose, scope of competition law and what actually constitutes a merger, the next section investigates the most problematic instances of control provided in section 12(2).

2.3. The instances of control

As stated above, the interpretation and application of section 12(2) has, for the majority of the part, been left to the Competition Authorities to determine.⁴⁶ The following paragraphs

⁴⁰ Sutherland and Kemp pp. 8-17.

⁴¹ *Ibid.*

⁴² *Cape Empowerment Trust Ltd. v Sanlam Life Insurance Ltd.* 05/X/Jan06 - See brief discussion hereof *infra* par 2.3.1.2.; Note that when joint control shifts to single control by the acquiring firm, it may still have to be notified as indicated in the matter of *Naspers Ltd./Electronic Media Ltd.* 23/LM/Feb07 par 16 where the Competition Tribunal noted that “*in examining the impact of this merger on competition our task is to establish whether any likely change in competitive conditions, in particular a likely substantial lessening of competition, is attributable to the removal of Johncom from the joint control structure.*”

⁴⁴ *Ethos supra* par 36 -37.

⁴⁵ *Ibid* – by implication.

will explore the more troublesome provisions of section 12(2). In the interest of staying within the boundaries of this topic, the following provisions of section 12(2) will not be discussed:

- Section 12(2)(c) – Ability to appoint or veto the appointment of a majority of the directors;
- Section 12(2)(e) – Control of a trust; and
- Section 12(2)(f) – Control of a close corporation.

2.3.1. Section 12(2)(a) – Beneficial ownership of the issued share capital

2.3.1.1. The scope of issued share capital

Section 12(2)(a) of the Competition Act provides that:

“A person controls a firm if that person- a) beneficially owns more than one half of the issued share capital of the firm”.

In section 3 of the Competition Act, which provides for the application of the Competition Act, and more specifically section 3(2)(c), the legislature took specific caution to separately mention “issued share capital” and “member’s interest of a close corporation”. This separation was repeated between sections 12(2)(a) and 12(2)(f), it is, therefore, submitted that section 12(2)(a) should solely apply to companies.

It is submitted that considering that the Competition Act relies on the Old Companies Act, in order to assist with the interpretation of a subsidiary,⁴⁷ one can deduce that the same approach should be applied in order to determine the scope of application to the term “issued share capital”. Put differently, since the Old Companies Act was the corporate legislation in force at the time of the promulgation of the Competition Act, one should use the Old Companies Act to determine what the intention of the legislature was when

⁴⁶ Refer *supra* par 2.2.1.

⁴⁷ Section 12(2)(d) of the Competition Act makes specific reference to as contemplated in section 1 (3) (a) of the Companies Act, 1973 (Act No. 61 of 1973)”.



interpreting section 12(2)(a) of the Competition Act.⁴⁸ The Old Companies Act addresses share capital under section 74 and provides that:

“The share capital of a company may be divided into shares having a par value or may be constituted by shares having no par value: Provided that all the ordinary shares or all the preference shares shall consist of either the one or the other.”⁴⁹

This seems to restrict the definition of “shares” under section 1 of the Old Companies Act, which states that a share “in relation to a company, means a share in the share capital of that company and includes stock”. It is uncertain as to whether the legislature’s intention was to include the stock of a company when assessing whether a person beneficially owns more than half of the issued share capital of a firm or not.

Sutherland and Kemp address the fact that the Old Companies Act has since been replaced by the New Companies Act in their discussion on section 12(2)(d).⁵⁰ They state that it is uncertain whether the provisions of the New Companies Act relating to subsidiaries should now apply to clause 12(2)(d) as the Old Companies Act has, since the inception of the New Companies Act, been largely repealed.⁵¹

The New Companies Act excluded the reference to stock in its definition of “shares”, which merely states that a share “means one of the units into which the proprietary interest in a profit company is divided”.⁵² Section 25 of the New Companies Act addresses the nature of shares and states that it is movable property and, furthermore, places certain restrictions on shares. These restrictions include, but is not limited to, the notions that shares may no longer have a nominal or par value (subject to item 6 of Schedule 5) and that the shares issued and held by a shareholder before the inception of the New Companies Act will have the same rights that it had notwithstanding the repeal of the Old Companies Act.⁵³

⁴⁸ Refer par 1.2 and 1.3 *supra*.

⁴⁹ Section 74 of the Old Companies Act.

⁵⁰ Sutherland and Kemp *supra* pp. 8-24.

⁵¹ Refer par 2.3.4 for a discussion on subsidiaries in terms of competition law.

⁵² Section 1 of the New Companies Act.

⁵³ Item 6 of Schedule 5 addresses the approach that one has to take to determine the nature and status of shares held by a shareholder immediately before the inception of the Companies Act 71 of 2008; the shares will maintain those rights until the Companies Memorandum of Incorporation is amended, acquired by the

Notwithstanding that the legislature elected not to insert a similar provision of section 12(2)(a) of the Competition Act into section 2 of the New Companies Act, the above would suggest, at first glance, a symbiotic relationship created between the Competition Act and the Old Companies Act in order to assess the scope and application of section 12(2)(a). However, this relationship appears to have now been complicated by the repeal of the Old Companies Act in order to make way for the inception of the New Companies Act.

The Competition Commission has yet to publish a directive or some guidance on which version of the Companies Act (the old 1973 or the new 2008 version) to use when interpreting the provisions of the Competition Act and, unfortunately so, it seems as though the notion of “when in doubt, notify” will have to apply until such time as clarity has been obtained. This means that those companies who are unsure whether their transaction constitutes a merger as they are uncertain as to whether there was an acquisition of “control” will now have to notify in order to mitigate the risk that they fail to notify and run into a wholesale “unscrambling” exercise later.⁵⁴

2.3.1.2. The scope of beneficial ownership

The next issue that arises when interpreting section 12(2)(a), is the extent of the scope of “beneficial ownership”. A point of departure here is the implications of the matter of *Caxton and CTP Publishers & Printers Ltd. v Naspers Ltd.* where the Competition Tribunal left open the discussion of whether “beneficial ownership” in terms of section 12(2)(a) should be construed in the narrow sense or whether it can be extended to include “beneficial interest”.⁵⁵ What the Competition Tribunal, however, established in *Caxton* (with mention to their finding in the *Ethos* matter⁵⁶) was the following:

company itself, surrendered to the company in terms of section 164 of the New Companies Act or by operation of item 6(3) of Schedule 5.

⁵⁴ The lack of directive was confirmed telephonically on 26 October 2016 and 31 October 2016 by two independent representatives of the Competition Commission who confirmed that, at this stage, the Commission does not have a definitive view on the applicable Act (the Old or New Companies Act).

⁵⁵ 16/FN/MAR04 par 32-33.

⁵⁶ *Ethos supra*.

