

**SOME OBSERVABLE LEGAL ANOMALIES IN RESPECT OF MERGER
NOTIFICATION, GROUP RESTRUCTURES AND OTHER CHANGES IN
CONTROL**

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Abstract:

Section 12 of the Competition Act defines a merger in the broadest of terms, with reference to the acquisition by one or more firms over the business or part of the business of another firm.

The premise is simple enough, but its implementation is not always straight-forward. This paper will explore three related anomalies that can crop up in the context of merger notification.

Firstly, there is nothing in the Competition Act that expressly carves out a merger between subsidiaries from the operation of the compulsory merger notification regime and indeed, the Competition Appeal Court's *obiter dictum* in the Distillers case that the Act "makes no express provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of a merger" suggests that such restructures may indeed require merger notification. However, a practical convention has developed amongst competition law practitioners that transactions between members of the same group (ie, with a common holding company) do not generally require merger notification.

Secondly, a similar question arises in respect of the buy-out of minority shareholders. Here, the Tribunal's decisions in the Ethos and Cape Empowerment Trust cases provide some guidance, although the recent decision in the Nedbank/Imperial Bank merger may destabilise the precarious balance of precedent in this regard.

Finally, and as something of a related post-script, a question remains as to how a merger approval may affect the legitimacy of joint venture agreements between competitors. Where joint control has been considered and approved, a lacuna exists as to whether this renders the joint venture part of a single economic entity, so that the respective parent companies cannot stand accused of colluding with the joint venture, or whether the same protection is afforded via the fact of merger approval.

When is a merger not a merger?

Chapter 3 of the Competition Act, 1998 ("**Act**") is concerned with merger control. As most are by now aware, parties to intermediate and large mergers may not implement the merger unless and until it has been approved by the competition authorities.²

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² Section 13A(3) of the Act

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The first step to be taken by parties to a transaction is whether or not the transaction amounts to a "merger" as contemplated in the Act. In this regard, section 12 of the Act provides the point of departure:

12. Merger defined

- (1) (a) For the purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.
(b) A merger contemplated in paragraph (a) may be achieved in any manner...

A "firm" is defined simply and widely, to include "a person, partnership or trust".

The premise is simple enough, but wide ambit of the definition creates a practical conundrum when dealing with intra-group transactions. By way of example, if firm "A" and firm "B" are both subsidiaries of a common holding company, "C", and C determines to restructure its corporate affairs so that A acquires the business of B, is that restructure subject to competition approval?

On a plain reading of the Act, it is clear that "A" – a firm – will acquire the whole of the business of "B" – another firm, thus amounting to a merger as defined. If the requisite financial thresholds for an intermediate merger are met, anyone would be forgiven for suggesting that the transaction requires prior approval before implementation.

However, most practicing competition lawyers in South Africa would (the writer hopes) agree that a practical convention exists whereby such transactions between members of the same group (ie, with a common ultimate holding company) do not require notification.

Certainly the approach makes practical sense – to suggest that a group restructure (such as moving a division into a new corporate entity or combining two separate entities into one new division) should incur the cost and delay³ of merger notification. It is a question of some academic import, however, as to whether such an approach is justified under the black-letter of the law.

The question was first raised in some form as early as 2000 (the year after the Act came into force) in the *Distillers* matter.⁴ The relevant facts were the following:

Distillers and SFW were two entities involved in the production, sale and distribution of wine and spirits. The entities were separately listed on the Johannesburg Stock Exchange (as it then was). For historical reasons (namely that both Distillers and SFW had been hived-off out of the same entity, CWD) the shareholding structure of both entities was similar: A joint venture, Rem-KWV, owned 60% of the shares in

³ Notification of intermediate and large mergers attract a statutory filing fee of R100,000 and R350,000 just to be considered. It can take upwards of 60 business days to clear a merger once notified.

