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INTRODUCTION

In today's economy, as many markets are oligopolistic¹, no firm should in theory be able to affect the market independently. In these markets, those firms may collectively exercise market power and coordinate their commercial behaviour strategically.

For this reason, most of the competition law regimes address the coordination of independent undertakings where it harms competition.

In the United States, Section 1 of the Sherman Act describes as unlawful “*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations*”².

In Europe, similarly, Article 101 of the Treaty on the Functioning of the European Union (hereinafter “*TFEU*”) prohibits cartels by stating that all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have for object or effect the prevention, restriction or distortion of competition within the internal market, shall be prohibited as incompatible with the internal market. The Article provides illustrations of such behaviours: ‘*directly or indirectly fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, or investment; share markets or sources of supply; apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*’³.

¹ D. Geradin, Dr A. Layne-Farrar, N Petit *EU Competition Law and Economics* (2012) 105 .

² § 1 Sherman Act, 15 U.S.C. § 1

³ Treaty on the Functioning of the European Union (TFEU), Article 101 (1) (a) (b) (c) (d) (e).

In South Africa, Competition Act (“The Act”) No 89 of 1998 prohibits cartels in Chapter 2 “*Prohibited Practices*”, Part A “*Restrictive Practices*”, Section 4 “*Restrictive horizontal practices prohibited*”⁴. This Act prohibits competitors and potential competitors from fixing prices or other trading conditions, dividing markets (by means of, for example, territorial, supplier or customer allocation) or tendering in a collusive manner. This type of conduct is per se prohibited, in terms of Section 4(1)

Section 4(1)(a) operates as a catch-all provision and prohibits any conduct that would substantially lessen or prevent competition, adopting the rule of reason approach.

An important qualification to both sections is the concept of a “single economic entity”, as envisaged in section 4(5) of the Act. The main aim of this section is to restrict the application of section 4(1), by excluding companies constituting a single economic entity from its ambit. The motivation for this exclusion is that companies falling within the confines of a single economic entity would usually be controlled by a common mind. Therefore, companies forming part of a single economic entity will not be prohibited from “colluding” among themselves, according to section 4(5)⁵. Thus, the rationale behind the SEE is that firms are not being prohibited from colluding among themselves according to Section 4(5).

As will be discussed in the course of this paper, there are similarities between the South African and the European notions of the SEE. It seems that the European notion of ‘undertakings’ and the South-African one of ‘firm’ do not have the same role when these entities form part of a single economic entity; the South African notion of the single economic entity seems to be an exception to the application of the Act whereas the European one seems to enlarge the application of the regulation.

Recent cases in Europe and South-Africa have shown an increase in the number of cartel cases and in the amount of fines on companies infringing cartel regulation.

⁴ SA Competition Act No 89 of 1998 as amended by Competition Amendment Act, No 35 of 1999, Competition Amendment Act No 15 of 2000 and Competition Second Amendment Act No 39 of 2000

⁵ J. Blakin and J. Lurie *The concept of a single economic entity* Business Law & Tax Review , COMPETITIVE EDGE.

Companies that are found liable for cartel infringement are generally important corporations, which are organized in a group of companies in an attempt to limit their liability and optimize their turnover. As Adolf A. Berle, JR explained in ‘The Theory of enterprise entity⁶’: *‘As the scale of business enterprises enlarged, the process of sub division began; subsidiary corporations wholly-owned or partly-owned; or holding companies combined into a series of corporations constituting a combined economic enterprise. More often than not, a single large-scale business is conducted, not by a single corporation, but by a constellation of corporations controlled by a central holding company, the various sectors being separately incorporated, either because they were once independent and have been acquired, or because the central concern, entering new fields, created new corporations to develop them, or for tax reasons’.*

In other words, many corporations are in fact members of a group of companies supervised by a parent company - often a holding company - at the head of the group. A holding company is a legal entity, such as a firm, business or organization, which owns a controlling majority of the outstanding shares issued by another company. The company’s structure generally precludes it from manufacturing, distributing, selling or supporting the goods or services of the subordinate company. It does not get committed to any active business operations of its own. This enables the holding company to reduce some of the risk and responsibilities of owning the business. Because the holding company owns the majority of a company’s outstanding shares and voting rights, it can influence the company’s board of directors and management policies. A holding company structure is often a tool for tax optimization, allowing the group to pay lighter taxes than in the case where all companies had tax imposed individually. An international holding company together with corporate tax planning can in many cases be the crucial factor that helps companies to reach their business goal and maximize profits for the shareholders.

It is accepted that in order for a firm to be held liable for cartel activity, it must be shown that the firm in question is guilty of cartel conduct. However the European Courts and the EU Commission have enlarged the application field and the effect of

⁶ AA. Berle, Jr. *The theory of enterprise entity* 1947 Colum. L . Rev. 343.

Article 101 TFEU to other undertakings or bodies active around the edges of the cartel, such as for instance the parent or holdings companies that are presumed to exercise an influence on the behaviour of their subsidiaries companies.

By using the parental liability doctrine it seems that the Commission and the European Courts are piercing the corporate veil to hold liable the companies that organized themselves to limit their liability and that of their shareholders. The argument is that in certain cases, some companies, which act as a corporate group, may operate in order to hide behind the advantages of limited liability to the disadvantage of their creditors. They may operate in such a way that the parent entity is not clearly distinguishable from the subsidiaries. The argument in favour of piercing the corporate veil in these circumstances is that a corporate group, which seeks the advantages of limited liability, must also be ready to accept the corresponding responsibilities⁷.

European institutions seem to have decided to apply this principle and to tackle the parent companies that may have tried to hide behind the corporate veil allowed by the group structure. Indeed, it seems that the European Commissioners and judges use the same reasoning as the English Lord of Justices in the *Bluecorp Pty Ltd v ANZ Executors and Trustee Co Ltd* case where the Court found that ‘*The inter-relationship of the corporate entities here, the obvious influence of the control extending from the top of the corporate structure and the extent to which the companies were thought to be participating in a common enterprise with mutual advantages perceived in the various steps taken and plans implemented, all influence the overall picture*’. As will be highlighted in the course of this paper, there is a similarity in the approaches adopted by the UK and the EC regarding the single economic entity.

The aim of this paper is to compare how South African competition authorities and the European competition authorities deal with the complexities of groups of companies infringing competition law. Even if these two jurisdictions do not use the notion of “single economic entity” in the same way and for the same purpose,

⁷ Doyle’s opinion in *Taylor v Santos Ltd* (1998) 71 SASR 434, 438 (Doyle CJ and Prior J).

the reasoning that they both hold takes into account the shareholding power of the parent on the subsidiary, the dependence or independence which the subsidiary has, the roles of the group's members and some similar clue that might lead the authority to evaluate the degree of independence of the subsidiary and by doing so, rule in favour or against the application of the parental liability doctrine.

One of the themes of this paper will also be to compare and analyse those cases in which it is in the parent company's interest to claim that it forms part of the SEE with their subs, and vice versa.

Ultimately, and in order to fully understand and explain the different interpretations and uses of the "single economic entity" notion, an analysis of the various interpretations must be conducted. This requires a study of the European and South African applicable legislation. At the same time we will attempt to determine the notion of control, inextricably linked to the "single economic entity" notion (Chapter 1). Then, this paper will attempt to delimit in which case the "single economic entity" defence can be a useful option to be raised by a group of companies (Chapter 2) when confronted with an allegation of a competition law infringement. Thereafter, instances in which the entity is used by the authorities to impose liability will be discussed (Chapter 3). Finally the paper will endeavour to put together the similarities and/or differences existing between the European and the South African points of view (Chapter 4) and try to evaluate whether these two systems could converge to a common application of the single economic entity.

Chapter I. Various notions of the single economic entity doctrine and the notions of undertakings.

This chapter will aim to define the key notion of “single economic entity”, the different appreciations and applications whether it concerns the European Union or the South African competition law regimes, before explaining the fundamental criterion of control, either sole or joint, key to analysing the “single economic entity”.

Part I. DEFINITIONS OF THE SINGLE ECONOMIC ENTITY AND UNDERTAKINGS.

1.1 The European central notion of “undertakings”.

The definition of an undertaking is important for present purposes because in terms of European Competition law, there is no express provision made to the SEE doctrine and thus the application of the doctrine depends upon the ambit of the notion of the undertaking.

Article 101 TFEU, the so called ‘prohibition system’⁸ provides both for an interdiction and an exemption. This article is a three-pronged provision. Article 101(1) prohibits agreements between undertakings, which may affect trade between Member States and restrict competition, as incompatible with the Common Market. Then, the second subsection states that the agreements targeted by Article 101(1) and contravening it are null and void. Finally the third subsection embodies an

⁸ D. Geradin, Dr A. Layne-Farrar, N Petit *EU Competition Law and Economics* (2012) 107,406.

exception rule, which withholds the application of Article 101(1) to agreements that bring a positive net contribution to consumer welfare: agreement that *‘contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’*.

As we can observe, under EU competition law, liability is imposed on ‘undertakings’, where it will be shown later that the South African Act refers to ‘firms’. However this fundamental notion remains undefined. For the purpose of EU antitrust law, any entity engaged in an economic activity that is an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed, is considered as an undertaking. The rules governing concentrations speak of ‘undertakings concerned’, that is to say the direct participants in a merger or in the acquisition of control⁹.

The notion of undertaking used in former Art 81 of the EC Treaty and now Article 101 TFEU is the threshold in terms of the articles. However the European legislators did not define it and left freedom to the Courts to shape and interpret this notion.

The first analyses of the European Court of Justice (the “ECJ”) are interesting regarding the definition this gives of an undertaking. Even if these cases are not related to the matter of infringements committed by subsidiaries but focused on an anti competition agreement contracted between the parent company and the subsidiary, the Court’s reasoning in qualifying it as an undertaking is of interest.

⁹ Glossary of competition terms available at <http://www.concurrences.com/anglais/droit-de-la-concurrence-150/glossaire-des-termes-de/Undertaking>, accessed last on 2nd February 2013.

Indeed, in *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v Commission*¹⁰, the ECJ established that an agreement between a parent and its subsidiary cannot fall within the scope of the prohibition set out in Article 81, since the two entities do not constitute separate undertakings, for these purposes:

Article 81, was intended to ‘leave untouched the internal organisation of an undertaking’. The ECJ elaborated on the rationale for this intra-enterprise conspiracy doctrine in *Centrafarm BV and Another v. Sterling Drug Inc. (Case 15/74) Centrafarm BV and Another v. Winthrop BV (Case 16/74)*¹¹, where it explained that Article 81: ‘*is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings*¹²’.

In other words, while the two companies in question may constitute separate legal entities, in reality they constitute a single entity, since the parent controls the subsidiary: ‘*the subsidiary has no real freedom to determine its course of action on the market*’. As a result, the subsidiary should be assimilated to its parent for the purposes of Article 81 (today Article 101 TFUE). It is clear, however, from the ECJ’s case law, that there are limits to the intra-enterprise conspiracy theory.

One criterion defining the limits which is of great relevance to this paper is that the undertakings must form an economic unit within which the subsidiary in question has no real freedom to determine its course of action on the market. The requirement that the subsidiary in question has no freedom to determine its course of action on the market implies control of the subsidiary by its parent¹³.

¹⁰ Joined Cases 56 and 58/64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.

¹¹ *Centrafarm BV v. Sterling Drug Inc. (Case 15/74) and Centrafarm BV v. Winthrop BV (Case 16/74)*

¹² Judgment of the Court (Sixth Chamber) of 4 May 1988. - *Corinne Bodson v SA Pompes funèbres des régions libérées*.

¹³ Christopher Townley *The Concept of an “Undertaking”: The Boundaries of the Corporation - A Discussion of Agency, Employees and Subsidiaries* (March 12, 2009).

Furthermore, in the ICI case of 1972 which is directly relevant to the matter of this paper, the ECJ held that for a parent company to be held liable for the illegal actions committed by its subsidiaries it is necessary to establish that this subsidiary ‘does not determine its actions in the marketplace independently, but rather applies, for the most part, those instructions given to it by the parent company’. In addition, in the 1983 AEG case, the Court established the presumption that if a subsidiary is 100 per cent owned by a parent company, it is presumed to apply policies determined by the parent company¹⁴.

1.2 The South African conception of a “single economic entity”.

As explained in the introduction, the South African Competition Act deals with the notion of a single economic entity in section 4 applying to agreements between and concerted practices of firms as well as decisions by association of firms¹⁵. To be more precise, the subsection that is relevant to this paper is section 4, in terms of which all conduct that would normally fall within the scope of section 4(1)(a) or (b) is excluded if it occurs between a wholly owned subsidiary and its parent company, wholly owned subsidiary of that subsidiary and the ultimate parent company or any combination of them. What is of particular relevance for this paper is the link between the notion of a SEE and firms that are “similar in structure to a parent company and its wholly.....”¹⁶.

This exclusion does not give an exhaustive definition of the concept of single economic entity. It goes further than wholly owned subsidiaries to include “the constituent firms within a single economic entity similar in structure¹⁷”. It seems that this exclusion is different from the subsidiary relationship defined in Section 1(3) of the Companies Act, indeed, the definition of the Companies Act seems

¹⁴ M. Debrox *Should parents always pay for their children’s infringements in cartel cases? Scope and threats of “Group Liability” in EU antitrust rules?* Hogan & Hartson MNP, Paris.

¹⁵ P. Sutherland, K. Kemp *Competition Law of South Africa* available online at [http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/dwvvn/g51t/ejuaa?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/dwvvn/g51t/ejuaa?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) last accessed 2nd February 2013.