“We made the point that control can also be exercised by virtue of a party’s economic leverage over another and that this formed the rationale for the language of section 12(2)(a) which emphasises ownership of shares as something distinct from voting rights”.⁵⁷

Therefore, it seems that the Competition Authorities’ approach would take into consideration the economical aspect of beneficial ownership. However, the Competition Tribunal demonstrated that there should be a link between control and economic or political leverage as the inability to control the indirect holding negates the ability to use such holding to exercise economic or political control.⁵⁸ This, as stated by Sutherland and Kemp, indicates a restrictive interpretation of section 12(2)(a).⁵⁹

It should be noted that Sutherland and Kemp⁶⁰ is quite critical of the Competition Tribunal’s finding in the *Ethos* matter with respect to the application of economic or political leverage to section 12(2)(d) and their criticism seems to extend to the findings of the Competition Tribunal in that same case with regards to the discussion of proportional relationship between the number of shares held, the right to share in capital and the voting rights attached to shares. The findings in the *Ethos* matter with regards to the economical aspect of control is, therefore, not without criticism and, Sutherland and Kemp opines that it is not persuasive.⁶¹

The Old Companies Act is quite clear on its definition of “beneficial interest” in section 140A, however, section 140A was only applicable to listed securities and financial instruments which can be converted into listed securities.⁶² It is, therefore, clear that the legislature’s intention was to specifically address listed securities only and that the common law position should be applied to unlisted securities.⁶³ The New Companies Act, however, does not limit the application of the definition to listed securities only and states that:

⁵⁷ *Ethos supra* par 29.

⁵⁸ *Ibid* par 35.

⁵⁹ Sutherland and Kemp p. 8-19.

⁶⁰ Sutherland and Kemp p. 8-22 (fn113).

⁶¹ *Ibid* p. 8-19.

⁶² Section 140A of the Old Companies Act; Henochsberg *Companies Act 61 of 1973 and Commentary* p. 250.

⁶³ See below for an indication of what the common law requires for “beneficial interest” and “ownership” in accordance with the views of Henochsberg.



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

(a) receive or participate in any distribution in respect of the company’s securities;

(b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or

(c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities,

*but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002)”.*⁶⁴

Henochsberg discusses the implications of the new scope of application of the amended definition of “beneficial interest” (as based on the version contained in section 140A of the Old Companies Act) and states that this new definition is an amendment of the common law concept of beneficial ownership (as opposed to its predecessor in the Old Companies Act, which was not).⁶⁵ Henochsberg continues its discussion and notes that the inclusion of “or” in the New Companies Act (as seen above) could indicate that each of the categories of beneficial interest could constitute beneficial ownership which, according to Henochsberg, seems to be the legislature’s intention. Note that this is a contrast to the common law position where the beneficial owner of a share would be the holder of all the categories, that is, subparagraphs (a), (b) and (c) as encapsulated in the above definition of “beneficial interest”. Henochsberg continues to state that all the categories jointly will constitute “beneficial ownership” – which is apparently the legislature’s intention.⁶⁶

To summarise the above, Rachlitz states the following:

“According to the concept of company ownership established under the Companies Act (71 of 2008) in conjunction with the common law, company ownership, in a wider

⁶⁴ Section 1 of the New Companies Act.

⁶⁵ Henochsberg *Companies Act 71 of 2008 and Commentary* (hereinafter referred to as “Henochsberg”) p. 220.

⁶⁶ *Ibid* p. 220.



sense of the word, can be broken down to three different forms of legal recognition as “owner”. Firstly, it is comprised of the legal capacity to dispose of any shares (“ownership” in the narrow sense of the word). Secondly, it refers to the legal capacity to exercise any shareholder rights vis-à-vis a company (“shareholders” or “members”). The third category of company ownership is that of “holders of a beneficial interest”. It includes the first two, but exceeds them in that it also covers legal capacity to cause the disposition of any shares and/or the exercise of any shareholder rights vis-à-vis the company, whether accompanied by the legal capacity to actually do so or not. Insofar as the exceeding part of it is concerned, the establishment of the category of “holders of a beneficial interest” aims at identifying the “ultimate owners” of, or “final investors” in, a company.”⁶⁷

If one considers “control” by referring to section 12(2)(a) in isolation, not considering sections 12(2)(b) to (g), then the necessity to determine whether the economic aspect of beneficial interest is applicable or not becomes quite concerning. To provide an example, some companies have made use of preference shares when restructuring its shareholding in order to comply with Broad Based Black Economic Empowerment (BBBEE) regulations in an attempt to obtain better BBBEE ratings.⁶⁸ In order to accomplish this, the companies issue a new class of undefined shares (to be converted into ordinary shares) and then convert their current ordinary shares into cumulative redeemable preference shares with a coupon of a certain percentage. These new preference shares (held by the same shareholders who held the ordinary shares before their conversion) create a liability for the company, which effectively extracts the equity of the company from its ordinary shares.

When a portion of the new ordinary shares are issued to such previously disadvantaged persons, to give them a percentage ownership of the company (the remaining ordinary shares being issued to the current preference shareholders), the original shareholders are not parted with their equity. In this scenario, the shareholders of the new ordinary shares controls the company as they have the voting rights attached to those shares. However,

⁶⁷ Rachlitz (2013) “Disclosure of Ownership in South African Company Law” *Stellenbosch Law Review* pp. 406-407.

⁶⁸ These regulations require, *inter alia*, that previously disadvantaged persons must own a certain percentage of a company in order to receive a determined compliance rating.

since dividends are first paid to the preference shareholders in terms of the coupon rate until the new liability is settled, it cannot be seen that the new ordinary shareholders will have an economic benefit from their new vested form of control, notwithstanding their voting rights.⁶⁹

When the scenario above is analysed in accordance with the discussion provided in Henochsberg's interpretation of the new definition of beneficial interest as opposed to the common law stance (in line with the provision of the Old Companies Act),⁷⁰ it is clear that new ordinary shareholders may still have beneficial ownership in terms of the New Companies Act. This is notwithstanding the lack of rights to share in distributions as the second category of beneficial interest has been met i.e. the right to exercise any or all of the rights attached to the company's securities.⁷¹ If interpreted in terms of the common law, it however seems that they would not be deemed beneficial owners and, therefore, control (in terms of section 12(2)(a) only) would not vest.

In the matter of *Cape Empowerment Trust Ltd. v Sanlam Life Insurance Ltd.*, the Competition Tribunal was faced with the determination whether the acquisition of preference shares that would only have voting rights if dividend payments or redemption payments were in arrears was an acquisition of "control".⁷² The Competition Tribunal found that the acquisition of preference shares (which constituted a majority of the share capital of that firm) did indeed constitute control, notwithstanding the fact that the voting rights were conditional upon default of the aforementioned payments. It should be noted that all the matters discussed under this paragraph were adjudicated before the inception of the New Companies Act in 2011. The implications of this matter shows the flipside of the coin of the interpretation conundrum illustrated by the BBBEE restructure above in that it is held that the acquisition of preference shares, which constitutes a majority of the share capital will be regarded as a vesting of control, notwithstanding the lack of voting rights normally

⁶⁹ Their rights to elect the board and vote at meetings may well manifest as control in terms of section 12(2)(b) and/or (c) as the case may be, but for the purpose of this discussion about section 12(2)(a), their ownership will not amount to any economic benefit while the liability of the preference shares exist.