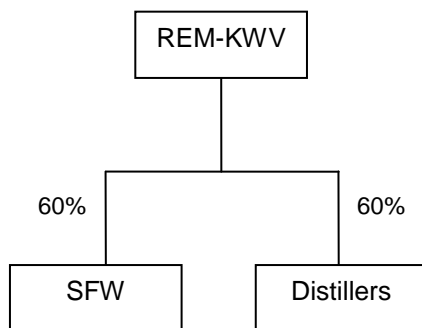
⁴ Per the Tribunal decision in *Bulmer SA (Pty) Ltd and Another vs Distillers Corporation (SA) (Pty) Ltd and Others* (Tribunal case no: 101/FN/Dec00) and the subsequent decision of the Competition Appeal Court in *Distillers Corporation (SA) Ltd SFW Group Ltd and another v Seagram Africa (Pty) Ltd and another* (CAC case no: 08/CAC/May01)

each of SFW and Distillers, 30% of the shares in each entity was held by SAB, with the balance (10%) of each company held by an assortment of public investors.

The shareholding structure of the two firms can be illustrated as follows:



Some, however, may have chosen to represent the structure as follows:



In 2000, Distillers sought to acquire the business of SFW. The parties declined to notify the merger, essentially on the basis that both before and after the transaction, SFW was subject to the same control structure – in other words, that the transaction did not lead to a change in the ultimate control of either company.

The Tribunal ruled that the transaction in fact amounted to a merger but in doing so, did not appear to rely on the simple wording of the Act (in terms of which, a firm, Distillers, had clearly established control over the business of another firm, SFW) to reject the notion put forward by Distillers and SFW that the relevant test was whether ultimate control remained. Rather, the Tribunal invoked a "single economic entity test"⁵ as something of a proxy for when it can be said that ultimate control remains unaffected. The following *dictum* is instructive of the Tribunal's reasoning:

"What we conclude from this discussion is this – a change in direct control presumptively triggers the obligation to notify. However we recognize that a limited class of transactions exists where that obligation may be negated if there is irrefutable evidence that indirect control remains unaffected. This is the case of firms who form part of a single economic unit, because the change in the direct form of control is illusory and has not altered the substance of control that both antedated and postdates the transaction. A clear example of when one would not be required

⁵ As is indicated in the separate discussion below, the concept of a single economic entity has resonance in the Act from section 4(5) where, in the context of alleged collusion, firms within "a single economic entity" are immune from prosecution on the basis that it is impossible to collude with one's self.

*to notify is the case of a company and transactions between it and its wholly owned subsidiaries or between its wholly owned subsidiaries...*⁶

The Tribunal ultimately found that the two firms did not form part of a single economic entity on at least the following grounds:

- the firms had separate boards of directors;
- they operated separately;
- they had separate listings on the JSE; and
- they had held themselves out to shareholders as being competitors.

The apparent lack of evidence that the common shareholders in fact directed the activities of the firms respectively (let alone in concert) drew the Tribunal to conclude that the merger was one that should have been notified.

Competition Appeal Court (CAC), while upholding the Tribunal's decision that the transaction was a notifiable merger took a more principled view – and there's the rub. Rather than merely confirming that the firms in question did not form part of a single economic entity, so that ultimate control did not in fact vest in the same shareholders pre- and post the merger, the CAC went further suggesting that reliance on ultimate control (or a single economic entity test) was –

*"...not mandated by the express wording of section 12(1). To the contrary, section 12(1) makes no provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of the merger."*⁷

Thus, while the Tribunal decision in the Distillers case might be seen as supportive of the notion that internal restructures (at least insofar as between wholly-owned subsidiaries are concerned) do not require merger approval, the CAC decision may be seen a supportive of a far more conservative view – namely that transactions between a company and its wholly-owned subsidiaries are not excluded from the definition of a merger.

It must be acknowledged that the Tribunal approach, while commercially more efficacious, is not immune to criticism. For instance, as the Tribunal itself acknowledges in its decision, the single economic entity test runs the risk of putting the cart before the horse insofar as questions relevant to a single economic entity test can just as easily be dealt with as part of the merger analysis. Internal restructures aside, many other mergers between unrelated parties are notified on a purely technical basis, but have no impact on competition and do not escape scrutiny on that basis.