¹⁶ M. Brassey, J. Campbell, R. Legh, C. Simkins, D. Unterhalter, J. Wilson *Competition Law* (2002) 162.

¹⁷ Section 4(5) South African Competition Act 89 of 1998.

tighter in structure and therefore the exclusion of the Competition Act does not seem to be “similar in structure” to the wholly owned subsidiary relationship described in the Companies Act.

It seems logical that the exclusion refers to a common group of entities rather than only one group of companies, as long as there is a parent-daughter relationship¹⁸.

It appears that the South African Competition Act criteria for determining if some firms should be considered as forming a single economic entity have been influenced by the US and European law.

Even from the wording of section 4(5) it appears that it is only applicable to horizontal restrictive agreements. However of central importance for the concept of SEE, is the notion of control. Section 12 of the Act that regulates mergers 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 firm¹⁹”. What is central in this section is the acquisition of control, and Section 12(2) sets out different categories of control: paragraphs (a) to (f) are relative to classic forms of control where paragraph (g) seems to be drafted as a catch all provision²⁰. It is established case law that in order to escape the application of the merger regulations, parties to a merger can claim that they form a single economic entity. This strategy was adopted in the Bulmer case²¹, where the merging parties argued before the Commission that the merger was not a merger as seen in the Act since the control structure did not change and that they were part of a single economic entity. As this case is fundamental regarding the notion of control, it will be dealt with thoroughly in Part 2 below.

These two sub-sections mirror some American case law in order to exclude what are essentially single-firm agreements from the reach of competition law.

¹⁸ Brassey, Campbell, Legh, Simkins, Unterhalter, op cit (n16) 162.

¹⁹ Section 12(1)(a) Competition Act 89 of 1998.

²⁰ Brassey, Campbell, Legh, Simkins, Unterhalter, op cit (n16) 237.

²¹ *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd/ Distillers Corporation (SA) Ltd, Stellenbosch Farmers Winery Group (Pty) Ltd & The Competition Commission (94/FN/Nov00) [2001]*.

1.3 Contrasting the US approach to the single economic entity doctrine with the approaches of the EC and SA authorities.

The decision *Copperweld Corp. v. Independence Tube Corp* issued by the U.S. Supreme Court in 1984 is a major case laying the foundation of the single economic entity notion. It indeed curtailed the application of the ‘intra-enterprise’ conspiracies brought under Section 1 of the Sherman Act and is considered as a “mainstay in contemporary antitrust thought”²² by holding that a parent and its wholly owned subsidiary must be seen as one actor for the purpose of Section 1 and therefore cannot collude among themselves.

In the United States, after an initial tendency for the Courts, according to the intra-enterprise conspiracy doctrine, to accept that conspiracy between related companies was possible, the Supreme Court restricted this inclination in its decision *Copperweld Corp. v. Independence Tube Corp*²³. In this fundamental decision, the Court restricted the scope of application of the intra-enterprise conspiracy doctrine and ruled that conspiracy is not possible between a corporation and its wholly owned subsidiary taking into account the fact that a *‘parent and its wholly owned subsidiary have a complete unity of interest’*²⁴. In other words, for the Supreme Court, the parent and its wholly owned subsidiary *‘share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may asset full control at any moment if the subsidiary fails to act in the parent’s best interests’*²⁵.

It seems that Section 4(5) in its first part suggests the same position, but the

²² Ernest N. Reddick. 2012. ‘Joint Ventures And Other Competitor Collaborations As Single Entity—What Did American Needle Do To Copperweld And What About Dagher?’ ExpressO Available at: http://works.bepress.com/ernest_reddick/1 accessed 20 December 2012.

²³ *Copperweld Corp. v. Independence Tube Corp.* (1984) 467 U.S. 752.

²⁴ *Copperweld Corp. v. Independence Tube Corp.* op cit (n23) at 771.

²⁵ *Copperweld Corp. v. Independence Tube Corp.* op cit (n23) at 771-772.

Copperweld decision raises some concerns, such as if in order to apply Section 4 to companies the shareholding must be taken into account²⁶. European institutions seem to have taken a different approach focusing on whether the subsidiary can itself determine its own actions or whether it forms part of an actual single economic unit, even in the case of a wholly owned subsidiary. Section 4(5) of the South African Competition Act in its second part seems to reflect the fact that the United States institutions have been applying the same doctrine to subsidiaries that are wholly owned by a holding company; however, cases involving Section 4 will surely involve more relationships between co-subsidiaries than between parent and daughter companies.

In order to determine if companies form a single economic entity, numerous factors must be considered. First of all, the common interest criterion is not precise enough, for instance cartels can have a common interest. What are more interesting and useful are the clues taken into consideration by the European institutions to find out whether there is a complete unity of purpose²⁷. There, competition authorities set out that an entity ‘*does not decide independently upon its own conduct on the market*’²⁸, but ‘*carries out, in all material respects, the instructions given to it by the parent company*’²⁹’, or that the entities must not be able to compete together. Also, the size of the shareholding has to be taken into account. However, if it is important to evaluate it, authorities should not give too much weight to this factor. To highlight this factor, some examples can be useful: for instance if an investment company invests largely in another company and behaves more like a partner than a basic financial investor, it should be considered as a single economic entity, whereas if the investor merely treats it as an investment it should not be regarded as a single economic entity.

Furthermore, the second part of Section 4(5)(b) requiring that a single economic entity must be “similar in structure” to those referred to in paragraph (a) is badly

²⁶ P. Sutherland, K. Kemp op cit (n15) para 5.5

²⁷ C-48/69 *Imperial Chemical Industries Ltd. (‘ICI’) v Commission (Dyestuffs)* (1972). par 133 ; Case 15/74, *Centrafarm BV and Adriaan de Peijper v. Sterling Drug Inc* (1974). par 41.

²⁸ *Ahmed Saeed v ZBW* 66/86 pars 35-36; *Corinne Bodson v SA Pompes funèbres des régions libérées*. Judgment of the Court (Sixth Chamber) (1988).

²⁹ *ICI v Commission* 48/69 op cit (n27) para 133.

formulated. Must it be understood that the single economic entity defence will only be applicable where the holding company owns almost all the shares of the daughter company? It seems logical that Section 4(5) should be interpreted to ‘*apply to single economic entities that are like the economic entity that exists where a company has wholly owned subsidiaries. But that does not mean that a single economic entity cannot exist where the shareholding of the controller does not even come close to a hundred per cent*’.³⁰ As the author of “Copperweld in the courts: The road to Caribe” explains, there is a need for a presumption of a single economic entity where the shareholding of the controller exceeds a certain level³¹. An answer to this could be found in the European decisions where - even if applied in order to hold liable a parent company and not as a defence argument - the authorities have set up a rebuttable presumption regarding the single economic entity.

The suggestion in *Copperweld* and in the entire body of single entity case law is plain:

‘ownership’ and ‘control’ are related, and both inform analysis of the single entity question. An outstanding problem is that none of the case law makes much progress sorting out what constitutes ownership and control (much less sorting out how they are related and how they inform analysis). As Judge Boudin observed in *Fraser v. Major League Soccer, L.L.C.*³², “the Supreme Court has never decided how far *Copperweld* applies to more complex entities and arrangements that involve a high degree of corporate and economic integration but less than that existing in *Copperweld* itself.”³³

In his book ‘*Competition law of South Africa*’³⁴, Professor Sutherland explains that comparing *Copperweld* with the South African Competition Act raises different

³⁰ P. Sutherland, K. Kemp op cit (n15) para 5.5

³¹ . Calkins ‘*Copperweld in the courts : the road to Caribe*’ 1995 Antitrust Law Journal 345, 352.

³² *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47 (1st Cir. 2002).

³³ EN. Reddick. 2012. ‘Joint Ventures And Other Competitor Collaborations As Single Entity—What Did American Needle Do To Copperweld And What About Dagher?’ ExpressO available at: http://works.bepress.com/ernest_reddick/1

³⁴ Sutherland & Kemp *Competition Law of South Africa* (2005) Service Issue 6 5-20 with reference to Waelbroeck & Frignani *European Competition Law* (1999).

questions. First of all, regarding the shareholding owned in a subsidiary; should this criterion be decisive in determining if Section 4 of the South African Competition ought to be applied? In the author's mind the European conception seems more desirable, indeed a shift is made from focusing on the shareholding (South African approach), to scrutinizing if the subsidiary is autonomous enough to direct its own conduct on the market, or if it forms a single economic entity. Also, Sutherland proposes that a presumption that wholly owned subsidiaries and their parent companies form single economic entities would be more appropriate³⁵.

Still according to Sutherland, there should be other important factors to take into account when assessing if a group of companies form a single economic entity, such as the integration of business activities, management, financial facts and so on³⁶.

Finally, Sutherland seems to be right when arguing that Section 4(5)(b) of the South African Competition Act is badly drafted and will raise problems. According to this author, only the requirement that there must be a single economic entity is useful, and the other one should have been deleted: *'Where the same companies together are in control of other companies and the controlling companies and the controlled companies function as a single economic unit, the collusion required for conduct to amount to a prohibited restrictive horizontal practice under section 4 of the Competition Act is not possible'*³⁷.

One can notice similarities between these three conceptions of the single economic entity even if the major difference between the South African and the European resides in the purpose of this notion. As it has been shown above, where the South African Act sees single economic entity as a defence argument, the European authorities have developed a doctrine allowing them, while interpreting the Act, to enlarge its scope of application and hold liable the totality of a group of companies

³⁵ Sutherland & Kemp *Competition Law* 5-22.

³⁶ Sutherland & Kemp *Competition Law* with reference to *Freeman v San Diego Association of Realtors* 322 F 3d

³⁷ RA Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* Dissertation presented for the degree of Doctor of Law at the University of Stellenbosch 2011.

and not only the infringing daughter company.

It would be interesting to have a confluence between the two utilisations and appreciations of the single economic entity. One can suggest a general statutory definition of the expression ‘firm’ and ‘undertaking’ as an economic unit or ‘a unitary organisation of personal, tangible, and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement’³⁸ of an act.

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³⁸ Shell V Commission T-11/89 ; Viho Europe BV v Commission T-102/92 para 50.

Part 2. THE COMPLEX NOTION OF CONTROL AND ITS IMPLICATIONS REGARDING THE SINGLE ECONOMIC ENTITY.

As this paper is not focusing on mergers, the area of law where the notion of control is essential and can slightly differ, this paragraph does not aim to list exhaustively the different cases where a company controls another one, but will attempt to show the inextricable links existing between the notion of control and the one of single economic entity and how competition law authorities deal with it. Furthermore, what will be shown through the notion of control is not the different thresholds and complex mechanisms of advisory opinions requests, notifications, authorisation and so on but more the influence and the consequences that control has on the definition and identification of a single economic entity.

1.1. When does a company control another one so that they form a single economic entity?

After explaining the different conceptions of the single economic entity, if one has to show why the notion of control is fundamental, the analysis made by Dean V. Williamson in “Organization, control, and the single entity defence in antitrust” is helpful. The reasoning held by the author, even though focused on the American jurisdiction, has a general and broad scope of application.

Since the beginning of antitrust regulation in the 1890s, American courts have had to define what constitutes conspiracies between corporate entities to restrain commerce. In the 1980s, the notion of conspiracies appeared by negation; it consisted of extending the status of ‘single entity’ to certain corporations. It appeared that economists and jurists when making efforts to sort out what constitutes a ‘firm’ or a ‘single entity’ focused on ‘control’. However the *‘difficulty*

*is that neither the law nor economics offer an operationally significant concept of control*³⁹, and neither of them define what a single economic entity is.

The suggestion in *Copperweld* and in the entire body of single entity case law is plain:

‘ownership’ and ‘control’ are related, and both inform analysis of the single entity question. An outstanding problem is that none of the case law makes much progress by defining what constitutes ownership and control, much less sorting out how they are related⁴⁰.

In other words, here lies one of the difficulties, as both the notions of control and single economic entity are linked but undefined. How is it possible to identify and apply them intelligently? How is it possible to determine when companies form a single economic entity; if a joint-venture must be seen as a single economic entity and so on? These are so called ‘hard cases’ where competition authorities are confronted with grey areas of the notion of control.

The following example will be useful in order to fully understand the problem. If some firms decide to incorporate a new entity, share the ownership of it and collectively participate in its governance, it must also be considered that the firms concentrate in the new entity many rights to ‘control’ certain activities within the firms themselves. Regarding the lack of definition or constitutive elements of a single economic entity, how should any jurisdiction approach this entity? Should the antitrust authorities perceive the agglomeration of the new entity and the parent firms as a ‘joint-venture’, a ‘strategic alliance’ or a ‘legitimate business arrangement’ to which the single economic entity should be applied?

The South African authorities had, with the *Bulmer* case, the occasion to analyse and delimit what constitutes ‘control’. The facts of this case concerning a merger are important to understand the repercussions of this decision. This transaction involved the acquisition by Distillers of the business of SFW, both of which were owned at 90 per cent by common shareholders, respectively Rembrandt, KWV and SAB with 30 per cent each. Rembrandt and KWV created Rembrandt-KWV

³⁹ DV. Williamson, ‘Organization, control, and the single entity defense in antitrust’ *Journal of Competition Law & Economics*, 5(4), 723-745.

⁴⁰ Williamson op cit (39), 723-745.

Investments, a holding company to combine their shares. The purchase consideration was payable by new Distillers shares which were to be distributed to the SFW shareholders by a dividend in specie, thus creating a larger single entity the shares of which were held up to 90 per cent by the same persons who held shares in SFW⁴¹.