⁷⁰ Refer *supra* fn. 64.

⁷¹ This is the position at least until the preference shares have been redeemed (or the dividends declared exceed the coupon rate) and the ordinary shareholders are entitled to share in dividends as ordinary shareholders.

⁷² Refer *supra* fn. 42.



associated therewith. The Competition Tribunal stressed that its findings are limited to the case at hand and that this was the first case where it had to consider the scenario where preference shares formed the majority of the share capital of a company.⁷³

The implications hereof are that without legislative intervention, or a directive or other guidance from the Competition Authorities, the question whether beneficial ownership should be construed in the narrow or in the broad sense is still left open.

A departing point here may be the statement by Sutherland and Kemp that section 12(2)(a) “should only apply to equity in the more technical sense”.⁷⁴

2.3.2. Section 12(2)(b) – Voting a majority of the votes

Section 12(2)(b) provides that:

“A person controls a firm if that person- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person”.

It should be stressed from the outset that the application of section 12(2)(b) is limited to votes that may be cast at a general meeting only. Furthermore, and unlike section 12(2)(a), section 12(2)(b) seems to apply to a firm in the broader sense, accordingly it is not limited to companies only.

A final observation is that the nature of the section seems *prima facie* quite straight forward. A cautiously confident assumption would, therefore, be that the “bright line approach” developed in the *Ethos* matter would apply in the majority of the cases.⁷⁵

The application of section 12(2)(b) was, however, highlighted in the matter of *Gold Fields Ltd. v Harmony Gold Mining Company Ltd.* where the counsel for Gold Fields Ltd. pleaded (in the alternative) the application of section 12(2)(b) or section 12(2)(g) to establish an

⁷³ *Cape Empowerment Trust supra* par 63.

⁷⁴ Sutherland and Kemp p. 8-19.

⁷⁵ *Ethos supra* fn 30.



acquisition of control.⁷⁶ The basis for this claim was that the chances are that not all holders of voting rights will be present at a general meeting of a large public company. Control can, therefore, easily be established by a person whose normal voting rights are less than 50% of the total voting rights where, as a result of a weak voter turnout, he/she will have a majority of the voting rights at that given meeting. In line with this scenario, the applicant in the *Gold Fields v Harmony*, argued that when past attendances is taken into consideration, a shareholder who had 34,9% of the votes would be able to control a majority of the votes at a general meeting.⁷⁷ This argument was opposed by the respondent who stated that European practices indicate that the latest statistic for voter turnout should be taken into account, if this is the case to follow, then 34,9% would not have constituted control at the latest meeting.⁷⁸

The Competition Tribunal did not definitively decide on the application of section 12(2)(b) as it held that control was not established on these facts.⁷⁹ Sutherland and Kemp suggests that “majority” in section 12(2)(b) does in fact mean 50% plus one vote (as this is how a similar provision in the Companies Act is interpreted⁸⁰) and that section 12(2)(g) would rather be used to determine the establishment of control in terms of the above scenario. It is unclear whether Sutherland and Kemp’s suggestion to interpret “majority” as 50% plus one is with reference to section 2(2)(ii)(aa) of the New Companies Act or section 1(3)(a)(i)(aa) of the Old Companies Act. However, judging from their reference to the Old Companies Act as the “Companies Act” in previous discussions, one can assume that the reference here is to the latter.⁸¹

The application of section 12(2)(b), therefore, seems quite straight forward and it seems as though the bright lines approach would constitute a good first step to determine whether control has actually been established. Should the bright lines approach not be a decisive factor, then, as illustrated in the *Harmony – Gold Fields* matter, section 12(2)(g) may serve as

⁷⁶ Unreported case no 86/FN/Oct04 par 28-29.

⁷⁷ *Ibid* par 69.

⁷⁸ *Ibid* par 69 - As opposed to the last six year average used by the applicant. (*Ibid* par 69); *Ibid* fn20 - The highest recent voter turnout at a general meeting of Gold Fields before the matter was heard by the Competition Tribunal was 91,56% (this was in 2002).

⁷⁹ *Ibid* par 72.

⁸⁰ Sutherland and Kemp *supra* p. 8-21.

⁸¹ *Ibid* p. 8-20.

a viable safety net. It should be noted, however, that this is not a conclusive alternative as the decision in the *Harmony – Gold Fields* matter is not without criticism.⁸²

What is clear is that the Competition Authorities would rather avoid providing any definitive interpretation of control in terms of section 12(2) if it able to provide its adjudication without the need to. To illustrate the aforementioned, if the facts of a particular matter is of such a nature that section 12(2)(b) and 12(2)(g) are both applicable, the Competition Authorities would rather rely on the far-reaching provisions of section 12(2)(g) so as to avoid providing a definitive interpretation on a more stringent provision, *in casu*, section 12(2)(b).⁸³

2.3.3. Section 12(2)(d) – Holding companies and their subsidiaries

Section 12(2)(d) states that:

“A person controls a firm if that person- d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973)”.

As discussed above, the Competition Act relies heavily on the Old Companies Act’s interpretation of a “subsidiary” in order to determine the element of control.⁸⁴ Sutherland and Kemp discuss the implication of the fact that section 12(2)(d) only refers to section 1(3)(a) of the Old Companies Act and that it has not been amended to refer to the new Companies Act.⁸⁵ Their discussion revolves around the fact that section 1(3)(a) merely states when a company is a subsidiary and that it is in fact section 1(4), which states when a company is a holding company. They indicate that it can only make sense if section 12(2)(d) of the Competition Act provided that a firm controls another if it is a holding company of the other, in terms of section 1(4) of the Old Companies Act, and that the other is a subsidiary of that firm, in terms of section 1(3)(a) of the same Act. Sutherland and Kemp continue to

⁸² Sutherland and Kemp *supra* p. 8-20.

⁸³ Refer *infra* par 2.3.4 for a discussion on the “catch-all” nature of section 12(2)(g) of the Competition Act.

⁸⁴ *Supra* par 2.3.1.