Ultimately, practical conventions in the implementation of legislation often defy justification on the law itself. Many experienced legal practitioners are worth their salt not because of their ability to read and interpret legislation, but because of their practical knowledge as to how a regulator or other agency is likely to apply the law. In this respect at least, competition law may be no different. However, the stakes

⁶ Page 17 of the judgement.

⁷ Page 25 of the judgement

are high⁸ and it must be acknowledged that the convention applies at the expense of legal certainty.

It seems that a prudent approach (the CAC's interpretative admonishment notwithstanding) would be to treat transactions involving wholly owned subsidiaries within a group as falling outside the merger regime. However, transactions between "mere" subsidiaries may not be as straight forward – even on the Tribunal's more robust approach, it will need to be proved that the subsidiaries in question meet the test for a single economic entity – for instance that they evince "a complete unity of interest" in their affairs.⁹ In this regard, one may look to whether the subsidiaries in question operate autonomously from the holding company, whether the boards of directors are identical, or other evidence of concerted action or "*a single controlling mind*."¹⁰

Two practical examples may serve to illustrate the anomalies created by the convention on internal restructures:

Clever structuring of transactional steps may avoid notification, whereas a less calculated approach may render the same end result notifiable. By way example, imagine that a company, "A" has a wholly owned subsidiary "B". A wishes to introduce a diverse range of BEE partners and other strategic investors ("C", "D" and "E") into the ownership structure of B – so that B will ultimately not be subject to control by any one firm (including A). Assuming that B on its own meets the requisite financial thresholds for notification, the transfer of B to a special purpose vehicle ("SPV") held by A, C, D and E would require notification, on the basis that a new, unrelated firm (SPV) has acquired control over B.

However, if A were to first incorporate SPV as a dormant, wholly owned subsidiary, and then transfer B to SPV, that would not trigger a merger as it would amount to an internal restructure. When A then transfers shares to C, D and E, no merger is triggered as there is no acquisition or establishment of control by any firm over SPV (now incorporating B).

It is conceivable that the introduction of C, D and E may change certain economic incentives (for instance if C also held shares in a competitor, or of D was a major supplier to B) but there would be no grounds to investigate the effects of the transaction if no merger is triggered as per the second structuring option.

In a different scenario, imagine that a firm, "X" has three shareholders, "A" (60%), "B" (30%) and "C" (10%). Assume that A and B jointly control X by virtue of a shareholder's agreement that confers minority protections on B. C is a BEE investor that wishes to exit in favour of a new BEE partner, "D". If C were to simply transfer its shares to D, no merger would be triggered as D would not thereby acquire control of X. However, for tax purposes it is more efficient for the business of X to first be transferred to SPV, with A and B each taking up their previous shareholdings (and rights) in the new entity and D the balance. Assuming that X, together with A and B meets the thresholds for notification, the transfer of X to SPV would trigger a merger

⁸ Failure to notify a merger can attract penalties of up to 10% of the annual turnover of each firm

⁹ From *Copperweld Corp v Independent Tube Corp* 467 US 752 (1984) quoted as authority by the Tribunal in *Distillers*

¹⁰ See page 20 of the Tribunal decision in *Distillers*

(with SPV as the primary acquirer and A and B as secondary acquiring firms), notwithstanding the fact that X remains subject to the same control structure as previously.¹¹ This draws a parallel with the Distillers case where the similar shareholdings were not sufficient to lead the Tribunal to conclude that a merger had not taken place.

Of sole and joint control – have the bright lines been dimmed?

A further issue flowing from the Distillers cases is the CAC's rejection of the notion that that control is a unitary concept – which was relied on by the appellants (SFW and Distillers) in support of the argument that "ultimate" control should be the deciding factor in defining a merger. The CAC found that *"the wording of section 12(2) clearly contemplates a situation where more than one party simultaneously exercises control over a company."*¹²

In the world of mergers and acquisitions, transactions often involve the acquisition of a majority stake, with the erstwhile owner retaining a significant stake. Alternatively, a BEE partner may be introduced as part of the merger. In certain cases, the minority shareholder (erstwhile management or BEE investor) may retain some influence over the business, sufficient to render that shareholder a joint controller notwithstanding ultimate control by the majority shareholder.