In the merging parties' minds, as there was no change in ultimate control, the operation was not constitutive of a merger according to the Competition Act. The Commission followed this opinion and so the merger was implemented without notification.

Two competitors then challenged this decision on the motive that the merging parties had always been separate and distinct juristic and business competitors and that this operation would significantly affect and hamper competition in the liquor industry. The question that had to be answered was whether there was acquisition of control.

For the competitors, all the elements of a merger that would require notification were satisfied, Distillers being a "person" acquired direct control over the business of SFW by way of an asset purchase. The merging parties argued that the only mergers that must be notified are when changes occur to 'ultimate' control and 'effective' control. Also, as the same shareholders would control the new entity as they controlled the two entities pre-merger, no change in effective control had taken place and therefore there was no merger.

However, the Court found, after applying Section 12 to the facts, that even if the merging parties owned 90 per cent of the shares, before and after the operation, they could not prove that there was a concerted action between them that would indicate that they formed a single controlling mind. Put in another way, the Court could not find that there was a single entity controlling the new structure and therefore the new entity could not be a single economic entity as there was no controlling head. This reasoning highlights how the notion of control is inextricable from the single economic entity.

⁴¹ Brassey, Campbell, Legh, Simkins, Unterhalter, op cit (n15) 239.

To sum up, one can observe that even though not specifically, the Tribunal has however accepted that if an entity does not see ultimate change in its control they is no merger and so no notification duty. More important, the Tribunal here sets out that to form a single economic entity, the shareholders must exercise a common controlling mind on the structure. In this case, the reference to instances of control listed in Section 12(2) indicates that acquisition of control cannot be a consequence of simple cooperation between firms or parts.

In the United States, the *Fishman v Wirtz* decision⁴² is particularly close to this controlling mind criterion. In this case, a large number of shareholders owned different corporations, but as there was no proof showing that any individual or group of shareholders was able to control the companies independently to the other shareholders, the Court did not apply the Copperweld principle of the single economic entity to these corporations⁴³. In other words, the Court could not find a complete unity of interest as requested under the Sherman Act, or a controlling mind as now requested in South Africa after the *Bulmer* case.

The question of a minimum threshold remains unanswered and one can only speculate on it. According to Chris Charter⁴⁴, three scenarios seem possible:

First, when a company is the majority shareholder of another company, and no other entity enjoys a controlling influence, the two firms are likely to be considered parts of a single economic entity. The controlling influence referred to above, so called "negative" control, occurs when an entity enjoys veto rights on major and strategic decisions such as commercial policy.

Secondly, when a company owns the majority of the shares of another company but contrary to the first option above, another entity enjoys "negative" control, the answer is less clear. Here the requirement of the controlling mind set in the *Bulmer*

⁴² *Fishman v Estate of Wirtz* 807 F. 2d 520 (7th Cir 1986) and *Areeda*, Antitrust Law 2000 supplement p 1469.

⁴³ *Patensie Sitrus Beherend Beperk v Competition Commission* [2003] 2 CPLR 247 (CAC). para 69.

⁴⁴ C. Charter 'SOME OBSERVABLE LEGAL ANOMALIES IN RESPECT OF MERGER NOTIFICATION, GROUP RESTRUCTURES AND OTHER CHANGES IN CONTROL' available online at <http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conference/Session2B/Some-merger-anomalies-C-Charter-18.08.10-.pdf> last accessed on 2nd February 2013.

case could be lacking, indeed, the Tribunal in the Netcare⁴⁵ case stated “*a firm that is subject to joint control does not necessarily have controllers with the same incentives (...) Thus without a full merger Netcare and CHG cannot be considered part of a single economic entity*”.

Even if the facts of the Netcare case are specific to Netcare’s situation (the constituent firms were both fully-fledged commercial entities with an established presence in the market and independent boards and operational teams⁴⁶), the single economic entity notion and protection should be granted to a firm that has established some rights to minority shareholders (BEE or financial institutions for instance).

Finally, and it is even less clear, one can wonder if the single economic entity quality would be established in the case of a firm owning less than 50 per cent of the shares of another company. There is unfortunately no case law on this matter, however in *Mergence Africa Property Investment Trust / Dipula Property Investment Trust and Certain Property Letting Enterprises held by ApexHi Properties Ltd*⁴⁷ the Tribunal suggested in passing that where one company owned 27.96 per cent of the shares in another and had board members in common, this may suggest that the firms are being run as a single economic entity.

To sum up this reflection on the South African interpretation of control and single economic entity, it is expected that a firm owning another company almost entirely would form with it a single economic entity. When a company owns less than the majority of another one the answer is less sure. The existing doctrine and few case law suggest that the casuistic should give the solution.

In the European Union, Regulation 139/2004 on the control of concentrations between undertakings⁴⁸ that entered into force on 1st May 2004 is the key document in the area of merger control. The notion of control is dealt in paragraphs

⁴⁵ *Competition Commission v Netcare Hospital Group (Pty) Ltd* (case no 27/CR/Mar07).

⁴⁶ Charter op cit (n44).

⁴⁷ *Mergence Africa Property Investment Trust / Dipula Property Investment Trust and Certain Property Letting Enterprises held by ApexHi Properties Ltd* (Case nos 130/LM/NOV07 and 131/LM/Nov07).

⁴⁸ Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) (2004) OJ L24/1.

2 and 3 of Article 3 of Regulation 139/2004, and is defined broadly⁴⁹. Like its South African counterpart, the European regulation provided for an acquisition of control that can take the form of sole or joint control.

Most of the solutions adopted by the European competition law authorities regarding the notion of control are now settled case law and are dealt with in great detail in the following chapter. What can however be said is that there is an established rebuttable presumption that when a parent company owns the majority of a subsidiary, they are for the purpose of the parental liability doctrine seen as a single economic entity. In fact, the European authorities tend to broadly apply this notion even when the percentage of shareholding seems really low.

The common way of acquiring sole control is whereby an undertaking purchases a majority of the voting rights of the target company. According to case law, it seems of little importance that the obtained shareholding is half of the share capital plus one share⁵⁰ or the integrity⁵¹ of it. As Maher M. Dabbah explains in EC and UK Competition Law⁵², sole control may also be acquired in the case of a qualified minority; this can be established on a legal and/or de facto basis. Here it seems that when it comes to establishing if an undertaking controls another one to form a single economic entity, the European and South African authorities tend to refer on casuistic rather than only legal criteria.

Regarding the situation of joint control, its acquisition can also be established on both a legal and a factual basis. To be able to claim joint control, there must be an agreement between the parent companies on major decisions concerning the commonly controlled undertaking. This conception matches the reasoning held by the South African Competition Tribunal in the *Bulmer* case where the Tribunal stated that there must be a concerted action at the head of the structure for it to form a single economic entity. Therefore one can notice that both jurisdictions seem to have a similar approach and conception of the close links between the notion of control and the single economic entity.

⁴⁹ MM. Dabbah 'EC and UK Competition Law Commentary, Cases and Materials'.

⁵⁰ Case IV/M.296- *Crédit Lyonnais/ BFG Bank*, of 11 January 1993.

⁵¹ Case IV/M.299 – *Sara lee/ BP Food Division*, of 8 February 1993.

⁵² Sutherland & Kemp op cit (n36).

Recently, in the matter involving a large merger between Life Healthcare Group (Pty) Ltd and Joint Medical Holdings Ltd⁵³, the Competition Tribunal had to decide upon knowing if Life was controlling JMH presently in the same way as it might post merger, and if it were doing so lawfully.

In order to fully understand the outcome of this case, it is necessary to give a summary of the facts, before analysing the decision itself.

Life Healthcare is a listed private hospital group that owns and operates private hospitals throughout South Africa; while JMH owns and operates five private hospitals situated in the Durban city center and surrounding areas. The parties' activities overlap in providing private healthcare services in the greater Durban area. Prior to the merger, Life Healthcare held 49 per cent of the share capital of JMH. In terms of the proposed transaction, Life Healthcare made a public offer to the other JMH shareholders (comprising some 300 private doctors, their families and trusts) to acquire an additional 21 per cent of JMH's shares. The merger would increase Life Healthcare's interest in JMH to 70 per cent⁵⁴.

In August 2011, the Commission received notification of the intended merger. After a six month long investigation, the Commission referred the merger to the Tribunal, advising that the operation should be prohibited. For the Commission, the merger would result in a lessening of competition. It would raise prices for uninsured patients and national regional medical schemes operating in the Durban area; hamper some concurrent hospitals' ability to compete for medical specialists, and for these hospitals reduce their ability to be part of designated service provider networks established by medical schemes.

The merging parties argued that contrary to what the Commission alleged, the operation would not have anti-competitive effects, as the only factual change was a

⁵³ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd*, 24/10/2012, 74/LM/SEP11 (013235)

⁵⁴ Webber Wentzel's Competition Practice Group South Africa: 'Tribunal Approves Opposed Merger Between Life Healthcare And Joint Medical Holdings'. 2012

move from ‘joint’ control to ‘sole’ control by Life Healthcare. Prices should not rise and the independent hospitals should neither have any problems being part of a designated service provider nor in recruiting new specialists.

After more investigation led by an expert especially appointed by it, the Competition Tribunal of South Africa ruled against the Commission’s recommendation and, on the 24th July 2012, unconditionally approved the large merger involving Life Healthcare (Proprietary) Limited (Life Healthcare) and Joint Medical Holdings Limited (JMH).

In case of a merger, the authorities make an assessment comparing how the market would operate with the merger and how it would be without the merger, generally taking as a reference how it was pre-merger. However, in the present case, the merging parties argued that because Life was enjoying a de facto control over JMH and forming a single economic entity, the post-merger situation would not be much different from the pre-merger situation. As the parties were already agreeing on prices before the merger, due to the de facto control (the regularity of this will be discussed in Chapter 2), they would continue to do the same post merger and therefore there would not be any major changes in the market.

In other words, the discussion around the notion of control focuses on knowing if the parties really had de facto control pre-merger, and even if they had, whether a switch to de jure control would have consequences on the market. Since Life had acquired 25 per cent of JMH in 1997, it had exercised a de facto control, a form of control that is recognized in Section 12(2)(g), and *‘the only difference the merger makes is the establishment of de jure control’*⁵⁵.

For the Commission, this case is an exception to the normal assessment practice; it is not the fact that Life would control JMH post-merger in the same way as during the pre-merger that is fundamental, but the keystone of the problem is to know if Life was doing so lawfully.

However, the Tribunal took the time to review the history of the different control operations (shareholders’ agreement, directors’ nomination, acquisition...) and

⁵⁵ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 21

reached the conclusion that ‘*prior to the present merger Life did not control the majority of votes at either board or general meeting level although the shareholders agreement gave it rights of veto in certain specified instances*’⁵⁶.

Indeed, the Tribunal explains that in 1997 Life’s predecessor obtained 25 per cent of the shares in JMH. A shareholder agreement that was concluded between the predecessor and JMH was still operational. It provided Life with the right to appoint 25 per cent of JMH directors and have some strategic voting rights; however through this agreement Life did not enjoy any control over the board or a majority of votes. Furthermore, even if in 2004 Life acquired more shares in JMH, seeing its ownership rising to 49.4 per cent, Life still did not increase its control rights on JMH⁵⁷.

Furthermore, according to Section 12(2)(g), a person controls a firm depending on his ability to influence fundamental and strategic decisions in a manner comparable to a person exercising a more common element of control as referred to in paragraph (a) to (f); for Life, relying on different facts, they were filling these requirements. For instance, according to a witness⁵⁸, Life was controlling the strategic decisions of JMH; in fact, before board meetings, agreements were made in order for the directors to make Life’s opinion prevail⁵⁹.

Additionally, the acquisition by Life in 2001 of a firm ‘Amashop’ that owns hospitals is interesting regarding the links between Life and JMH. As a large merger, this operation had to be notified and Life was to list all the firms it controlled⁶⁰. However, it did not incorporate JMH in this list as a controlled firm, but as a competitor. There is then a real confusion, perhaps created on purpose in this case, regarding the links between JMH and Life. For the purpose of the Amashop merger, JMH is listed as a competitor, but for the purpose of the Life merger, Life claims that it controls de facto JMH, taking into account that the two mergers share part of the same time period. As Life controls JMH according to Section 12(2)(g) and the witness’ statement, it should have listed JMH as an

⁵⁶ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 26

⁵⁷ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 24

⁵⁸ See Kurt Wylie’s witness statement page 2.

⁵⁹ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 28

⁶⁰ 23 July 2001, record of the merger notification, Exhibit T1.

acquiring firm according to Section 1(1)(i) providing that an acquiring firm includes all firms directly or indirectly controlled by another acquiring firm⁶¹. So, it seems that Life in the first merger (Amashop) preferred to keep silent on the fact that it had controlled JMH de facto since 1997, so that the Commission would approve the large merger. Later, Life pretends not to know about this fact and argues that it controls JMH de facto. In other words, the Tribunal was confronted by a flagrant contradiction in Life's arguments towards its relationship with JMH, depending on if it were more valuable to argue that JMH was a competitor or a controlled company.

Even if Life argues that it had de facto control over JMH, this is inconsistent with the fact that Life twice sought advisory opinion from the Commission on two operations that were meant to obtain control over JMH⁶². First, one year before the new acquisition of control of Life over JMH, Life's attorneys requested an advisory opinion of the Commission; they wanted to know if an acquisition of shares in JMH raising Life's ownership to 49 per cent should be notified, taking into account that Life would not be able to control JMH. In this first advisory opinion, neither the shareholders' agreement nor the 25 per cent already owned by Life were mentioned to the Commission. However the Commission intended Life to notify such an operation, arguing that it would lead to a de facto control.