⁸⁵ Sutherland and Kemp p. 8-22.

unpack the implications of merely mentioning section 1(3)(a) of the Old Companies Act by noting that sections 1(3)(b) and 1(3)(cA) are supposed to assist one in determining the scope of section 1(3)(a) and consequently they opine that section 1(3)(a) “will be ambiguous and overly narrow if it is not interpreted in terms of section 1(3)(b)”.⁸⁶ They hold a very strong opinion that section 1(3)(b) and “with less conviction section 1(3)(cA)” should be used to determine the application of section 1(3)(a) of the Old Companies Act to section 12(2)(d) of the Competition Act.⁸⁷

The problems relating to section 12(2)(d) of the Competition Act continues when one considers the actual provisions of section 1(3)(a) of the Old Companies Act. It is to be noted that in terms of section 1(3)(a) of the Old Companies Act for a company to be considered as a subsidiary of another, the very first prerequisite is that it must be a “member” of that company. The implications on the prerequisite of membership was noted by Coetzee J during the adjudication of the matter of *Unisec Group Ltd. v Sage Holdings Ltd.* where he stated that a company can circumvent the provisions in the Old Companies Act, which regulates a subsidiary relationship by arranging for a nominee to hold its shares on its behalf.⁸⁸ This will effectively make the nominee the member (and not the company), which means that the relationship between the company and of the actual owner of the shares falls short of the membership prerequisite to be deemed a subsidiary of that company. This is due to his observation that “there is no deeming provision in respect of membership (only the ‘holding’ of shares, which has nothing to do with membership, is so dealt with)” and accordingly he called for intervention by the legislature to address this *lacuna*.⁸⁹

It should be noted that section 1(3)(cA) was only introduced into the Old Companies’ Act in 1998, which was after the adjudication of the *Unisec* matter.⁹⁰ The introduction of section 1(3)(cA), however, did little to address the aforementioned *lacuna* in the application of section 1(3)(a) as the prerequisite of membership is not resolved. This is evident as Coetzee J could not make use of section 1(3)(b)(iii) during his deliberations of the *Unisec* matter. Section 1(3)(b)(iii) specially makes provision for nominee holders to be considered, however,

⁸⁶ Sutherland and Kemp *supra* p. 8-23.

⁸⁷ *Ibid.*

⁸⁸ 1986 (3) SA 259 (T) p. 269-271.

⁸⁹ *Supra* p. 269.

⁹⁰ Section 1(3)(cA) of the Old Companies Act was introduced by section 1(b) of Act 35 of 1998.

not in order to circumvent the membership prerequisite. Sutherland and Kemp are quite critical of the incorporation of section 1(3)(cA) into the Old Companies Act and state that its application may cause confusion.⁹¹

The introduction of section 1(3)(cA) was, therefore, a move in the right direction by the legislature in that it makes express provision for the incorporation of beneficial holders into the ambit of section 1(3)(a) (as opposed to the narrow interpretation of only registered owners). However, the aforementioned step by the legislature did little to resolve the possible loopholes as observed by Coetzee J.

Fortunately the calls by Coetzee J for legislative intervention were answered the second time around with the inception of the New Companies Act as it has done away with membership as a prerequisite to the subsidiary relationship.⁹²

Sutherland and Kemp note the exclusion of the membership prerequisite in the New Companies Act as a “major substantive difference”, unfortunately (as mentioned above), whether section 3 of the New Companies Act should apply to section 12(2)(d) of the Competition Act in the wake of section 1(3)(a) of the Old Companies Act is still uncertain and will remain so in the absence of legislative intervention or a directive by the Competition Authorities.⁹³

2.3.4. Section 12(2)(g) – Material influence of the policy of the firm “the catch all provision”

Section 12(2)(g) of the Competition Act provides that:

“A person controls a firm if that person- (g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).”

⁹¹ Sutherland and Kemp p. 8-23.

⁹² Refer *infra* par 3.2.1 for a discussion of the new provisions relating to the holding-subsidiary relationship.

⁹³ *Supra* par 3.2.1.1; Sutherland and Kemp p. 8-24.



Sutherland and Kemp remark that the use of the word “firm” suggests a more general operation and, therefore, applies to all economic units (including companies, close corporations and trusts).⁹⁴

The term “firm” is defined in section 1(xi) the Competition Act as follows “‘firm’ - includes a person, partnership or a trust”. The seemingly lacksadaisical approach of the legislature to define the term has led it to exclude an express provision with regards to companies (and close corporations) from the ambit of the definition. It is, therefore, submitted that mention of the word “person” should be construed to include both natural and juristic persons, which seems to be the intention of the legislature. This reiterates Sutherland and Kemp’s interpretation as above, where the general application to all economic units and the nature of section 12(2)(g) applies.

The nature of section 12(2)(g) is a catch-all provision, which applies to scenarios that cannot be determined in terms of sections 12(2)(a)-(f), or as Neuhoff explained, section 12(2)(g) was included to deal with any deficiencies of the aforementioned sections.⁹⁵

Sutherland and Kemp cannot but express their frustration by noting that it would have been much better if control was defined indefinitely, however, they do acknowledge that the use of section 12(2)(g) can fill the *lacunae* of the other “more specific definitions of control”.⁹⁶ It is submitted that their use of the word “definitions” is questionable, as the legislature did not define control in section 12(2) but merely created an indication of different scenarios that would constitute an instance of control, which is reiterated by the fact that section 12(2) is not a *numerus clausus*.⁹⁷

Neuhoff and Sutherland and Kemp all note that the application of section 12(2)(g) extends to circumstances where a firm merely has the “ability” to exercise such a material influence over the policy of a target firm and that the act of actually exercising such an influence is not

⁹⁴ Sutherland and Kemp p. 8-26.

⁹⁵ It is uncertain where the term “catch-all” was coined, however, the Competition Tribunal did find its use favourable during its adjudication of the *Ethos* matter *supra* par 32; Neuhoff *supra* p. 207; It is assumed that Neuhoff was paraphrasing the Competition Tribunal’s adjudication of *Ethos supra* par 32.

⁹⁶ Sutherland and Kemp p. 8-26.

⁹⁷ *Supra* par 2.2.1. – discussion of the *Ethos* matter.



required.⁹⁸ This seems to be the case with the other provisions of section 12(2) as well e.g. the mere ability to exercise the majority of the voting rights at a general meeting of a company [section 12(2)(b)] will also be construed as the establishment of control upon acquiring such a right.

For the purposes of the notification procedure, one must be cautious to not read too much into such observations. This is because section 12(1) still requires that there must be an actual acquisition (whether directly or indirectly) of control over the whole of a target firm's business or at least part thereof before it will constitute a merger that may be subject to notification.⁹⁹ The aforementioned observations of Neuhoff and Sutherland and Kemp are, however, not in vain as the notion of mere ability may well have certain consequences when the same approach is applied to section 2(2)(d) of the New Companies Act and is, therefore, worthy to note.¹⁰⁰

2.3.4.1. The material influence aspect

Sutherland and Kemp suggest that “material influence” underlies the concept of control.¹⁰¹ The wording of section 12(2)(g) is such that it seems the legislature, quite insidiously impressed upon us that the various scenarios set out in sections 12(2)(a) to 12(2)(f) indicate what it deems as to “materially influence”. They summarise instances of control as set-out in sections 12(2)(a) to (f) in three different manners:

- If a firm owns more than 50% of another firm (whether directly or indirectly);
- If a firm has the ability to appoint or dismiss controlling managers of another firm (whether directly or indirectly); and

⁹⁸ Neuhoff *supra* p. 207; Sutherland and Kemp *supra* p. 8-28.

⁹⁹ Provided that it falls within the notification thresholds as published from time to time in terms of section 11 of the Competition Act.

¹⁰⁰ Refer discussion at par 3.2.4. *infra*.

¹⁰¹ Sutherland and Kemp *supra* p. 8-14.