Until recently, at least two well-known precedents, building on the above dictum in *Distillers*, seemed to have mostly settled the question of whether a majority shareholder needed to notify the acquisition of the balance of the share capital, in circumstances where this would result in the falling away of control by another party.

In the *Ethos* case¹³ the Tribunal introduced the concept of "bright lines" of control. One such "bright line" is the acquisition of more than one half of the issued share capital of a company. In this case, Ethos acquired increased its shareholding from just less than 50% to just more than 50%. However, due to restrictions contained in the shareholders' agreement, Ethos remained unable to make any material decision in the company without the assent of at least one of two other shareholders, a situation which endured prior to the increase in shareholding (ie, the firm was jointly controlled both before and after the transaction).

The Tribunal ruled that the transaction nevertheless constituted a notifiable merger as the acquisition of more than 50% of the issued share capital of a company involved crossing a "bright line" (also referred to as "sole control") which was a form of control that required notification regardless of whether the majority shareholder was in fact able to dictate the decisions of the company.

¹¹ For similar facts, see the unreported Tribunal decision in *Housing Solutions no. 39 (Pt) Ltd and Stocks Building Africa (Pty) Ltd* (case no. 78/LM/Dec03)

¹² Section 12(2) of the Act provides a non-exhaustive list of instances of control. These listed instances include beneficial ownership of more than one half of the issued share capital of a firm; the entitlement to vote a majority of the votes that may be cast at a general meeting of the firm, or the ability to control those votes; the ability to appoint or veto the appointment of a majority of the board of directors of a firm; or the ability to materially influence the policy of a firm in a matter comparable to a person who, in ordinary commercial practice, can exercise an element of control specified above. The last mentioned form of control is what often gives rise to so-called negative joint control (such as where a minority shareholder has the right to veto a business plan).

¹³ *Ethos Private Equity Fund IV / Tsebo Outsourcing Group (Pty) Ltd* (case no 30/LM/JUN03)

Importantly, the Tribunal went on to state that if the crossing of a bright line has been notified and approved by the competition authorities, it is not necessary to notify afresh when that control is strengthened. In the Tribunal's own words:

*"Control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required."*¹⁴

As a result, where a firm has notified and obtained competition approval for the acquisition of more than 50% of the issued share capital of a company, in terms of the Ethos case it does not need to notify the acquisition of further shares, even if that results in the joint control of another shareholder falling away.

The question was left open as to what would be the position if the so-called "bright line" were crossed prior to the Act coming into force? Such an acquisition would of course not have been notified previously and the Ethos case suggests that where such sole control became "unfettered" it would need to be notified as the authorities had not previously considered the competition aspects of the sole control.

Subsequently, the *Cape Empowerment Trust* case¹⁵ served to suggest that where an initial acquisition of bright line control predates the Act, it is not necessary to notify a further acquisition of control. In that case, Sanlam had acquired more than one half of the issued share capital in a company, Sancino in 1998 (before the Act came into force). The bulk of the share capital held by Sanlam was in the form of non-voting preference shares. In 2002, due to a default on the part of Sancino, Sanlam became entitled to vote the preference shares and later sought to convert them to ordinary shares. Both latter events took place subsequent to the Act coming into force and would have resulted in Sanlam becoming de facto sole controller of Sancino (with in excess of 50% of the voting rights). The Tribunal reasoned that as Sanlam already had more than half the issued share capital, it effectively crossed the bright line of "sole" control in 1998 and that the subsequent developments did not amount to a change of control so that it was not necessary to notify the "super-imposition of another one or more forms of control". The Tribunal made this finding despite positing (but without confirming) that in addition to Sanlam's sole control by virtue of holding more than 50% of the issued share capital, Sancino may have been subject to control by one or more other entities (ordinary shareholders).