One year later, a second law firm asked the same advisory opinion but this time revealing the shareholders agreement and the 25 per cent shares that Life was already holding in JMH. This time the Commission accepted the explanation provided by Life's counsel that the de facto control would not be changed by the new shares as the shareholders' agreement would still be in place and therefore decided that the notification was not necessary⁶³. Life then acquired the 24 per cent without notifying it to the Commission.

In order to summarize this important and complex situation putting together the notification process and de facto control, it seems that Life had enjoyed a de facto

⁶¹ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 31.

⁶² *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 32 and 41.

⁶³ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 35

control over JMH since 1997, and that the Commission accepted this fact in 2003 during the second advisory opinion request.

It was however fundamental for the Tribunal to decide upon which version of control must be retained: would it be Life's version of the facts; the Amashop version, or the one in the requested advisory opinion of 2003? In other words, must the Tribunal contend that Life had enjoyed de facto control since 1997, or that Life and JMH were independent or finally a kind of in between de facto control⁶⁴?

The Tribunal found that Life had had de facto control over JMH since 1997 and that the merger would bring about the jure control as Life would be controlling a majority of the votes⁶⁵ after the merger.

Also, the Tribunal, after concluding that Life was enjoying a de facto control, tempered this by explaining that because this control was not sole but joint control and could have been challenged at board or general meeting, Life and JMH were not forming a single economic entity.

In this case, the Tribunal explains that the control factor is primarily when trying to identify a single economic entity, and that in order to form one, the companies must be held, in case of de facto control, by a sole controller, so as not to be challenged by other shareholders. In other words, when confronted by a de facto control, the holder of this control must be a sole controller (hypothesis where the rest of the shares are not concentrated in other hands but dispersed) or in case of joint control, be able to enjoy enough rights that would prevent him from being challenged, for instance a shareholders' agreement as in Life since 1997, some extra voting rights or nomination rights.

The fact that a firm enjoys a de facto control situation over another firm can allow the controlling firm not to notify another acquisition of the controlled company's shares, as it would not change the situation drastically regarding the control. However as it will be developed in Chapter 2, a de facto control situation does not always mean that the companies linked by this form of control are part of a single economic entity.

⁶⁴ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 44

⁶⁵ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* (n53) at para 46.

1.2. Joint ventures and the single economic entity doctrine.

1.2.1 The particular case of joint-control as approached by South African law and applied by South African competition law authorities.

This sub section will aim to explain how and why joint venture creation might have to comply with merger regulations and will discuss the solutions adopted in both the European Union and in South Africa.

As a joint venture implies the creation or the acquisition of shareholding of an entity by two or more parents, this operation, depending on its complexity and intensity, can be treated as a merger.

An important question still has to be asked: how a merger approval may affect the legitimacy of joint venture agreements between competitors?

First of all, according to its Section 3, the Act applies to any economic activity within South Africa or having effects on the country. According to this section, it should be clear that any joint ventures must comply with the Act, therefore, the question should instead be whether such operations could be seen as mergers as understood by the Act.

The South African Competition Act 89 of 1998 has raised questions about the application to joint ventures of the mergers provisions contained in Chapter 3.

As explained in the Guidelines issued by the Compliance Division of the Competition Commission⁶⁶, a merger according to Section 12 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*’. It seems that the wording of this section, especially the terms “one or more” firms, indicates that sole or joint control can be acquired in a merger. Regarding Section 12, a merger may occur by various means including ‘*the purchase or lease of the shares, an interest or assets of the*

⁶⁶ European Competition Commission Issue 3 ‘The application of merger provisions of the Competition Act 89 of 1998, as amended, to joint ventures’.

*firm in question; or amalgamation or other combination with the other firm in question*⁶⁷. It seems that this list is not exhaustive of the parameters of control that may be relevant for the application of Chapter 3, and it cannot be seen as stating the only ways of how a merger can occur.

Furthermore, according to the Competition Commission guidelines, as Section 12 do not take into account the length of the acquisition of control, the duration of the joint venture does not appear to be important regarding applicability of Chapter 3 to joint ventures.

More important and directly matching with the keystone of this paper, the guidelines state '*control is based on the possibility of exercising decisive influence over a firm or a business*'. This statement reminds directly of the European jurisprudence⁶⁸ explaining that for a parent company to own the totality of the shares of a subsidiary creates a rebuttable presumption that the parent company exercises a decisive influence on its subsidiary.

In order to answer the question of the applicability of the merger regulations to joint ventures, two recent decisions seem to have more or less settled the question of whether or not a majority shareholder need notify the acquisition of the balance of the share capital in the joint entity.

In the *Ethos* case⁶⁹ the Tribunal introduced the concept of 'bright lines' of control. Crossing the 'bright line' happens when a company acquires of more than one half of the issued share capital of another company. The Tribunal ruled that the acquisition of more than 50 per cent of the issued share capital of a company constitutes a notifiable merger as it involves crossing a 'bright line'. The fact that the majority shareholder could dictate the decisions of the company was of less importance.

Going further in the *Cape Empowerment Trust* case, the Tribunal suggested that

⁶⁷ Section 12 (1) South African Competition Act 89 of 1998.

⁶⁸ ECJ of 29 September 2011, C-521/09 *Elf Aquitaine SA / European Commission Akzo Nobel v Commission*, 10 September 2009.

⁶⁹ *Ethos Private Equity Fund IV / Tsebo Outsourcing Group (Pty) Ltd* (case no 30/LM/JUN03)

where an initial acquisition of bright line control has been realized, a further acquisition of control need not be notified.

The dominant view in competition law circles regarding a move from joint to sole control following the Ethos and Cape Empowerment Trust cases can be summarized as follows:

- If a firm had notified the acquisition of ‘bright line’ control (eg the acquisition of more than half the issued share capital, notwithstanding the fact that one or more other parties may have enjoyed joint control at the same time) and the merger was approved on that basis, it was not necessary to notify the authorities when the firm later sought to acquire the balance of the shares, or if the element of joint control fell away for any other reason.
- If the bright line control had not been previously considered by the competition authorities, then it would be necessary to notify them if the sole control became ‘unfettered’, unless (based on Cape Empowerment Trust) the acquisition of sole control was not notifiable because it had occurred prior to the Act being in force.

One recent decision⁷⁰ deserves our attention for apparently changing the previous paradigm; indeed it was perhaps commonly assumed that a shareholder of ‘bright line’ didn’t have to notify the Commission when he was acquiring new forms of bright lines. In the Imperial Bank case, in 2001 Nedbank acquired 51.1 per cent of the equity of Imperial Bank, in which Imperial Bank Holdings still owned 49.9 per cent. At the time of the operation, the procedure was not notifiable regarding the regulations towards the banking industry. Then in 2009 Nedbank desired to acquire more shares from Imperial Bank Holdings. Arguing the parties’ opinion that as Nedbank already had ultimate control and therefore the operation need not be notified, the Commission considered that *‘the proposed transaction is notifiable as it will result in an acquisition by Nedbank of unfettered control over Imperial Bank’*. Even if the Tribunal approved the merger with conditions, it did not expressly rule regarding the notifiability, even if it seems to rebut the

⁷⁰ *Nedbank Ltd and Imperial Bank Ltd* (case no 70/LM/Oct09)

Commission's stance.

An important question has to be answered: after the approval of joint control, would this make the joint venture part of a single economic entity, so that the parent companies cannot be held liable of colluding with the joint venture, or would the same protection be afforded via the fact of merger approval?

Depending on the structure chosen by the controller to create the joint venture, the result might be a merger or an anticompetitive conduct by the parties involved. As explained in the Competition Commission Guidelines, the merger control provisions should be understood to be applicable to joint venture transactions in South African law. In other words, only the joint ventures operating a change of control should be notifiable and comply with Chapter 3 of the Competition Act, whereas those that do not result in change of control and therefore do not form a single economic entity may be examinable under Chapter 2 of the Act to determine any anticompetitive effects. In fact, joint ventures would only form a single economic entity where there is an effective change of control and this operation would result in seeing the procedure falling under the scope of Chapter 3.

1.2.2 The particular situation of joint-control as targeted by European law and applied by European competition law authorities.

Under the European competition law, a joint venture has been defined as an undertaking, which is jointly controlled by two or more other undertakings⁷¹. If joint ventures are of particular importance under European Union competition law, it is not an easy task to know under which regulation they should be assessed: Article 101 TFUE or Regulation 139/2004? The answer to this question could be found in the distinction between “concentrative” and “cooperative” joint ventures. The concentrative type has been described as those bringing a lasting change in the

⁷¹ Commission Notice (98/C 66/01) p.101 para. 3 of the Introduction.

structure of the undertakings concerned, when the cooperative type aims at a specific goal: research and development, marketing, networking, distribution and production. The former were said to fall within the scope of Regulation 4064/89, predecessor of Regulation 139/ 2004, both stating that *'the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration'*⁷².

According to the South African Competition Commission⁷³, commenting on the European regulations, there is general doctrine considering that a joint venture will be regarded as full function and therefore subject to merger regulation when there is sufficient indication showing that the entity is more than partial function⁷⁴.

The requirement - for a joint venture to be full function - of *'activities beyond one specific function for the parents'*⁷⁵ means that the subsidiary must be able to carry out one of the parent company's activities with its own full access to the market. In other words, this statement joins the requirement set in settled European case law regarding the "parental liability" notion, demanding that the subsidiary be independent enough in the market without having the parent company (ies) exercising on it its (their) decisive influence. If this criterion were not fulfilled, the European authorities would be able to find the group of companies as forming a single economic entity and therefore hold them liable in case of an infringement committed by the subsidiary.

Another requirement to have the full function joint venture assessed under the Regulation is that the parents must have full control of the entity. This criterion does not mean that the parent companies must own an equivalent number of shares of the common subsidiary. For instance minority shareholders may have additional rights allowing them to vote for certain strategic decisions or giving them a veto power. These rights do have to be related to fundamental and strategic decisions on the business policy of the joint entity⁷⁶. In other words, the joint control must be coherent and form a governing body able to "check and balance" the other parent

⁷² MM. Dabbah op cit (n49).

⁷³ Competition Commission Issue 3 op cit (n66).

⁷⁴ Lennart Ritter et al (2000) pp. 408.

⁷⁵ Commission Consolidated Jurisdictional Notice, n22, at para 95.

⁷⁶ MM. Dabbah op cit (n49).

company rights. This requirement seems intellectually close to the reasoning held by the South African competition law authority in the Bulmer's case when requiring a common controlling mind.

In its 'Review of the new regime for assessment of horizontal co-operation agreements in response to European Commission Public Consultation'⁷⁷, Norton Rose LLP provides a critical point of view regarding the problematic of how joint control is tackled by European authorities.

Concerning the joint control exercised by parent companies of a joint entity, to support its opinion stated in the Draft Guidelines that '*a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it*'⁷⁸ the Commission quotes Avebe⁷⁹, decision the issued by the General Court. In this case, if the jurisdiction decided that '*taken together, the factual evidence provides a sufficient basis for the presumption that Akzo and Avebe determined jointly [the joint venture's] course of action on the market to the point where [the joint venture] was deemed not to have any real autonomy in the matter*'⁸⁰, it did not clearly state that if confronted with an equal joint control situation, the Court should rule in favour of a lack of autonomy in the joint entity's conduct of its business. Put in another way, the Court did not create a presumption that in case of joint control, the joint entity is presumed to be dependant on the parent companies and by doing so forming a single economic entity with them. The vocabulary used in paragraph 11 of the Draft Guidelines makes one think that a joint venture is dependent on its parents.

However, the introduction by the Commission in the Guidelines of the concept of "partial single economic entity" creates some confusion. Indeed, in the Commission's mind, a full function joint venture should be treated as a "partial single economic entity". For Norton Rose LLP, this new term '*erodes the concept of a single economic entity*'⁸¹. With this new concept, one can only try to guess how authorities will apply Article 101 TFUE to joint ventures.

⁷⁷ Norton Rose LLP 'Review of the new regime for assessment of horizontal co-operation agreements in response to European Commission Public Consultation'

⁷⁸ European Commission 'Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements'.

⁷⁹ Case T-314/01, *Avebe*, ECR II - 3085, paragraphs 138 and 139.

⁸⁰ *Avebe*, supra (n79).

⁸¹ Norton Rose LLP op cit (n77) para 5.4.

In order to summarize what has been said regarding the notion of control, it is possible to assert that neither the law nor the jurisdictions of both South Africa and Europe have totally managed to delimit and define the inextricable relations between control and the single economic entity notion. If they have confirmed that the notions are linked, there is still a lot to do to gain certainty as to when it is possible – apart from the School case of a wholly owned subsidiary- to ascertain, regarding certain criteria, that a holding company and its subsidiary form a single economic entity

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Chapter 2. Circumstances under which the single economic entity can be raised as a defence.

In this chapter the author will consider circumstances in which the single economic entity doctrine can be raised as a defence in cartel cases both in South Africa and in Europe.

Part 1. THE POSITION UNDER SOUTH-AFRICAN LAW.

1.1 An exemption mechanism.

As discussed, the aim of Section 4(1)(b) of the Competition Act is to prohibit competitors and potential competitors from fixing prices or other trading conditions, dividing markets (by means of, for example, territorial, supplier or customer allocation) or tendering in a collusive manner. On the other hand, section 4(1)(a) operates as a catch-all provision and prohibits any conduct that would substantially lessen or prevent competition. The concept of a “single economic entity” is the keystone of both sections, as pictured in section 4(5). This Section aims to limit the application of section 4(1), by excluding companies constituting a single economic entity from its ambit. As companies forming a single economic entity are generally controlled by a common mind and in a cohesive manner, they should not be banned from “colluding” between themselves.