- If a firm has the ability to make management decisions of another firm free from control by others (such an ability to be exercised either directly or by the power to replace managers).¹⁰²

Accordingly, the catch-all nature of section 12(2)(g) indicates that any instance of possible control that is not encapsulated by sections 12(2)(a) to (f) and which may not justify an extension of their application on policy grounds, may still be deemed “control” for the purpose of merger adjudication in terms of section 12(2)(g).

In order to demonstrate the nature of section 12(2)(g), the following paragraphs considers the two different scenarios.

2.3.4.2. Minority shareholder control

Neuhoff notes the ability of minority shareholders to control a firm by various means e.g. shareholders agreements or a *de facto* ability to determine the outcome of shareholders meetings.¹⁰³

The ability to control by a minority shareholder via a shareholder agreement can be established if the agreement grants certain veto rights to the minority shareholders. Neuhoff accordingly indicates that the right to veto the adoption of strategic policies by a firm, the right to withhold consent to the adoption of a budget or the appointment of senior management may be sufficient for the Competition Authorities to determine that sufficient control has been established for the purposes of section 12.¹⁰⁴

Another method for a minority shareholder to obtain “control” is the notion of historical voter turnout as noted in the *Gold Fields – Harmony* matter.¹⁰⁵ As indicated above, a minority shareholder may have control over a firm if the holders of sufficient voting rights

¹⁰² Sutherland and Kemp *supra* p. 8-27.

¹⁰³ Neuhoff *supra* p. 209.

¹⁰⁴ Neuhoff *supra* p. 210.

¹⁰⁵ Unreported case no 86/FN/Oct04.

fail to show up at the meeting or fail to vote. In this instance, a minority shareholder may have a majority of the voting rights at the meeting and, thereby, control.¹⁰⁶

2.3.4.3. Management control

It has to be mentioned from the outset that Sutherland and Kemp observe that mere management control over a firm will not be adequate for the purposes of control. Their observation is based off the finding by the Competition Tribunal in the *Naspers* matter.¹⁰⁷ In the matter of *Nasmedia and Paarl Post Web Printers (Pty) Ltd*, the Competition Tribunal briefly addressed the issue of management control.¹⁰⁸ The Competition Tribunal, however, held that control was established in terms of section 12(2)(a) in that Naspers obtained 65% percent of the shareholding in Newprint and, therefore, held that control was established.¹⁰⁹

For the purposes of this discussion, what is worthy to note is that the parties made much of an argument that the new 65% percent shareholder did not obtain management control as the current managing director was contracted for five years. It was emphasised that the managing director in question would not do allow the company to be run in a manner that would conflict the target firm's interests.¹¹⁰

In the matter of *Iscor Ltd. and Saldanha Steel (Pty) Ltd.*, the Competition Tribunal had to adjudicate, *inter alia*, the position where a person who manages a firm had control as a result of lack of shareholder control over him.¹¹¹ The Competition Tribunal held that the shareholder acted as a constraint and was deemed not to be a "mere passive investor or spectator at board level."¹¹² The Competition Tribunal was further of the opinion that the

¹⁰⁶ Refer discussion *supra* par 2.3.2.

¹⁰⁷ Refer *supra* fn. 49.

¹⁰⁸ Ltd. 65/LM/May00 par 29.

¹⁰⁹ *Ibid* [note that the case report mentions section 11(2)(a), however this is assumed to be an error and it is submitted that reference should be to section 12(2)(a)].

¹¹⁰ *Ibid* par. 29.

¹¹¹ 67/LM/Dec01 par 46.

¹¹² *Ibid*.



shareholder had too much at stake to avoid a close scrutiny over the affairs of its investment.¹¹³

Sutherland and Kemp are of the firm view that the Competition Tribunal is unlikely to ever find that control for the purpose of section 12(1) can be established as a result of management control.¹¹⁴ Their statement does not come without a *caveat*, in that they note that normally managers will be subject to board supervision and at the ultimate control of the shareholders.¹¹⁵ Unfortunately, the *Iscor* matter did not provide a clean set of facts for management control and as it was held that the shareholder had too much at stake to allow management *carte blanche* over the business. Accordingly, it may be more accurate to state that the door may still be open, albeit not by much, for control to be established by means of the acquisition of management control.

¹¹³ *Iscor Ltd. and Saldanha Steel (Pty) Ltd supra* par 46.

¹¹⁴ Sutherland and Kemp *supra* pp. 8-27 at fn148.

¹¹⁵ *Ibid* pp. 8-28.



3. Chapter 3 – Control in terms of the Companies Act 71 of 2008

3.1. Introduction – The scope and purpose of inter-related and related parties

The inception of the New Companies Act brought with it many new concepts and principles. One of these new concepts as identified by Delport is the term “related” while the term “control” is a reintroduction into the South African company law.¹¹⁶ Henochsberg notes that the concept of related persons is a rebuttable presumption where parties are seen to be related if one of the provisions of section 2(2) of the New Companies Act is applicable, until such a presumption is disproved.¹¹⁷

This ties in with the above discussion, that the process of merger adjudication is a proactive exercise.¹¹⁸ As with merger adjudication, the rebuttable presumption regarding related persons by the Companies Act is similarly a proactive exercise. If parties are presumed to be related, they will have to seek exemption from the provisions of the New Companies Act where the “related” (alternatively “inter-related”) principle applies.¹¹⁹ This exemption must be obtained from either a court, the Companies Tribunal or the Panel, each of which has been granted the power to adjudicate over such matters in terms of section 2(3) of the New Companies Act.

Section 2(3) offers this exemption if the relevant person can provide sufficient evidence that he/she/it acts independently from such a related or inter-related person. This indicates a difference between merger adjudication and the exemption process of related persons in that the Companies Tribunal will, for instance, not have to undertake a predictive or probabilistic investigation into the likely consequences of actions by related persons.¹²⁰ The production of present evidence that he/she/it acts independently in relation to a specific action will, therefore, suffice.

¹¹⁶ Delport, P *The New Companies Act Manual (Student Edition) (2001)* pp. 4 and- 5.; Henochsberg *supra* p. 30(3).

¹¹⁷ Henochsberg *supra* p. 30(3).

¹¹⁸ *Supra* par 2.1.

¹¹⁹ Refer the discussions about sections 44 and 94(4)(c) *infra* par 3.1.1 and 3.1.2 respectively for an illustration of the application of the “related” principle in terms of some of the provisions of the New Companies Act.

¹²⁰ Henochsberg *supra* par 2.1.

Henochsberg indicates that the basic principle of the related relationship is to ensure that actions of persons must be independent.¹²¹ To illustrate the implications hereof, the application of section 2 of the New Companies Act in the following two different, yet prevailing, sections has to be considered:

- Section 44 – Financial assistance for subscription of securities; and
- Section 94(4)(c) – Requirements for membership of the audit committee.

Section 44 falls under Chapter 2 (Formation, Administration and Dissolution of Companies) - Part D (Capitalisation of Profit Companies) while section 94(4)(c) falls under Chapter 3 (Enhanced Accountability and Transparency) – Part D (Audit committees).