The dominant view in competition law circles regarding a move from joint to sole control following the Ethos and Cape Empowerment Trust cases could 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

¹⁴ Paragraph 37 of the judgement

¹⁵ *Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd and another* (case no: 05/X/JAN08)

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 due to it having occurred prior to the Act being in force.

The recent decision in the *Imperial Bank* case¹⁶ in rather innocuous fashion appears to have potentially upset the paradigm described above. In 2001, Nedbank acquired 51.1% of the shares in Imperial Bank. Imperial Bank Holdings retained 49.9% and joint control as a result of certain minority protections. The transaction was not notifiable at that stage as the Competition Act had yet to be amended to give the authorities jurisdiction over banking mergers. In 2009, Nedbank sought to acquire the balance of the shares in Imperial Bank. It is recorded in a footnote to the Tribunal's decision that although the parties put it to the Commission that the transaction ought not to be notified as Nedbank already had ultimate control, the Commission determined that "*the proposed transaction is notifiable as it will result in an acquisition by Nedbank of unfettered control over Imperial Bank*".

If the footnote is read as an endorsement of the Commission's view, the Tribunal decision suggests that a change from 50.1% to 100% control requires further notification, as it removed the element of joint control enjoyed by the erstwhile minority shareholder. This despite the position taken in *Ethos* and *Cape Empowerment Trust* which together suggest that where a party has bright line control at the same time as having joint control with a minority, it does not need to notify the falling away of the joint control.

Through some jurisprudential tap-dancing, it is possible to reconcile the *Imperial Bank* case with *Ethos*, on the basis that the latter decision contained the proviso that a move from joint to unfettered sole control only escapes notification if the authorities had previously approved the acquisition of sole control at the time it was attenuated by the joint control of another party. As Nedbank had not previously notified the acquisition of sole control of Imperial Bank, the subsequent acquisition, whereby existing sole control becomes unfettered, is notifiable.

However, it is more difficult to read the *Imperial Bank* case in conjunction with *Cape Empowerment Trust*, which is authority for the notion that the *Ethos* proviso applies only if a prior merger notification could have been postulated – in this case, the Act did not apply at the time Nedbank crossed the bright line in respect of Imperial Bank. Recall that in *Cape Empowerment Trust* the Tribunal did consider that Sancino may well have been subject to control by one or more ordinary shareholders while Sanlam at the same time had bright line control as holder of the majority of the issued share capital. Although the conversion of the preference shares and the exercise of the majority of voting rights would have removed the influence of these mystery joint controllers, the Tribunal did not suggest that this rendered the move notifiable.

It is regrettable that the Tribunal did not take the opportunity to clarify the potential contradiction between the notification in *Imperial Bank* and the decisions in *Ethos*

¹⁶ *Nedbank Ltd and Imperial Bank Ltd* (case no 70/LM/Oct09)

and Cape Empowerment Trust. That said, it may be possible to chart a course through the decisions as follows:

- If the acquisition of sole control (in the form of a majority shareholding) has been previously notified and considered on that basis, even while that sole control was attenuated in some way by another party, the removal of the joint control (for instance by virtue of a further acquisition of shares) does not require further notification.
- However, if the sole control was not previously subject to scrutiny by the competition authorities, the removal of joint control will be notifiable. This is so even if the initial acquisition of sole control was, at the time, not subject to merger control.
- As an aside, the proviso above does not apply where the question of joint control is not at issue. In other words, if a firm has sole control with no other joint controllers in the picture, the acquisition of further forms of sole control is not notifiable, even if the initial acquisition predated the Act.

In order to avail oneself of the protection afforded by Ethos, any merger structure that involves a firm being across a bright line post-merger must make express reference to that sole control, notwithstanding that other firms may at the same time retain or acquire joint control. In addition, it seems that firms with majority shareholdings in companies that are also subject to joint control by another party (such as a management consortium, financial institutions or BEE partner) will need to notify the acquisition of the balance of the share capital even if the current structure predated the Act.