In the case of a wholly owned subsidiary, determining whether it and its parents form a single economic entity does not raise any difficulty. However, when it comes to a subsidiary that is not owned integrally, the answer becomes more complex. One of the fundamental questions raised by this situation is whether or not section 4(5) can be interpreted to apply to less than wholly owned situations and, if so, what do ‘the constituent firms within a single economic entity’ mean?

After many years, in the matter between the Commission and Loungefoam/Vitafoam⁸², the Competition Tribunal finally had the opportunity to consider the application of the single economic entity defence to the prohibited practices contemplated by Section 4 of the Competition Act. The Tribunal had especially to decide if competing firms with a common minority shareholder form a single economic entity⁸³.

In this case, on 3 September 2007, the Tribunal received a complaint from the Commission, alleging that Loungefoam and Vitafoam were contravening Section 4(1)(b) of the Competition Act, mostly by price fixing and by allocating customers. More specifically, the Commission identified the anti-competitive conduct as involving: '*[p]rice fixing and dividing markets by allocating customers in contravention of section 4(1)(b)(i) and 4(1)(b)(ii). Exclusionary acts, inducement, predatory pricing and buying up scarce resources in contravention of section 8(c), 8(d)(i), 8(d)(iv) and 8(d)'6/...*'⁸⁴.

Then, on 26 May 2008, after having found that Steinhoff International and Kap International Holdings were shareholders of the investigated entities, believing that these two companies orchestrated the unlawful operation, the Commission lodged another complaint that would include them.

The respondents then challenged this allegation. Even if they had acted in the alleged way, the fact that Steinhoff's owns 47 per cent of the shares in Loungefoam and 100 per cent of the shares in Vitafoam, and also taking account of factual issues such as the organisation of the businesses, Loungefoam and Vitafoam, according to Section 4(5), were forming a single economic entity, Steinhoff International, which meant that they therefore were exempt from the application of section 4(1) of the Act.

On 16 February 2010, the Commission requested from the Tribunal the authorisation to

⁸² *Competition Commission v Loungefoam (Pty) Ltd* (CCT 90/11) [2012] ZACC 15; 2012 (9) BCLR 907 (CC) (2012).

⁸³ J. Balkin, J. Lurie., 'The concept of a single economic entity' COMPETITIVE EDGE Business Law & Tax Review.

⁸⁴ Commission's Form CC1, 3 September 2007.

amend its referral in order to refine its strategy to counter the respondents' assertion about the single economic entity defence. The modifications added by the Commission were first made to implicate Feltex Holdings, a company falling outside the Steinhoff group that was alleged to be part of the price fixing conduct with Loungefoam and Vitafoam. Then, the Commission contradicted the claim that Loungefoam and Vitafoam were forming a single economic entity; but if however the Tribunal found that it was the case, this was a result of a larger collusion occurring between the parent companies Steinhoff International and Kap. As a consequence of this last allegation, as Loungefoam and Vitafoam were in fact controlled and directed by the holdings companies, Steinhoff International and Kap should also be held liable for the unlawful conduct and as a consequence, be responsible for the fine imposed on the subsidiaries.

In line with this opinion, the Commission decided that the parent companies should then be liable for any administrative penalty imposed on the subsidiaries and so, they had to take part in the proceedings. In seeking leave to appeal, the Commission developed its argument in regard to the collusion complaint but, beyond saying that it stood by its heads of argument, did not develop an argument in relation to the joinder point⁸⁵.

The Competition Tribunal in its decision issued on 8 June 2010⁸⁶, granted all the amendments that the Commission asked for⁸⁷. In order to approve the extension of the complaint to the holdings companies, the Tribunal explained that Section 49B(1) of the Competition Act simply requires to '*provide a rational link between the conduct complained of and a relevant section of the Act*'. For the Tribunal, this link can be found in the Commission's statement of May 2008: '*the relationship between the parties and Steinhoff appears to have orchestrated the collusive conduct complained of*' and Section 4(1)(b)(i) or 4(1)(b)(ii)⁸⁸, drawing the conclusion that '*there was no need for the Commission at that stage to identify exactly which, how many or even which subsidiaries or divisions of the respondents were involved in collusive activities*'⁸⁹. In its decision, the Tribunal explained that it had to follow a permissive approach to amendments applications,

⁸⁵ *Competition Commission v Loungefoam (Pty) Ltd* op cit (82) para.

⁸⁶ *Competition Commission v Loungefoam (Pty) Ltd*, In re: *Competition Commission v Loungefoam (Pty) Ltd* (103/CR/Sep08) [2010] ZACT 39 (8 June 2010).

⁸⁷ R. Legh '*Competition SG*' (2012) 15 of 31 § .

⁸⁸ Dissenting judgment of Cameron and Yacoob , *Competition Commission v Loungefoam (Pty) Ltd* at para 47.

⁸⁹ Dissenting judgment of Cameron and Yacoob op cit (n88) at para 59.

so as to be in ad equation with the public interest pursued by the Commission⁹⁰.

Unsurprisingly, Feltex and Steinhoff lodged an appeal to the Competition Appeal Court (hereafter referred as the CAC) in order to have the Tribunal's decision set aside and reviewed.

On 6 May 2011⁹¹, the Competition Appeal Court upheld the appeal lodged by Feltex and Steinhoff. Regarding the intention of the Commission to tackle the holding companies, the CAC stated that the Commission could not use the single economic entity defence invoked by the respondents to enlarge the liability to Steinhoff International and Kap.

Arguing against the interpretation made by the Competition Appeal Court regarding the single economic defence, the Commission then applied to the Court that had just dismissed its case for leave to appeal against its decision to the Supreme Court of Appeal. In the mean time, the Commission applied to appeal against the whole judgement of the CAC before the Constitutional Court; however this appeal will not be discussed as not focusing on the single economic entity notion.

The questions that were asked of the Competition Appeal Court are in substance the following. First, could the Tribunal allow the Commission to '*allege co-operation or collusion between the Steinhoff group of companies and the KAP group of companies directed at enabling Loungefoam and Vitafoam to take advantage of the provisions of section 4(5)(b) of the Act?*'⁹². Then, it was asked of the Tribunal if Section 4(5)(b) could be used to hold the parent companies liable for the infringing conduct perpetrated by their subsidiaries Loungefoam, Vitafoam and Feltex⁹³.

⁹⁰ Section 12 (1) South African Competition Act 89 of 1998.

⁹¹ *Loungefoam (Pty) Ltd v Competition Commission South Africa, Feltex Holdings (Pty) Ltd v Competition*

Commission South Africa (102/CAC/Jun10) [2011] ZACAC 4 (6 May 2011).

⁹² Judgments Online, a LexisNexis Electronic Law Report Series. *Loungefoam (Pty) Ltd v Competition Commission of SA & others; Feltex Holdings (Pty) Ltd v Competition Commission of SA; & two related review applications* [2011] JOL 27203 (CAC).

⁹³ Lexis Nexis Electronic op cit (n92).

The appealed judgement issued on 14 December 2012⁹⁴ offers an interesting and constructive approach to the claims surrounding the single economic entity defence. First of all, in its paragraph 28, Judge Wallis writing for the unanimous Competition Appeal Court (the ‘CAC’) explains that the claim based on Section 4(5)(b) is not (as argued by its detractors): *‘an alternative claim based on the same facts as the main claim but adding nothing to the factual material that the Tribunal will have to consider at the hearing’*⁹⁵. In fact, Judge Wallis discusses a total different opinion. In his mind, as this claim aims to hold liable some parties that were not directly, at least at the beginning, considered responsible for the alleged complaint, it must be seen as a *‘separate and novel claim’*. Furthermore, if the Commission is to pursue the claim, it will have to be shown that the Steinhoff group forms with Loungefoam and Vitafoam a single economic entity. In order to succeed in this task, the Commission will have to take into account multiple factual clues such as, the corporate structure of the group, the relations between the companies within the group and so on. In other words, the acceptance by the Tribunal of the amendment lodged by the Commission created a new complaint. However, in Judge Wallis’ opinion, the fact that the Tribunal granted the Commission with the modification and addition of its claims constitutes a fair ground for the appeal.

Regarding the intention of the Commission when trying to enlarge and recreate the scope of application of Section 4(5)(b) of the Competition Act, Judge Wallis adopts here a singular but attractive interpretation. Quoting Mr Maenetje (acting as counsel for the parties)’s statement “ *‘(...) it may appear that Steinhoff controlled Loungefoam sufficiently for purposes of Section 4(5)(b) – because of this wider collusion – any such control was rooted in a stratagem to achieve what section what Section 4(1)(b) prohibits and cannot be permitted to benefit the Steinhoff group (...)’* ”, Judge Wallis tries first to interpret and explain what he says. First of all, according to the merging parties’ interpretation of the complaints, the Commission did not want to introduce a new and separate complaint under Section 4(1)(b) between the two holding companies, but instead aimed to provide more

⁹⁴ *The Competition Commission vs Loungefoam (Pty) Ltd, Gomma Gomma (Pty) Ltd, Steinhoff International Holdings Ltd & Steinhoff Africa Holdings (Pty) Ltd*. 102/CAC/Jun10

⁹⁵ *C/f Dharumpal Transport (Pty) Lid v Dharumpal* 1956 (1) SA 700 (A).

facts that would be able to prove that the single economic entity is only a façade created by the holding companies and should be regarded as such. Here, Judge Wallis reminds that according to the “removing of the corporate veil” principle, the Court ‘*will strip away the façade in which parties have chosen to cloak their transactions or relationships and look to the underlying reality of matters*’⁹⁶. Furthermore, the appealed judgement explains that if the Court does not have any problem regarding the fact that the Commission will be able to tackle this allegedly fake single economic entity defence, the problem lies more in the true intention of the Commission when amending its complaints, and on the fact that the merging parties’ explanation seems weak.

Put in another way, the CAC judges had the impression that the Commission had strategically decided that its amendments now had meaning different from the one they were meant to have before the Tribunal. According to the Tribunal, if it is possible to add ‘*a new legal point in support of the same result*’⁹⁷, trying to change the meaning and substance of the amendment should not be tolerated.

Also, going deeper into the substance of the single economic entity defence, the CAC begins to explain that Section 4(5) has an exclusion purpose, totally different from the interpretation that the Commission tried to give, that is to say, not creating any obligations. Initially, the complaints issued by the Commission were only targeting Loungefoam and Vitafoam, which responded by using Section 4(5)(b) as a defence. What the Commission then tried to do was to accept the single economic entity defence, but by accepting it, had in mind to enlarge the scope of application of the claim. In other words, if Loungefoam, Vitafoam and Feltex form part of a single economic entity, they are under the control of Steinhoff International and Kap, and so these two holdings should also be held liable for the conduct of the subsidiaries. However, the CAC refutes this vision and explains that if the subsidiaries have engaged in an unlawful conduct under Section 4(1)(b), each of the firms is liable for its own conduct, and therefore Section 4(5)(b) cannot be used. As

⁹⁶ *The Competition Commission vs Loungefoam (Pty) Ltd, Gomma Gomma (Pty) Ltd, Steinhoff International Holdings Ltd & Steinhoff Africa Holdings (Pty) Ltd. op cit (n94) para 61.*

⁹⁷ *The Competition Commission vs Loungefoam (Pty) Ltd, Gomma Gomma (Pty) Ltd, Steinhoff International Holdings Ltd & Steinhoff Africa Holdings (Pty) Ltd. op cit (n94) para 63.*

a consequence, if Section 4(5)(b) could not be used by the subsidiaries to “excuse” their restrictive horizontal practice, the Commission could not use the same section to extend the liability to the holding companies. The Competition Appeal Court concludes this explanation by stating that the Tribunal shouldn’t have allowed the Commission to extend its claim under Section 4(5)(b).

Finally, the Competition Appeal Court concluded and ordered that *‘the Feltex appeal and the Steinhoff appeal must succeed in their entirety’*⁹⁸, and therefore upheld both appeals. However, the CAC left intact the possibility for the Commission to prove that the single economic entity described by the subsidiaries is artificial: *‘that does not mean that the Commission must not seek leave to place before the Tribunal, (...) material directed at showing that the appearance of a single economic entity between Loungefoam and Vitafoam is a charade’*⁹⁹.

In order to summarise this case and extract its result, one could say that the Loungefoam decision confirms the single economic entity defence, even though the Court does not accept its application to the facts of the case. Unfortunately the decision does not decide if the companies do form a single economic entity. However it seems that the Competition Court of Appeal does not explicitly exclude the application of the single economy entity when a parent company owns less than the majority of the shareholding of the subsidiary.

Furthermore, and a major aspect of the decision relies on this, the Competition Appeal Court states explicitly, that the single economic entity under Section 4(5)(b) is a defence and an exemption; it is in any case a way to target the liability of parent companies.

As this case was the first occasion for the South African competition authorities to rule on the matter of a single economic entity in terms of Section 4, it is beneficial to study how foreign authorities have dealt with it. The American Needle decision is comparable with the Loungefoam matter. If the American authorities have dealt with the single economic entity doctrine in a famous case such as Copperweld vs Independence Tube, the question

⁹⁸ The Competition Commission vs Loungefoam (Pty) Ltd, Gomma Gomma (Pty) Ltd, Steinhoff International Holdings Ltd & Steinhoff Africa Holdings (Pty) Ltd. op cit (n94) para 67.

⁹⁹ The Competition Commission vs Loungefoam (Pty) Ltd, Gomma Gomma (Pty) Ltd, Steinhoff International Holdings Ltd & Steinhoff Africa Holdings (Pty) Ltd. op cit (n94) para 67.

of knowing if a company held by a minority shareholder can form with the latter a single economic entity, still remains unanswered.