3.1.1. Section 44 of the New Companies Act

Section 44 governs the provision of financial assistance for the subscription of any option or securities of a company. It allows that a company may provide such finance to a related or inter-related person subject to the provisions of subsections (3) and (4), which set out certain prohibitions and prerequisites.

The predecessor to section 44 was section 38 of the Old Companies Act which, as noted by Cassim, only addressed financial assistance by a company for the acquisition of shares in itself or its holding company.¹²² The implication was that there was no prohibition on a company to provide financial assistance for the purchase of securities in its subsidiary.

The new section 44 now extends its application, from only applying to acquisition of securities in itself, to a related or inter-related company.¹²³ Henochsberg notes that the inclusion of the words “related” and “inter-related” extends the application of section 44 from downwards only (holding company to subsidiary), to upwards (subsidiary to holding company) and sideways (between two subsidiaries) as well.¹²⁴

¹²¹ Henochsberg *supra* p. 30(4).

¹²² Cassim *supra* p. 332.

¹²³ *Ibid.*

¹²⁴ Henochsberg *supra* p. 190.

Seligson notes that while section 44 draws to some extent on its antecedents in the Old Companies Act, it seems to be more “far-reaching” in its ambit and implications than its predecessors.¹²⁵ To illustrate how important section 44 is, the legislature deemed it necessary to provide that any director who failed to vote against a resolution which authorises financial assistance to person in contravention of section 44, is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence thereof.¹²⁶

The prerequisites and prohibitions set-out in subsection (3) include, *inter alia*, that the board may only approve such financial assistance should it be pursuant to shareholder approval by way a special resolution, adopted within the previous two years, and that the company must satisfy the solvency and liquidity test immediately after providing such assistance.¹²⁷

3.1.2. Section 94(4)(c) of the New Companies Act

Section 94(4)(c) governs the prerequisites for membership of a company’s audit committee. The functions of an audit committee are set out in section 94(7) and comes down to *inter alia*, the authority of the committee to appoint the company’s auditor, to determine his/her remuneration and to determine whether they are satisfied that the auditor conducted himself/herself independently from the company.

Section 94(4)(a) requires that a member must be director of the company (subject to meeting the requirements of section 94(5)), while sections 94(b) and (c) set out prohibitions to membership. The latter providing that a member may not be related to any person who falls within the ambit of section 94(4)(b), while section 94(4)(b)(ii) specifically disqualifies any potential member from the committee if he/she is a prescribed officer or full-time employee of a related or inter-related company.

Henochoberg discusses the implications of sections 94(4)(b) and (c) and states that the director in question may not be an immediate family member or a material supplier or even

¹²⁵ Seligson (2013) Exploring Sections 44 and 45 of the New Companies Act: The Perils Of Providing Financial Assistance *Business Tax and Company Law Quarterly* p 1-13.

¹²⁶ Section 77(3)(e)(iv) of the New Companies Act.

¹²⁷ Section 44(3)(a)(ii) of the New Companies Act; Section 44(3)(b)(ii) of the New Companies Act.

customer of such a person.¹²⁸ It elaborates on the implications of the aforementioned by explaining that a person (or entity) is a “material supplier or customer” where “circumstances are such that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that director is compromised by that relationship.”¹²⁹

3.1.3. A conclusion regarding the related principle

It is clear that the legislature recognised the need to govern all actions by a company where a lack of independence may lead to an abuse of the provisions of the New Companies Act or be prejudicial to the integrity of a company. As indicated above, there are a wide range of the actions, from financial decisions (section 44), for instance, to other administrative actions (section 94).

The importance of independence can easily be illustrated under the notion of an “arm’s length transaction”. Investopedia has a simple description for the universal term “arm’s length”:

*“An arm's length transaction is a transaction in which the buyers and sellers of a product act independently and have no relationship to each other. The concept of an arm's length transaction allows the market to ensure that both parties in the deal are acting in their own self-interest and are not subject to any pressure or duress from the other party. It also assures third parties that there is no collusion between the buyer and seller.”*¹³⁰

The description enumerates two important goals of the related principle. The first being the need to ensure that the board of a company acts in the best interest of the company, put differently to act not for the gain of another person to the prejudice of the company. The other being to ensure that there is no collusion between the director(s) and a material

¹²⁸ Henochsberg *supra* p. 359.

¹²⁹ *Ibid.*

¹³⁰ <http://www.investopedia.com/terms/a/armslength.asp#ixzz4QqokUrWX>.

supplier or customer of a company that would jeopardise the integrity or impartiality of the director(s).

3.1.4. The element of control

The legislature recognised the crucial role which the element of control plays in independence, specifically when determining the degrees of affinity or consanguinity between persons who may be subjected to non-arm's length transactions or actions. Henochsberg notes that section 2(2) of the New Companies Act is clearly based on section 12 of the Competition Act.¹³¹ The wording of the section extends to control not only in respect of a particular juristic person, but also over the business of the juristic person in question.¹³² This exemplifies the notion that the New Companies Act based its interpretation of control on section 12 of the Competition Act.

The element of control and the implications of the precedence of section 12(2) of the Competition Act will now be discussed in relation to the correlating provisions of section 2(2) of the New Companies Act.

3.2. Control in terms of Section 2

3.2.1. Section 2(2)(a)(i) – Control over a subsidiary

Section 2(2)(a)(i) of the New Companies Act addresses the related nature of subsidiaries and their holding companies and provides as follows:

“For the purpose of subsection (1), a person controls a juristic person, or its business, if— (a) in the case of a juristic person that is a company— (i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)(a)”.

¹³¹ Section 2(2) of the New Companies Act.

¹³² *ibid* p. 28.



The use of the term “control” in identifying a holding-subsidary relationship is not a new concept as section 3(1) of the Old Companies Act made use of the word when addressing the nature of the power required over voting rights.¹³³ The New Companies Act uses the term more liberally, in that it also extends to the ability to control the appointment of the board.

The application of competition law precedence, to determine the scope and ambit of section 2(2)(a)(i) of the New Companies Act, will be a moot exercise when one considers that the subsidiary – holding relationship is an old topic of discussion in the realm of corporate law and will be better addressed in its own precedence.

Accordingly, the correlation between section 2(2)(a)(i) of the New Companies Act and section 12(2)(d) of the Competition Act is much less troublesome than the interpretational headache when attempting to determine whether the Old or New Companies Act is applicable to section 12(2)(d) of the Competition Act.¹³⁴

It is, however, evident that there are consequential differences between the application of the subsidiary-holding relationship to corporate law compared to competition law. Section 3(1)(a)(i) of the New Companies Act (formally section 1(3)(a)(i)(aa) of the Old Companies Act) establishes a subsidiary-holding relationship where a person holds or controls the majority of voting rights. This is a similar provision to section 12(2)(b) of the Competition Act.

To illustrate the different consequences, we rely on Blackman’s suggestion that even where shares are held as security, the holder of such security will be regarded as holding the voting rights attached to such shares.¹³⁵

The notion is pragmatic in the domain of the related persons principle as it can be seen that the holder of the security over shares will be deemed to have a vested interest in the shares, which may implicate his/her/its independence.