Approved joint ventures – single economic entity or a blessed union?

In principle, joint ventures between competitors (so called horizontal cooperation agreements) can raise competition concerns. For instance, such structures can limit competition through the exchange of competitively sensitive information which helps the parties involved to coordinate competitive behaviour or otherwise fail to act unilaterally in regard to important competitive parameters. Of even greater concern is the notion that certain competitor joint ventures (particularly those that involve joint selling or marketing) can in fact technically result in fixing prices or related trading terms in contravention of section 4(1)(b) of the Act.

Take for instance the long-running *Anzac* saga,¹⁷ where 5 USA producers of soda ash formed a joint venture to export soda-ash from the USA, including into South Africa. The competition authorities treated this as a cartel on the basis that the soda ash from 5 different competitors found its way into South Africa at a single price, coordinated through the joint venture. Although the Supreme Court of Appeal¹⁸ suggested that the Act may be interpreted so as to exclude such joint ventures from falling within the scope of the price fixing prohibition (on the basis that it was

¹⁷ *Competition Commission and others v American Natural Soda Ash Corp CHC Global (Pty) Ltd and others* (case no:49/CR/Apr00)

¹⁸ *American Natural Soda Corporation and another v The Competition Commission and Others* SCA case no: 577/2002

essentially formed to facilitate market entry by players unable to do so alone and not to reduce competition through price fixing, but only had that incidental effect) the matter was ultimately settled through a consent order and so no clarity has been established in regard to the correct approach.

An option is to consider whether the joint venture could be considered a "single economic entity" with its parents, in accordance with section 4(5) of the Act. This section provides an important exception to the *per se* prohibition contained in section 4(1)(b). It reads as follows:

(5) The provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by –

a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

The rationale behind section 4(5) is that an arrangement between entities that form part of a single economic unit cannot amount to collusion on the basis that it is not possible to collude with oneself. It is clear from section 4(5)(a) that a firm and its wholly owned subsidiary will always escape the provisions of section 4(1)(b). Unfortunately, the import of section 4(5)(b) is anything but clear.

On the one hand, it may be argued that section 4(5)(b) is designed merely to extend the exemption to "firms" other than "companies" so that where non-companies are related in a way that is analogous to a company and a wholly-owned subsidiary, the exemption equally applies. Such a strict interpretation would afford a company and its non-wholly owned subsidiary no protection at all.

On the other hand, it has been suggested that¹⁹ despite its poor formulation, section 4(5)(b) is intended to extend the exemption to any two or more firms (whether companies or not) that are related in such a way that they might be said to be economically integrated, which is to say they form part of a single economic entity.

This looser interpretation of "single economic entity" seems to have been favoured by the Tribunal and the Competition Appeal Court, as well as foreign precedent. However, the question is clearly one of degree: in other words, is there a threshold level of shareholding that a company needs to have in another for those companies to be considered part of a single economic entity? Three possible scenarios present themselves in this regard:

- Where a company has a majority shareholding in another, and no other entity enjoys a controlling influence²⁰ the two firms are likely to be considered part of a single economic entity.

¹⁹ For instance by Lawrence Reyburn in Competition Law of South Africa (Sutherland/Kemp Service issue 11).

²⁰ In South African competition law, a party can have so-called "negative" control by virtue of veto rights over decisions that are considered material to the strategic commercial policy of the firm in question. Typical examples are the ability to veto the business plan or the hiring and firing of key employees. By virtue of this "material influence", such a party will, in

- Where a company has a majority shareholding, but another firm enjoys joint control by virtue of its ability to exert material influence²¹ the position is less clear, with the extent to which the minority shareholders would be both likely and able to ensure that the firm in question pursues a strategic policy that is at odds with the wishes of the majority shareholder likely to be a key consideration. This is suggested by the Tribunal in the *Netcare* case²² where it stated that:

"a firm that is subject to joint control does not necessarily have controllers with the same incentives. Thus Netcare in considering pricing or investment decisions may have regard for how those decisions in CHG in which it has only a 43.75 % interest impact on its much larger interests in Netcare which it wholly owns. CHG Holdings, which has no hospital interests outside of CHG, may have had a different view, and as a long as they both enjoyed joint control, an outcome may have been different from that of Netcare, as sole controller. Thus without a full merger Netcare and CHG cannot be considered part of a single economic entity".