In the American Needle case, 32 separately owned professional football teams in the National

Football League (NFL) collectively, through an entity, granted an exclusive licence to a brand that would manufacture and sell equipment for the 32 NFL teams. For American Needle, this conduct represents a conspiracy that would restrict the competitors of the “*NFL authorized manufacturer*” for the thirty-two teams. Answering this accusation, the respondents argued that because they had formed a single economic entity, at least for the concerned conduct, they could not be held liable of such an infringement.

The lower court’s decision stating that the parties had “so integrated their operations that they should be deemed a single entity rather than joint-ventures co-operation for a common purpose” was rejected by the US Supreme Court. The latter affirmed that in order to determine if companies form a single economic entity, “*the central substance of the situation*” must be taken into account, and authorities must not rely only on the fact that the parties are legally distinct entities; it was ‘*moved by the identity of the persons who act, rather than the label of their hats*’¹⁰⁰. Finally, the US Supreme Court ruled that each of the NFL teams was a “substantial, independently owned and independently managed business”, and furthermore that there was no common controlling mind and that ‘*their objectives are not common*’.

According to J. Balkin and J. Lurie¹⁰¹, ‘*the South African Competition Tribunal has already indicated, in merger hearings, that it believes that the single economic entity doctrine can apply to less than wholly owned entities*’. However, when the two authors wrote about the case, the appealed decision of Loungefoam was still pending, and it was not sure if this principle would be extended to subsidiaries that are less than 50 per cent owned. In the opinion of these two authors, the distinction between collusion and integration is easy to cross and applying the single economic entity to entities that are held by less than 50 per cent would be an extreme step.

¹⁰⁰ *American Needle, Inc. vs. National Football League et. al Id.*, at 353

¹⁰¹ Balkin, Lurie op cit (n5)

1.2 Does the single economic entity doctrine apply as a defence in merger cases?

In July 2012, the Competition Tribunal of South Africa issued a decision¹⁰² that applies the single economy entity concept to a merger in order to decide if the merging entities formed a single economic entity or not pre merger and could therefore argue that the economic situation post merger would not change for the competitors.

As Section 4(5)(b) of the Competition Act applies to restrictive horizontal practices, the main question of the present case is the applicability of the single economic entity defence argument to an operation normally scrutinized under Chapter 3 of the Competition Act.

Since the facts and the question of control inherent to the Life decision were laid out in Chapter 1, it is possible to focus on how the single economic entity theory was interpreted and applied to this case.

The respondents argued that because they were forming a single economic entity, the pricing agreement they had could not fall within the ambit of Section 4, and because the holding had a de facto control over the subsidiary, the change to a de jure control would have very few consequences and so need not be notified. As the discussion regarding the perception of control has already been made, the focus will be on the interpretation of the single economic entity.

The merging parties were arguing that because Life controlled JMH and they together formed a single economic entity, the two companies were allowed to reach agreements in which they would be for instance fixing prices, without being considered as colluding and harming the competition on the market, and that therefore, the merger would not make major changes to the market. By using the single economic entity doctrine, the merging parties were trying to avoid the application of Section 4(1) to the agreement they made between them.

The Competition Tribunal after stating that *'The intention of the Act (Section 4(1)) is to facilitate the prosecution of firms in such a situation and thus to discourage*

¹⁰² *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd* supra (n53)

*such partial forms of control*¹⁰³, focuses especially on the phrasing of Section 4(5)(a) and (b) in order to understand and define in which cases a group of companies can be excluded from the application of Section 4(1). After stressing the conditions of Section 4(5)(a) where an agreement can benefit from the exclusion only if it had been contracted between a parent and its wholly owned subsidiary, the Tribunal excludes the application of this subsection as the infringing companies do not match this requirement. Then the Tribunal is still not confident concerning the application of Section 4(5)(b); indeed in its opinion, the requirements that are set are extremely restrictive and the companies in the case do not match them. For instance, the wording “similar in structure” does not mean that the subsidiary must be wholly owned but it still ‘*seems to suggest that the structure is not far removed from it*’¹⁰⁴.

The Tribunal goes even further in its explanation of why Life and its subsidiary could not claim to be a single economic entity when it states in substance that even the American and European regimes, known to be liberal regarding this notion, would never consider Life and JMH pre-merger to form a single economic entity¹⁰⁵. More precisely, the Tribunal asks why Section 4 of the Act would exist if the legislature did not mind seeing a partial or joint controller of a company given immunity from colluding with it by a normal operation? The answer is simple, for the Tribunal there was no such intention and therefore, Life and JMH, the holding company not even having de jure control of the subsidiary and owning less than the majority of its shares, could not pretend to form a single economic entity.

For the Tribunal, the parties cannot rely on an illegal agreement in order to escape the application of Section 4 by saying that according to this illegal agreement, the situation post merger would not change anything because the illegal agreement was already setting the same conditions. In other words, as they did not constitute a single economic entity pre-merger, Section 4(5)(b) was not applicable. Therefore the agreement they rely upon was unlawful and according to Section 4(1) created a collusion between the companies: *‘the merging parties cannot rely on a past*

¹⁰³ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd supra* (n53) para 52.

¹⁰⁴ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd supra* (n53) para 53.

¹⁰⁵ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd supra* (n53) para 54.

*history of joint pricing to create a counterfactual that the merger would make no difference to pricing post merger, because they had priced jointly before it*¹⁰⁶.

In order to summarize the significance of this decision, one could first say that the Tribunal applies perfectly the civil law principle “Nemo auditur propriam turpitudinem allegans”, or no one can be heard to invoke his own turpitude¹⁰⁷ when stating that Life and JMH could not use their illegal agreement pre merger concluded while they did not form a single economic entity as a counterfactual. Furthermore, it seems that the Tribunal tries to help in the delimitation and definition of the single economic entity notion by taking and developing its constitutive criteria before applying them to the facts of the case. What should be remembered regarding the single economic entity, is that this notion cannot and should not be applied too broadly according to the Tribunal, interpreting here the intention of the legislature.

In other words, this decision seems to restrain the applicability of the single economic entity; there must be very strong ownership links between a parent and a subsidiary, if not integrally owned by the parent.

¹⁰⁶ *Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd supra* (n53) para 59.

¹⁰⁷ E. Nelson ‘Effects of Illegality: A Comparative Study in French and English Law’ 1995 *The International and Comparative Law Quarterly*, Cambridge University Press on behalf of the British Institute of International and Comparative Law 44 (1).

PART 2. THE SINGLE ECONOMIC ENTITY DOCTRINE AS A DEFENCE UNDER EU COMPETITION LAW?

European authorities have a very different approach to the single economic entity, indeed where South African regulations and authorities consider the single economic entity as a defence strategy, their overseas counterpart tend to see it mostly as a way to increase the repression on infringing group of companies. However it seems that the defence argument succeeded in front of the European Court of Justice in the Viho case¹⁰⁸.

In the Béguelin Import¹⁰⁹ case, it was decided that when a subsidiary ‘*enjoys no economic independence*’, or if the undertakings ‘*belong to the same concern*’ or have ‘*the status of parent company and subsidiary*’ and ‘*form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market*’¹¹⁰, they form, according to Article 101 TFUE, a single economic entity.

In the Viho case, the reasoning set out by the Commission that a parent company and its 100 per cent owned subsidiary form a single economic entity, was confirmed by the European Court of Justice. As a consequence, following the Copperweld decision, agreements and arrangements made between these entities would not fall within the scope of Article 101 TFUE and therefore such agreements should be seen as internal allocations of functions of a single enterprise, and not as a collusive conduct targeted by Article 101 TFUE¹¹¹.

In this case, Viho, a Dutch company, lodged a complaint before the European Commission, arguing that it was not able to obtain Parker Pen Ltd.’s products on conditions equivalent to those granted to Parker’s subsidiaries and independent distributors, which was as a matter of fact breaching Article 101(1).

The Commission investigated the matter and rejected the complaint. It found that Parker’s subsidiaries were wholly owned and not enjoying real autonomy. Viho

¹⁰⁸ Case C-73/95 P, *Viho Europe BV v. Commission* (1996).

¹⁰⁹ Case 22/71, *Béguelin Import v. GL Import-Export* (1971) para 8.

¹¹⁰ Case 15/74, *Centrafarm BV and Adriaan de Peijper v. Sterling Drug Inc* (1974) ECR 1183, para 41.

¹¹¹ A. Jones, B. Sufrin *Eu Competition Law, Text, cases and materials*.

decided to appeal against this decision to the General Court that upheld the decision, so lodged another appeal before the European Court of Justice (hereafter referred as the ECJ), which confirmed the Commission reasoning classifying the Parker group as a single economic entity. As a consequence, the subsidiaries were not considered as enjoying any independence, neither determining their course of action in the market¹¹².

The appellants were claiming that even if the conduct in question was occurring within the Parker Group, Article 101 was still applicable '*since the division of responsibilities between the companies in the Parker group aims to maintain and partition national markets by means of absolute territorial protection*¹¹³'. In other words, the conduct could not be interpreted as an internal allocation and should therefore comply with Article 101 TFUE.

The Court found that the subsidiaries and Parker formed a single economic entity and confirmed the reasoning held by the General Court that dismissed the application of Article 101 TFUE. However, this unilateral conduct could fall within the ambit of Article 102 TFUE.

The main outcome of this decision is to confirm that '*truly unilateral behaviour of an undertaking*¹¹⁴' within a single economic entity, will not be scrutinized under the scope of Article 101 TFUE, unless the entity is in a dominant position and this conduct would result in a breach of Article 102 TFUE.

Defining the confines of this doctrine as a defence argument is a hard task; the cases show that the casuistic has a large place in determining which companies form a single economic entity: independence, compliance, control from the parent company...

When confronted with a fully owned subsidiary, as in Viho, a rebuttable presumption of dependence of the subsidiary towards the parent applies, and furthermore the parent is presumed to exercise a decisive influence over its subsidiary (see Chapter 3). However, in the case of a partially owned subsidiary,

¹¹² Jones, Sufrin op cit (n111).

¹¹³ Jones, Sufrin op cit (n111).

¹¹⁴ Jones, Sufrin op cit (n111).

determining if the group forms a single economic entity is harder, and according to case law, the parent company must prove that it exercises a decisive influence over the subsidiary¹¹⁵.

As a consequence of the Viho jurisprudence, an arrangement or an agreement between undertakings forming a single economic entity cannot be considered as an unlawful agreement covered by Article 101 TFUE.

Regarding the question of dominance targeted in Section 8 of the South African Competition Act and for which the Competition Appeal Court had to decide if the single economic entity could be transposed in, it is interesting to concentrate on the way European authorities focus on this problem. In the Patensie Citrus case, South African authorities were confronted with a joint dominance, a scenario not foreseen in the Act; indeed, it is totally possible that a competition law authority might be confronted with two or more undertakings enjoying a dominant position. In this case, the European Act refers to a “collective dominance” situation and Article 102 TFUE provides that: *‘Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States¹¹⁶ (...)’*.

The application of Article 102 to the conduct of a joint or oligopolistic abuse of dominance is clearly pictured. However the question of knowing if the Article 102 is bound to the behaviour of the same single economic entity or is applicable to one or more independent undertakings must still be answered. In other words, is it possible to apply Article 102 tackling “collective dominance” only to members of a single economic entity or to different undertaking having some links but not sufficient to form a single economic entity?

Initially, the common interpretation of Article 102 TFUE was that it could only apply to members of the same single economic entity. In a single economic entity, subsidiaries are presumed not to be independent enough to decide of their own

¹¹⁵ Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission* (2000) para 29.

¹¹⁶ Article 102 TFUE. The wording of Art. 102 TFEU is unchanged from that of Art. 82 EC other than the substitution of ‘internal market’ for ‘common market’.

course on the market. It was therefore fair and logical to hold the integrity of the group liable for the actions of a subsidiary in case of abusive collective dominance¹¹⁷.

However, the *Continental Can*¹¹⁸ and *Commercial Solvents* decisions changed this perception. In the first decision, the Commission held that the American parent owning 85.8 per cent of a German company committed an abuse of collective dominant position when it used its Belgian subsidiary to take the control of a Dutch company, direct competitor of the German company it owned. Even if the European Court of Justice annulled the Commission's decision for not defining the market properly, this does not correct the interpretation of the Commission towards the collective dominance.

A similar reasoning was held later in the *Commercial Solvent* decision¹¹⁹, where a US parent company held 51 per cent of an Italian subsidiary and the latter following the instruction of its parent refused to supply an Italian company. The parent and daughter were accused of collectively abusing their dominant position. As it is arguable that even under the European jurisprudence a company owning 51 per cent of a subsidiary forms with it a single economic entity, one can notice that in this case too, the collective dominance concept was applied outside a proper single economic entity situation.

Looking at different cases¹²⁰, the wording "one or more undertakings" related to a collective dominance situation can either refer to legally independent undertakings holding a dominant position together or to a group forming a single economic entity; Article 102 therefore applies to both these situations.

Put into perspective with the South African jurisprudence, the European one looks much harsher. Indeed, being a single economic entity and claiming this defence before a European authority seem to have few chances to succeed. It appears that if

¹¹⁷ Introduction to Article 102' Oxford University Press available at <http://fds.oup.com/www.oup.com/pdf/13/9780199572731.pdf> accessed last on 2nd February 2013.

¹¹⁸ Case 6/72, *Europemballage Corp and Continental Can Co Inc v. Commission* [1973] and *Re Continental Can Co Inc* [1972].