¹³³ Sections 3(a)(i)(cc) and 3 Refer the comparison table *infra*.

¹³⁴ Refer *supra* par 2.3.3.

¹³⁵ Blackman, MS *Commentary on the Companies Act* Int 17.



The application of Blackman’s suggestion to competition law is more complicated, as identified by Sutherland and Kemp, since it would be ridiculous to expect a firm to notify a merger every time a security right over the majority of another firm’s shares have been acquired.¹³⁶ Firms will have to spend copious amounts of time and money to notify where it cannot reasonably be seen that holding a security right over shares will have an anti-competitive effect in the relevant market. Should the security right however realise and ownership in the shares vest, then it will be a completely different matter as the acquiring firm may find itself in the unfavourable position where the Competition Tribunal will have to adjudicate over the realisation of the security right in question.

In addressing the question of whether the Old or New Companies Act should be applicable to determine the application of section 12(2)(d) of the Competition Act, it is submitted that one need only look whether the company in question has conformed to the provisions of the New Companies Act or not. For instance, the substitution by a company of its par value shares for no-par value shares should be indicative of a company’s undertaking to be bound by the provisions of the New Companies Act and not that of the Old Companies Act.

3.2.2. Comparison between the Old and New Companies Act in respect of Subsidiaries

Subsidiary in terms of section 1 of the Old Companies Act:	Subsidiary in terms of section 3 of the New Companies Act:
<p>1(3)(a) For the purposes of this Act, a company shall be deemed to be a subsidiary of another company if—</p> <p>(i) that other company is a member of it and—</p> <p>(aa) holds a majority of the voting rights in it; or</p>	<p>3. Subsidiary relationships—</p> <p>(1) A company is—</p> <p>(a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination—</p>

¹³⁶ Sutherland and Kemp *supra* p. 8-22 and 8-23.



<p>(bb) has the right to appoint or remove directors holding a majority of the voting rights at meetings of the board; or</p> <p>(cc) has the sole control of a majority of the voting rights in it, whether pursuant to an agreement with other members or otherwise; or</p> <p>(ii) it is a subsidiary of any company, which is a subsidiary of that other company; or</p> <p>(iii) subsidiaries of that other company or that other company and its subsidiaries together hold the rights referred to in subparagraph (i)(aa), (bb) or (cc).</p> <p>(b) In determining whether a company holds the majority of the voting rights as contemplated in paragraph (a)(i)(aa)—</p> <p>(i) voting rights, which are exercisable only in certain circumstances shall be taken into account only—</p> <p>(aa) when those circumstances have arisen, and for so long as they continue; or</p> <p>(bb) when those circumstances are under the control of the person holding the voting</p>	<p>(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or</p> <p>(ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or</p> <p>(b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph (a).</p> <p>(2) For the purpose of determining whether a person controls all or a majority of the general voting rights associated with issued securities of a company—</p> <p>(a) voting rights that are exercisable only in certain circumstances are to be taken into account only—</p> <p>(i) when those circumstances have arisen,</p>
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<p>rights;</p> <p>(ii) voting rights held by a person in a fiduciary capacity shall be treated as not held by him but by the beneficiary of such voting rights;</p> <p>(iii) voting rights held by a person as nominee for another person shall be treated as not held by him but by that other person, and voting rights shall be deemed to be held by a nominee for another person if they are exercisable only on the instructions or with the consent or concurrence of that other person.</p> <p>(c) A body corporate or other undertaking, which would have been a subsidiary of a company had the body corporate or other undertaking been a company shall be deemed to be a subsidiary of that company.</p> <p>(cA) For the purposes of this subsection “hold” or any derivative thereof refers to the registered or beneficial holder (direct or indirect) of shares conferring a right to vote.</p>	<p>and for so long as they continue; or</p> <p>(ii) when those circumstances are under the control of the person holding the voting rights;</p> <p>(b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and</p> <p>(c) voting rights held by—</p> <p>(i) a person as nominee for another person are to be treated as held by that other person; or</p> <p>(ii) a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.</p> <p>(3) For the purposes of subsection (2), “hold”, or any derivative of it, refers to the registered or direct or indirect beneficial holder of securities conferring a right to vote.</p>
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3.2.3. Section 2(2)(a)(ii)(aa) – Majority of the voting rights

Section 2(2)(a)(ii)(aa) provides as follows:



“For the purpose of subsection (1), a person controls a juristic person, or its business, if a) in the case of a juristic person that is a company— (ii) that first person together with any related or inter-related person, is— (aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise”.

A direct comparison between the above section and section 12(2)(b) of the Competition Act indicates that the legislature of the New Companies Act intended to broaden the scope of application of section 2(2)(a)(ii)(aa) by some extent. It is submitted that this extension, of the ambit in question, was to ensure that it is as far reaching as possible without derogating from the actual intention of the provision.

For instance, the application of section 12(2)(b) of the Competition Act is limited to votes at a general meeting only while the New Companies Act does not share the same approach. It is submitted that the wording of section 2(2)(a)(ii)(aa) is wide enough to encapsulate any security that a holder may have regardless whether such securities is relevant to the action by the related persons or not.

It seems that the application of the provision is only limited by the provision that the votes must constitute a majority of the overall votes of the company. It shows an intention by the legislature to rather err on the side of caution by not limiting the application of the voting rights. It is submitted that the application of the section to any voting rights illustrates a recognition by the legislature that a vested interest by a person in the actions of a company can be established outside the scope of its own securities.¹³⁷

Making reference to Blackman’s suggestion regarding a security right over shares, the Competition Act requires that the votes must be exercisable at a general meeting of the company. When shares of a company are pledged as security for a debt, the pledgee will not have the right to vote at a general meeting until the pledgor defaults. Accordingly, no notification will be necessary by the parties until ownership vests and the pledgee is entitled

¹³⁷ Provided that the securities constitute a majority.



to vote at a general meeting.¹³⁸ The same can, however, not be said about the application of the notion to section 2(2)(a)(ii)(aa). It is submitted that the mere security right over the majority of the securities would constitute a related relationship as the pledgee can no longer be deemed independent. This seems to be more in line with the intention of the New Companies Act to regulate related and inter-related parties to ensure arm's length transactions.

Another point to consider is the implications of a historical voter turnout as with the *Gold Fields – Harmony* matter.¹³⁹ The implication of this is that as soon as the turn-out of a meeting (whether a general meeting or not) is low enough to provide a minority shareholder with a majority of the voting rights at that meeting or on a specific point, then control can be established for the purposes of section 2(2)(a)(ii)(aa).

The above seems to be in line with the underlying principles of the related persons provisions, that is, the requirement of independence in corporate actions. In our scenario above, the minority shareholder will be deemed a majority shareholder at the meeting and his/her/its independence must then be shown in order to avoid more stringent governance requirements.