In this writer's view, it would be anomalous to deny the benefit of single economic entity exemption to a subsidiary that had, for instance, afforded minority protections to a financial institution or BEE shareholder, merely by virtue of those protections. Moreover, the facts of the *Netcare* case are unique as the constituent firms were both fully-fledged commercial entities with an established presence in the market and independent boards and operational teams.

- Even less clear is whether a firm with a shareholding of 50% or less in another can be considered part of a single economic entity with the latter firm. Unfortunately, there is no decided case law that deals with this specific situation²³ and one is left to speculate as to the approach of the competition authorities in this regard.

In summary, although there is a dearth of case law on the question of single economic entity, the concept is well established in Europe and the US. It is likely that a company that owns all or close to all of the shares in another will be presumed to form part of a single economic entity with the latter company. Less clear (principally because of a lack of directly applicable case law) is whether a company that holds less than a majority of the shares of another can be said to be part of a single economic entity with the latter. The weight of academic writing as well as available case law suggests that the issue should be dealt with on a factual, case by case basis and there is certainly no reason in principle why the doctrine

competition law parlance, be deemed to have joint control over the firm, together with the majority shareholder.

²¹ See footnote 20 *supra*

²² *Competition Commission v Netcare Hospital Group (Pty) Ltd and another* (case no 27/CR/Mar07)

²³ Although in *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) the Tribunal suggested in passing that where one company owned 27.96% of the shares in another and had board members in common, this may suggest that the firms may be run as a single economic entity.

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cannot apply to a company and its shareholder(s) with less than a majority shareholding.

However, there is potentially a more elegant solution for certain joint ventures that have been subjected to merger approval.

There is often a fundamental difference between a joint venture involving competitors and a merger. Not all joint ventures amount to mergers (for instance, the joint venture may be a start-up between competitors which does not involve the acquisition of a business, or the parties to a joint venture may not – jointly or solely – control the business, which in each case would not amount to a merger). However, where a joint venture involves the establishment of control, then it becomes necessary to approach the competition authorities for approval prior to embarking on the joint venture. The flip-side of obtaining merger clearance is that the merged entity is recognised as being subject to the control of one or more joint venture parties, which involves a full economic assessment of any potential competition concerns arising out of the joint venture. Put differently, the analysis *inter alia* assumes that the merging parties will not compete and that prices will be uniformly set through the joint venture and the approval is given taking all this into account.

In principle, merger approval therefore effectively sanitises the joint venture so that there can be no question of price fixing or other per se prohibitive behaviour. It is worth noting that it is the fact of merger approval that effectively "blesses" the joint venture. The mere fact that joint control has been established does not necessarily protect the parties unless and until the merger has been investigated and approved.

In the *Netcare* case referred to above,²⁴ being a complaint against two hospital groups for price fixing, the parties alleged that they had in fact merged, but had merely failed to obtain merger clearance (a lesser infringement than price-fixing). The Tribunal however indicated that it was unwilling to treat the groups as a merged entity, noting that they had at no stage prior to the complaint notified their purported union.

If the mere fact that a merger between competitors resulted in an erstwhile competitor retaining a stake in the business exposed the parties to allegations of price fixing, this would lead to the nonsensical outcome of any approved merger that did not involve a complete buy-out of a competitor potentially being subject to a complaint of price fixing. Although maintaining structural links between competitors post the merger may facilitate collusion in other markets, this is a factor that would fall to be considered during the merger investigation.