¹¹⁹ Cases 6 and 7/73, *Instituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. Commission* [1974].

¹²⁰ Case 15/74, *Centrafarm BV and Adriaan De Peijper v. Sterling Drug Inc* [1974] para. 41, repeated in Case 30/87, *Bodson v. Pompes funèbres des régions libérées SA* [1988], para. 19

this defence has succeeded once, it is likely that the authorities will manage to interpret the agreement taken within the group of companies as a conduct of abusive dominance and therefore, even agreed between companies part of a single economic entity, this conduct would fall under the scope of Article 103 TFUE and the companies will be held liable for it, especially the parent companies if they were found to form a single economic entity. In other words, this defence can be seen as a double-edged sword.

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Chapter 3. The single economic entity doctrine as a mean to impose liability.

This chapter will describe in which cases and more specifically before which jurisdiction a group of companies should not use the notion of single economic entity, or should avoid forming a group of companies that would fall within the ambit of this notion. In other words this chapter will change the scope under which the single economic entity is seen. It will be discussed how and why the competition authorities use the single economic entity as a fining tool.

PART 1. PARENTAL LIABILITY IN TERMS OF EUROPEAN LAW.

This section will aim to develop and describe how the single economic entity doctrine is applied to groups of companies and to joint ventures, before pointing out the danger of such a powerful tool. It will point out **the repressive approach held by the European Union competition law authorities when it comes to the single economic entity notion: the parental liability or how to hold a parent company liable for the competition law infringement committed by its subsidiary?**

1.2 The “parental liability” doctrine, its interpretation and application by the European competition law authorities.

1.2.1 The application on a normal group of companies.

Since a precedent was established, it seems that the Court of Justice has applied the principle of undertakings in order to hold liable a parent company when its subsidiary commits an infringement to Competition Law rather strictly.

The major decision that settled the jurisprudence of the Court of Justice was issued on 10 September 2009 in the Akzo Case¹²¹. Following the judgment of the European Court of Justice in Akzo Nobel v Commission, parent companies can

¹²¹ C-97/08P *Akzo Nobel v Commission* 2009.

expect to be held jointly and severally liable for any infringements of EU Competition Law committed by their subsidiaries.

The Akzo Nobel case established that a 100 per cent shareholding owned directly or indirectly by a parent company in a subsidiary is sufficient to create a presumption that the parent company exercises decisive influence over the commercial policy of that subsidiary, and so can be held liable for any infringement(s) committed by that subsidiary.

The concept that a parent company and its wholly owned subsidiaries (even if they have distinct legal personalities) are considered a form of single economic unit is used by the European Commission in taking a tough stance on hard core infringements of EU competition law – and to direct fines at the highest level of a corporate group. In the Akzo Nobel case (which involved a cartel), even though the infringements were committed by four distinct subsidiaries, the Commission was able to hold the parent company liable for these infringements and take account of the worldwide consolidated turnover of the entire Akzo Nobel group in imposing a fine of over €20m.

The fact that a parent company and its subsidiaries constitute a single entity under EU competition law allows the Commission to fine the parent company even though the parent company might not have committed any infringement itself.

The Court ruled that a 100 per cent shareholding of a parent company in a subsidiary creates a rebuttable presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary, no other elements being necessary to establish the presumption. The parent company cannot rebut the presumption merely because the subsidiary was capable of independent day-to-day market conduct. The Court confirmed that account must also be taken of other relevant factors such as economic, organizational and legal links between the parent company and the subsidiary, as the Commission did in its Decision¹²².

¹²² Antitrust: ‘Commission welcomes Court judgment in Akzo Nobel case’ available at http://europa.eu/rapid/press-release_MEMO-09-385_en.htm?locale=en last accessed on 2nd February 2013.

In other words, the Court of Justice uses here the notion of undertaking to group together a parent company and its subsidiary in order to fine them both. Furthermore, the Court only uses the presumption that the parent company owns the totality of the subsidiary to conclude that the parent must be held liable for the infringement committed by the daughter company, because it gives theoretical power to the company to influence the commercial policy of the subsidiary. In fact the subsidiary could be totally independent and have committed the infringement without the control of the parent. In the European Judges' minds, to the onus is on the parent company to prove that its subsidiary was in fact independent.

One can observe that it is now settled case law that a parent company will be held liable for the conduct of a subsidiary where the latter does not have the power to decide independently about its conduct in the market, when in fact it follows the instructions coming from the parent company.

Nonetheless, in two decisions issued on 29 September 2011, respectively the *Arkema* and *Elf Aquitaine* cases, the European Court of Justice confirmed the *Akzo Nobel* jurisprudence. The Court ruled that where a parent company owns the totality of its subsidiary's shares, "first the parent company can exercise a decisive influence on the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise such a decisive influence¹²³". Therefore, "it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent company exercised a decisive influence over the commercial policy of the subsidiary¹²⁴".

In these cases, the Commission and the ECJ (on appeal) apply strictly the notion of "undertaking" in order to hold the parent company liable; by doing so the Court re-affirmed the rebuttable presumptions that are used: the shareholding based imputability¹²⁵ that presumes the exercise of a decisive parental influence.

¹²³ *C-520/09 P Arkema SA / European Commission* ECJ of 29 September 2011, para. 40.

¹²⁴ *C-520/09 P Arkema SA / European Commission* supra (n123)

¹²⁵ ECJ of 29 September 2011, *C-521/09 Elf Aquitaine SA / European Commission*, para 56. C-97/08P

It is obvious that under the European Union law, a group of companies are not in an advantageous position when a daughter commits a competition law infringement. In fact, it seems that the single economic entity is here a tool to increase the liability and cannot be seen in this case as a defence argument.

1.2.2 *Parental liability doctrine and the Joint Venture.*

It is also interesting to see how the ECJ approaches the liability of parents of a Joint Venture (JV). A JV is an association of firms or individuals formed to undertake a specific business project. Under the Community competition rules, joint ventures are undertakings, which are jointly controlled by two or more other undertakings¹²⁶. In this particular situation, following the parental liability jurisprudence of the ECJ, the controlling undertakings might be found liable for a competition law infringement committed by the controlled undertaking. As there are at least two controlling entities, our first thought would be that the Court would analyze the incorporation statutes of the JV and decide which company has the more shares or the biggest controlling power of the common subsidiary. However as we can see in two decisions¹²⁷ issued 2 February 2012, the General Court held that the parents could be held jointly and severally liable for the conduct of their jointly owned subsidiary, in which each parent had a 50 per cent shareholding. This was despite the fact that each parent did not individually have the power to impose decisions on the subsidiary, but could only prevent it from taking certain decisions¹²⁸, and furthermore that this joint-venture is a “full-function” JV within the meaning of the EU Merger Regulation, in other words meaning that it was performing all the functions of an “autonomous economic entity” on a lasting basis.

This interpretation and application of the shareholding based imputability is much more arguable when it comes to parents of a JV that do not have a “positive” role

¹²⁶ Glossary available at <http://www.concurrences.com/anglais/droit-de-la-concurrence-150/glossaire-des-termes-de/joint-venture?lang=en>

¹²⁷ T-77/08 *Dow Chemical v Commission* and T-76/08 *El du Pont de Nemours v Commission*.

¹²⁸ P. Citron, H. Lovells ‘Holding parents liable for 50/50 joint ventures’ available at <http://kluwercompetitionlawblog.com/2012/02/14/holding-parents-liable-for-5050-joint-ventures/>

but can only prevent the subsidiary from taking certain decisions, and when the joint-venture seems to be almost an independent undertaking by itself.

1.2.3 *Parental liability and succession: no right to be forgotten.*

Succession liability occurs when the economic unit that committed the infringement changes its legal form. It seems that the successor should then be liable for the past infringement. However, if the economic unit is a subsidiary that is sold to another parent company, then the subsidiary will remain liable as well as its previous parent; the new parent company will only be liable too if the subsidiary resumes its unlawful behaviour.

In the case of an absorption of the subsidiary, the new parent will also be held liable for the past infringements committed by the daughter company.

The *Rheinzink* judgement¹²⁹ stated that “succession liability” doctrine was applicable to Competition Law infringements. Its direct effect is that the parent company remains liable for the past infringement committed by the subsidiary in accordance with the parental liability doctrine; even if the subsidiary is sold, absorbed by another company or changes its legal form, the parent company will be liable.

More recently, another judgement gave some clarification regarding the succession liability when occurring in an intragroup transfer. The *Aalborg Portland* judgement¹³⁰, issued in 2004, allows us to understand that, in presence of an intragroup transfer of a company directly concerned by the infringement, the new entity might be held liable for the fine, even if the predecessor still exists, but only if the parent company that was liable at the time of the infringement remains the same on the day of the decision.

¹²⁹ Cases 29, 30/83, *Compagnie Royale Asturienne des Mines SA et Rheinzink GmbH v Commission* (1984), para 9.

¹³⁰ *Aalborg Portland v. Commission* (2004) para 356-359.

In 2011, in the Alstom/ Areva judgement¹³¹, the General Court applied a combination of parental and successive liability that occurred both within and outside the company group.

In this case, the General Court confirmed the Commission's decision stating that the parent company would be liable for a previous infringement committed by the subsidiary even if at the day of the judgment they no longer formed an undertaking: *'although Areva T&D SA belongs to a different undertaking at the time of the adoption of the Commission's decision, it is legally identical with Alstom T&D SA, therefore as a subsidiary directly involved in the infringement, it might be held liable jointly and severally with its parent company (Alstom) before the intergroup transfer and at the time of the infringement'*¹³².

The applicants of course contested this point of view; they argued that paying a fine for an infringement committed by another applicant was going against the principle of personal liability, especially knowing that both the subsidiary and the parent company no longer formed part of the same undertaking. To that the General Court answered "the Commission has the discretion to establish the liability of the parent company additionally to the liability of the subsidiary and the parent company's liability for its conduct at the time it formed an undertaking with its subsidiary would not diminish just because at the time of the decision they do not form an undertaking anymore"¹³³.

In these judgements, one can notice that parental liability cannot be set aside simply by changing the form of the infringing subsidiary, transferring it inside the group or selling it outside the group.

We can sum up the response of the Commission and the Courts to the strategies parent companies could devise in order to avoid the liability they are facing due to this hard parental liability doctrine¹³⁴:

. In case of legal succession, antitrust liability follows the subsidiary and the parent remains liable.

¹³¹ Cases T-177/07 and T-121/07 Alstom/ Areva v. Commission, (2011).

¹³² *Alstom / Areva v Commission supra* (n131) para 134 and 137.

¹³³ *Alstom/ Areva v. Commission supra* (n131) para 206.

¹³⁴ A. Horvath, E. Lorand 'Parental, Successive and passed-on liability of undertakings for antitrust fines' (2011) available at http://www.law.muni.cz/sborniky/cofola2011/files/odpovednost/Horvath_Andras_5782.pdf

- . In case of acquisition of business unit, the ex parent company remains liable.
- . In several cases the liability shifts to the company currently holding the business unit: if the ex parent company no longer exists at the time of the Commission's decision; if the ex parent company still exists but cannot pay the fine; if there is a proven attempt to limit the liability unlawfully; and if there are structural links between the ex parent company and the one currently owning the business unit¹³⁵.

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¹³⁵ K. Hoegh 'Succession of liability for competition law infringements- The Cement judgement' *European Competition Law Review* (2004) 25(9) 534-537, 536.

PART 2. THE SINGLE ECONOMIC ENTITY DOCTRINE AS A TOOL TO IMPOSE LIABILITY: THE SOUTH AFRICAN PERSPECTIVE.

As developed, explained and discussed through this paper, the South African conception of the single economic entity is more the one of a defence argument than a way for the authorities to hold liable companies controlling an alleged transgressing one. However, after a thorough examination of the latest decisions, one may wonder if the South African competition law authorities are not tempted to consider the parental liability doctrine as applied in the European Union.

For instance, in Loungefoam, the Commission tried to use an interesting reasoning in order to hold liable companies that were within the group that had allegedly infringed Section 4(1) of the Competition Act. This reasoning is two-pronged. First of all, the Commission explains that if Loungefoam and Vitafoam were in fact forming a single economic entity, they are actually part of a larger collusion, made possible only by the conduct of their holding company Steinhoff. Then, the Commission argues that the holding companies should be liable for any fine that would be imposed on the subsidiaries. However, for the Competition Tribunal, this reasoning, even if attractive, does not comply with the essence of the texts. The Tribunal reminds that once the illegal conduct involves third parties, Section 4 becomes irrelevant as it only applies as an exemption for a conduct between the original parties. Furthermore, this section does not create any ground for holding liable a holding company when its subsidiaries commit an infringement. This does not mean that in such a case depending on the circumstances, a holding company wouldn't be responsible for the unlawful conduct of its subsidiaries, but, the Tribunal here expressly set aside this question, repeating that it is not what was asked: 'that does not mean that a holding company may not in certain circumstances be held liable for prohibited anti-competitive conduct by its subsidiary – a matter on which I prefer not to express any view – only that it cannot be held liable under s 4(5)(b) ».

Is the single economic entity defence applicable under Section 8 of the South African Competition Act? How have South African authorities tried to use the

single economic entity notion to hold liable parent companies under section 8 of the Act?

The single economic entity exemption as described in Section 4(5)(b) normally applies only under the scope of Section 4, targeting horizontal restrictive practices. However, in the *Patensie Sitrus* case¹³⁶, the respondents tried to use the single economic entity defence strategy in order not to see their operation scrutinized under Section 8 of the Competition Act prohibiting the abuse of dominance.