It is, furthermore, submitted that in scenarios like the above, parties may make use of the “bright lines” approach to determine whether the thresholds set out in the New Companies Act have been met, or whether a person falls short thereof. This will be greatly beneficial in order to obtain clarity, however, it is submitted that not all scenarios will be as clear. The next section will now consider the catch-all provision of section 2(2)(d) where the “bright lines” approach may not be a suitable method.

3.2.4. Section 2(2)(d) – The new catch-all provision

Section 2(2)(d) provides for the all-important catch-all provision and states as follows:

¹³⁸ The holder of a security right over the share may result in its encumbrance, however such a holder shall not have any right to exercise any voting rights in terms of such shares save for a disposal thereof (provided same is addressed in the pledge agreement).

¹³⁹ Refer discussion *supra* par 2.3.2.



“(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if (d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).”

Similar to the term “firm” used in the Competition Act, the New Companies Act uses “juristic person” which is defined in section 1 of the Companies Act to include a foreign company and a trust. However, it does not specifically address the inclusion of a company and/or a close corporation. Henochsberg elaborates on the definition of “person” and makes use of section 2 of the Interpretation Act, which includes “any company incorporated or registered as such under any law” and “anybody of persons corporate or unincorporate”.¹⁴⁰ It continues to state that the word “includes” used in the definition of “persons” presumes the inclusion of companies as incorporated under the New Companies Act and common law juristic persons.¹⁴¹

When taking into consideration that the section leans on the provisions of section 2(2)(a) – companies; section 2(2)(b) – close corporations and section 2(2)(c) – trusts, it is clear that the application of section 2(2)(d) should apply to all economic entities. It is submitted that much like section 12(2)(g) of the Competition Act, section 2(2)(d) of the New Companies Act is intended to be as far reaching as possible in order to alleviate the risks of any *lacuna*.

If one is to use the precedence created in competition law to determine the scope and application of section 2(2)(d) as suggested by Henochsberg, the implications can be quite colourful.

For instance, as with section 12(2)(g) of the Competition Act, section 2(2)(d) of the New Companies Act is applicable once the mere ability to influence policy is established and the actual exercise of such an ability is not necessary.¹⁴²

¹⁴⁰ Henochsberg *supra* p. 65; 33 of 1957.

¹⁴¹ Section 1 of the New Companies Act defines “person” as – “includes a juristic person”; Henochsberg *supra* p. 65.

¹⁴² Refer discussion *supra* par 2.3.4.

As stated above, the implications of this for the purpose of merger notification are not too contentious as there is always the overriding prerequisite that control must be established by way of section 12(1) of the Competition Act before parties will be obliged to notify a merger. Unfortunately, the same cannot be said in the realm of the New Companies Act. The implications are that persons may be wrongfully assumed to lack independence in administrative actions and will be subjected to much more stringent governance by the New Companies Act as a result thereof.

I will rely on the instance whereby minority shareholders can be deemed to have established control under section 12(2)(g) of the Competition Act as discussed above.¹⁴³

As discussed above, a minority shareholder can be deemed to have obtained control in terms of the ability to veto the adoption by a company of certain policies. Accordingly, the mere ability by a minority shareholder to be able to veto the appointment of management may establish control in terms of section 2(2)(d) if competition law precedence is to be followed. The implication is that the minority shareholder will have to provide evidence of its independence before it may take certain actions without ever vetoing a single policy, which *ipso facto* means that control has never been established.

The flipside of the coin is that in terms of our current competition precedence and the opinion of Sutherland and Kemp, management control can never be deemed adequate enough to establish control for the purposes of section 12 of the Competition Act. Accordingly, control by a manager of a company who is free from any shareholder control may be deemed to fall short of the application of section 2(2)(d) of the New Companies Act. The implication is that such a manager may never be deemed to be a related party, however, the element of control is clearly sufficiently established that he/she should at least be required to adduce evidence of his/her independence. This is, however, not the case in terms of current competition law precedence.

¹⁴³ Refer discussion *supra* par 2.3.4.2.

4. Chapter 4 – Conclusion and Recommendations

It is evident from the above findings that the purpose of merger regulation is to prohibit mergers that would have an anti-competitive effect on a certain market and, thereby, ensure a fair and competitive market for all to participate in. The purpose of company law in regulating the actions of related and inter-related persons, on the other hand, is to ensure sufficient independence by the controlling parties in order to alleviate actions that may be prejudicial to the integrity of the company and/or may not be in the best interest of the company for the gain of someone related. The one aims to ensure a competitive environment, while the other regulates actions that may not be made at arm's length.

This dissertation investigated the manner in which the Old Companies Act was used in interpreting the Competition Act and the *lacunae* created thereby. The lack of clarity in using the New Companies Act, has been discussed notwithstanding that the aforementioned *lacunae* may well be addressed. As stated before, the Competition Authorities must publish a directive or some guidance soon to ensure that parties are not obliged to incur extensive legal fees in order to notify a merger that may not need to be notified. Additionally, parties may fail to notify a merger to the Competition Authorities that may in fact have been notifiable.

It is submitted that the most logical approach is to determine whether the company in question has conformed to the provisions of the New Companies Act. To determine conformity, one need not look further than the constitutional document of the company.¹⁴⁴ If the company has conformed to the provisions of the New Companies Act, then it is submitted that the provisions of the Old Companies Act, mentioned in the Competition Act, should be read to refer to their equivalent counterparts in the New Companies Act.

With regards to using the Competition Act in determining the scope and application of section 2 of the New Companies Act as advised by Henochsberg, one would do well to bear in mind the respective purposes of the two Acts.¹⁴⁵ The advice of Henochsberg is in direct

¹⁴⁴ The constitutional document of a company will in all likelihood either be a Memorandum of Incorporation or Articles of Association. This is a public document that can be order at the Companies and Intellectual Property Commission and it should make specific mention to the applicable version of the Companies Act.

¹⁴⁵ Refer discussion *supra* par 3.1.4.



contrast to that of Sutherland and Kemp, who provide that “merger law is designed for the evaluation of specific types of transactions. Applying it to transactions that are not mergers may cause a skewing of the law.”¹⁴⁶

As noted in Chapter 3, it may be beneficial to use the precedence of section 12(2) of the Competition Act to determine the ambit of section 2(2) of the New Companies Act. However, it could be argued that this is detrimental. Accordingly, both Sutherland and Kemp and Henochsberg have valid suggestions.

It is submitted that competition precedence must be used to determine the scope and ambit of section 2(2) of the New Companies Act as it would be a superfluous and unnecessary exercise to attempt to ‘reinvent the wheel’. However, it should be emphasised that the Companies Tribunal, court or the Panel, must exercise extreme caution not to take a ‘copy paste’ approach in their adjudication. The backdrop and purposes of the respective fields of the law should always be the overriding factor and the Companies Tribunal, the court or Panel, must understand their position when providing directives or guidance. It is advised that these authoritative bodies adopt a pragmatic approach to their findings, which will enshrine the vital respective fields of law play in our everyday life.

[Word count: 16 757]

¹⁴⁶ Sutherland and Kemp *supra* pp. 8-12.

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