By way of example:

Imagine a matter in which an acquirer obtains 50% in a competing business. The acquisition is notified to the competition authorities on the basis that the firm in question is subject to joint control. The merger is duly investigated on the basis that it would be controlled by parties who prior to the transaction were competitors. In particular, the impact of the loss of actual and potential competition between acquirer and target is assessed.

²⁴ Footnote 22 *supra*

If the authorities ultimately approve the acquisition of control, one might submit that the logical outcome should be a blessing of the joint venture along with any economic consequences flowing directly from it (including the fact that the target and acquirer would no longer be competitors). In having approved the merger, there should be no scope to now allege that the parties to the joint venture are acting anti-competitively merely by virtue of the existence of the joint venture.

A preoccupation with the single economic entity doctrine in this context fails to concentrate on the correct issue, namely whether conduct approved under chapter 3 of the Act (merger approval) can be rendered unlawful under chapter 2 (prohibited practices) insofar as the post-merger attempts by the acquiring firm to coordinate the activities of the target firm are concerned.

To deal with the question of single economic entity (as contemplated in section 4(5)) without taking into account the effect of merger approval conflates the question of single economic entity and the application of section 4(5) to allegations of collusion with the separate consequences of merger approval. In the case of a reluctant joint venture, it would be anomalous to suggest that, having sought and acquired competition approval for the acquisition of joint control over the parents of the jointly controlled entity should not be free to exercise that control for fear that it would amount to a technical case of collusion.

In this writer's view, the Act must be read so as to clearly distinguish between the effects and outcomes of the relevant merger control provisions contained in Chapter 3 of the Act and the regulation of prohibited practices contained in Chapter 2. In this regard, merger approval unequivocally grants permission for an acquiring firm to exercise control over its target, which would include coordinating its behaviour in such a way that, absent the merger approval, may otherwise amount to a violation of section 4. From both a policy and a logical perspective, merger approval serves to place the target and acquiring firms outside the ambit of section 4, so that it is not necessary to consider the impact of section 4(5).

The following legal precedent may be offered in support of the notion that section 4 should not apply at all (let alone section 4(5) in particular) in regard to interactions between the target and acquiring firms:

- the decision of the CAC in the *Ansac* matter²⁵ between where Malan AJA indicates that joint ventures that might otherwise give rise to horizontal restrictive practices may be exempted under Chapter 3 of the Competition Act (merger control);
- the decision of the Tribunal in the *Netcare* consent order - although this decision may be read to indicate a view from the Tribunal that a firm under the joint control of another firm may nevertheless be in a competitive relationship with its joint controller, and therefore susceptible to allegations of collusion under Chapter 2 despite approval under Chapter 3, the Tribunal's position in this regard is factually distinct from the current instance, as in that case the parties had not obtained merger approval and the Tribunal was understandably reluctant to treat the firms as a merged entity so as to avoid an allegation of price fixing. Furthermore, the Commission's investigation into

²⁵ *American Soda Ash Corporation and another vs the Competition Commission and Others* (Case 12/CAC/DEC01)

alleged price fixing was initiated and concluded prior to any purported attempt to notify a merger between the relevant firms. The Tribunal's decision (not to endorse the consent order) was appealed to the CAC, where the notion that merger approval serves to obviate any allegations of the merged entities being in a collusive relationship appeared to find favour with the CAC (which would be in keeping with the CAC's previous *obiter dictum* in the Ansac case above), although the Tribunal's decision was ultimately overturned on another basis so that the CAC did not need to pronounce on this issue; and

- in the Distillers case, the Tribunal stated²⁶ that "*A merger cannot be implemented until it has been approved or conditionally approved. Once approved, a transaction is immunized,*"

As a final point of clarity, the above reasoning is not to suggest that merger approval provides a blanket exemption from section 4 – rather, conduct approved under chapter 3 (such as pricing terms between the joint venture and the acquiring parents) should not then be rendered unlawful under chapter 2 of the Act. Outside of the specific activities of the joint venture, the parents of the joint venture may never collude (in circumstances where the parents are in a competitive relationship).

²⁶ At page 19 of the judgement