In this case, *‘the appellant public company, the successor of an agricultural co-operative, was set up to pack and market the agricultural produce of certain farmers. The farmers were the sole shareholders in the appellant. In terms of its articles of association, the appellant’s members were required to give the appellant first option to acquire and distribute their entire crop or so much of it as the appellant wished’*¹³⁷.

The Tribunal received a complaint from the Commission, arguing that the above articles of association required a customer not to deal with a competitor and therefore they were in violation of Section 8 of the Act. The Tribunal agreed with the opinion of the Commission. So the appellant lodged an appeal to the Competition Appeal Court against the integrity of the Tribunal’s decision.

The appellant contended before the tribunal that they form a single economic entity, stating that *‘that the Articles of Association of the Respondent essentially constitute a voluntary agreement between farmers or producers of citrus (...). The members accordingly form a single economic entity insofar as the packing and marketing of their fruit are concerned. The members of the respondent are not competitors in respect of the packing and marketing of their fruit. They are in effect partners’*¹³⁸.

The Tribunal, in its reasons for its decision, uses the notion of single economic entity in a totally different way and only to discuss the definition of the relevant

¹³⁶ *Patensie Sitrus Beherend Beperk v Competition Commission* [2003] 2 CPLR 247 (CAC).

¹³⁷ Editor’s summary of *Patensie Sitrus Beherend Beperk v Competition Commission* available at <http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/cc/51fp/61fp/cikp/n57r/ztqaa>

¹³⁸ Calvyn Michael Du Toit’s affidavit. Page 260 of [2003] 2 CPLR 247 (CAC)

market. When arguing the respondents' assertion that '*Patensie, is simply the sum of its members who are citrus fruit producers of the GRV, and that accordingly it cannot enter into a market exchange with itself, much less inflict 'abuse' upon itself in the conduct of that exchange*', the Tribunal asked the question if '*the respondent and the farmers who are its members constitute a single economic entity by virtue of the latter's shareholding in the former?*'

The way the appellants visualised how their relationship formed a single economic entity is a problem by itself; as this notion is not to be used under other circumstances than Section 4 dealing with restrictive horizontal practice. So the main question will be if the single economic entity defense can be expanded to other Section(s) than the Section and purpose for which it was created.

After explaining that Section 4(5)(b) concerns restricting horizontal practices and underlining that its aim is to confirm that firms cannot conspire between themselves, the Tribunal develops and criticizes the respondents' strategy. In the Tribunal's opinion, by demonstrating that the respondent and its members had a common existence, the respondents wanted to show that the single economic entity should be considered under Section 8. In other words, by arguing that firms forming a single economic entity cannot conspire between themselves, the respondents' strategy was to lead the Tribunal to consider the alleged conduct under the scrutiny of Section 4(5) and not only under Section 8.

The argument of the respondents, when claiming that they form a single economic entity with their members, was rejected by the Tribunal, opinion confirmed by the Competition Appeal Court: '*I agree with that (the tribunal's) finding and it is accordingly unnecessary to consider whether the "importation" of the concept "single economic entity" into a case to be decided in terms of section 8 is either appropriate or permissible by law*'¹³⁹.

The Competition Appeal Court reminds that the application of the single economic entity concept to other provisions than Section 4(5) has already been considered. In

¹³⁹ *Patensie Sitrus Beherend Beperk v Competition Commission* supra (n136) page 261.

the Bulmer case¹⁴⁰, the Competition Tribunal applied the single economic concept to a merger that is normally scrutinized under Section 12 of the Act and contains no reference to the single economic entity notion.

Interpreting the American decision on Copperweld, it seems that the Tribunal tried to find if the respondents were forming, or if there was a leading and directing body in this entity, that would control the different parties forming the single economic entity. However, the Tribunal didn't manage to find a controlling mind, which is a determining criterion when trying to define whether a group of companies forms a single economic entity, according to the Bulmer decision. In this case, the members are independent farmers who do not receive any control or participation from any other shareholders. Taking also into account the meagre percentage of shares owned by each farmer (between one and six per cent), the Tribunal was right when concluding that it was not able to find a controlling mind and that there was an absence of unity of action: *'They have nothing in common except their participation in appellant. While the members' control over their farms as economic entities is absolute, they have no significant control over appellant'*¹⁴¹.

For the Competition Appeal Court, the consequence of allowing the appeal, by allowing the use of the single economic entity concept under Section 8, would be to *'allow a company such as appellant which is clearly dominant to evade the reach of the Act without seeking or obtaining an exemption nor reliant upon any other discernable statutory basis for avoiding prohibitions in section 8 of the Act'*¹⁴²

Finally, the Competition Appeal Court dismissed the appeal, finding it unnecessary to rule a decision on the applicability of the single economic entity to Section 8.

However, the CAC put forward an interesting argument: wondering whether the underlying question is to identify a victim, the answer could have been different. The CAC noted that the Tribunal stated that *'a section 8 charge cannot be sustained if the farmers – qua victims of the abuse – and [appellant] are related in*

¹⁴⁰ *Bulmer SA (Pty) Ltd & Seagram Africa (Pty) Ltd/ Distillers Corporation (SA) Ltd, Stellenbosch Farmers Winery Group (Pty) Ltd & The Competition Commission* supra (n21).

¹⁴¹ *Patensie Sitrus Beherend Beperk v Competition Commission* supra (n136) page 263.

¹⁴² *Petensie Sitrus Beherend Beperk v Competition Commission* supra (n136).

a manner described in section 4(5)'. This statement seems to be based on a misconception regarding the quality of the victim. Is the victim of an unlawful conduct under Section 8 a party or the competition itself¹⁴³? This confusion might be the keystone when deciding if the concept of a "single economic entity" or a joint venture could be scrutinized under Section 8 by the willingness of the judges.

Furthermore, in the case of a parent company and its wholly owned subsidiary fixing prices at excessive levels, they obviously form a single economic entity and therefore would be exempt under Section 4. But their behavior, if their common market power was calculated, would also be examined under the prohibition of excessive price fixing under Section 8.

If the single economic entity was to be imported into Section 7 on this basis, there would be a presumption that the parent and its subsidiary always act together. This new utilization of the single economic entity could have consequences contrary to for the intention; consider a non-dominant subsidiary having some exclusive supply agreements while its parent company is out of this agreement. If a Court was using the single economic entity, it would likely hold liable the parent company and the subsidiary for the agreement negotiated with the non-dominant subsidiary, as the size of both would be taken into account and would likely show dominance¹⁴⁴.

This effect would go in the opposite direction from Section 4(5)(b); it would use the single economic entity not as an exemption, but as a way to suppress a conduct that would normally be totally legal or at least not anti competitive. This interpretation and use of the single economic entity notion would go even further than the European doctrine of the parental liability as it would tackle some behaviors that do not normally fall within the ambit of a specific regulation/ do not normally harm competition and therefore should not be hampered.

The Competition Appeal Court's decision seems to be in conformity with a past case where it was also asked if and how the single economic entity could be

¹⁴³ *Patensie Sitrus Beherend Beperk v Competition Commission* supra (n136) page 262.

¹⁴⁴ Sutherland, Kemp, op cit (n15) para 7.11.3 available at: <http://butterworths.uct.ac.za.ezproxy.uct.ac.za/nxt/gateway.dll/dwvn/g51t/zjuaa/elyxa/hlyxa> last accessed 20th December 2012.

transposed into Section 7 in case of a joint dominance held by multiple firms¹⁴⁵, as Section 7 does not provide for such a case. Presented with this problematic in the second South African Airways case¹⁴⁶, the Competition Tribunal simply stated that the single economic entity, as exposed in Section 4(5)(b) does not allow its extension in such a way. The Competition Appeal Court in the Loungefoam case confirmed this opinion¹⁴⁷: ‘*The purpose of [section 4(5)] is exclusionary. It is not creative of obligations going beyond that exclusionary purpose. Its operation is restricted to section 4 of the Act ...*’

One can notice that the South African competition law authorities do not feel comfortable with the idea of extending the parent liability doctrine to the single economic entity concept. In the Loungefoam decision, the Judge of appeal repeats that it is possible for a parent company to be held liable for the infringements committed by its subsidiary, but not by using the single economic entity argument as the Commission suggested.

¹⁴⁵ D.Unterhalter ‘The Abuse of Dominance’ in M Brassey et A. ‘*Competition Law*’ (2002) 197; and the rebuttal of his views on the interpretation of s 7 in Heather Irvine “Does the South African Competition Act accommodate the concept of collective dominance?” 2004 *SA Merc LJ* 448

¹⁴⁶ *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* 80/CR/Sep06 par 138.

¹⁴⁷ *Loungefoam (Pty) Ltd v Competition Commission* supra (n82) para 65.

Chapter 4. Conclusion. Are there any common grounds in the reasoning and application of the two jurisdictions when using the single economic entity? Would the two different conceptions and applications of the single economic entity be able to converge?

This Chapter will analyse and put together the differences and common grounds that have been revealed through this paper. It will also be discussed if there are any aspects that each jurisdiction could improve taking into consideration the way its counterpart applies the single economic entity principle.

First of all, regarding the single economic entity notion itself. If the South African Competition Act refers to the Single economic entity in its Section 4, the European pieces of legislations do not seem to explicitly cite it. However, both jurisdictions have in common that neither of them define this central notion, develops its constitutive criteria and so on. Both seem to have left this fundamental work to the Courts; it can be a factor of legal insecurity, insofar as it enables companies to expect and anticipate the application of the Law; on the other hand it can be seen as an advantage, by giving the jurisdictions enough flexibility to adapt their solution to the facts without being over bound by a definition and some fixed criteria. Also, as exposed through this paper, both jurisdictions take into account different factors to define and identify a single economic entity.

Secondly, an important notion linked to the one of the single economic entity is that of control. What can one remember regarding the links between control and the single economic entity? Is it possible to assert when a parent has enough control over a subsidiary that they form a single economic entity?

European authorities seem to be extremely liberal when assessing the minimum “amount” of control that must be held by a company over another one to form a single economic entity. Indeed, as has been developed through this paper, according to the parental liability doctrine, European institutions have created a

presumption allowing them to consider that when some minimal criteria –not settled yet, except in case of a wholly owned subsidiary- are met, the holding company is presumed to exercise enough control on its subsidiary so that the latter cannot be seen as independent and cannot conduct its own affairs on the market, and therefore both companies form a single economic entity.

In order to conclude this point, it seems relevant to highlight the outcome of the *Bulmer* and *Life* decisions regarding the inextricable links existing between the notion of control and the one of single economic entity. The first important point to remember concerns the controlling mind or body that must lead and gives impulsion to the single economic entity. Without this fundamental element, the South African authorities do not seem to recognize a single economic entity. Secondly, the *Life* case explains that if a company enjoys a *de facto* control over a second one, they can form a single economic entity, if the controlling mind condition is met...So if these two requirements are put together, one can assume that to form a single economic entity, a company must enjoy at least a *de facto* control over another one, and be able to lead the decisions of the group (condition that was lacking in the *Life* merger).

The last word regarding the link between control and the single economic entity could be that both jurisdictions totally agree on one point: in the case of a subsidiary wholly owned by a parent company, these two companies form together a single economic entity and therefore either the defence strategy before a South African authority or the parental liability doctrine used by a European authority is applicable.

Furthermore, as was highlighted throughout this paper, one can conclude that the goals of the legislations and their application by competition law authorities are different. In Europe the single economic entity led to the parental liability doctrine, a means for authorities to enlarge the number of companies that are liable for one infringement and therefore increase the amount of the fine. In South Africa, on the other hand, the single economic entity is a defence strategy and an exemption mechanism allowing companies not be held liable for a behaviour that without this

exemption mechanism would have been unlawful or at least contrary to competition regulations.

It is interesting to note that if the goals of South African and European legislations are different, it could be explained by the differences between the cultures, the societies and the economic maturity of their respective markets. As Europe is more developed in term of consumers' protection, due its quite long history of market and competition regulations, and the influence of the Common Market, it does not have exactly the same needs as South Africa. Indeed, the latter is a new country, bringing together influences from abroad and adjusting them to its own needs. South Africa is slowly becoming more engaged in customer protection and the regulation of the markets since the end of the Apartheid. South Africa takes into account in its different regulations some concepts that are foreign to most European acts, such as the principle of public interest¹⁴⁸. In other words, one could suppose that the way single economic entity is interpreted and applied in South Africa reflects its particular need to slowly build a competitive market but at the same time realize that it has to be done at its own pace.

This could be the reason why South Africa has chosen to use the single economic entity as a defence argument rather than a liability tool. By doing so, it could allow companies to become stronger, and grew together in order to resist international competitors and become stronger abroad, but in the same time limiting this favour by applying the single economic entity exemption principle more strictly than in Europe. In other words, companies can use this exemption mechanism when the authorities consider that the long term result created by the single economic entity strictly applied would benefit the entire market and the consumers.

On the other hand, as Europe is more advanced regarding consumer protection and so on, companies operating there are larger, stronger and more used to the harsh liberal market competition. This could be the reason why European authorities are less reluctant to hold liable and fine broadly a group of companies, while applying their version of the single economic entity doctrine less strictly than in South

¹⁴⁸ Preamble South African Competition Act 1998.

Africa, depending on the facts and the harm it could do to the competition and the customers.

However, as has become clear through the paper, a converging tendency seems to appear between the two authorities. Indeed, the South African authorities are tempted, as in the Loungefoam case, to enlarge the application of the single economic entity, by operating a switch from a defence argument to a tool similar to the European parental liability doctrine. On the other hand, even if the European authorities are not receptive to the argument, as explained in Chapter 2, numerous cases have attempted to use the single economic entity as a defence strategy.

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