Competition laws apply to economic activity. The economic actors who carry out this activity are the ones to whom the law confers rights and on whom the law imposes obligations. Different countries use different terms to describe these economic actors. Europe and the UK refer to 'undertakings'. The US Sherman Act applies to 'persons'. In South Africa, the Competition Act borrows the word from economic literature that describes the most basic economic unit – the ‘firm’.

Notably, it is extremely rare to find a jurisdiction that chooses the word ‘company’ as the subject of competition law. We would submit that this is deliberate, and for good reason. The choice of terminology in competition laws reflects the difference between an economic entity (the actor that conducts economic activity) and a legal entity (a juristic person, such as a company, closed corporation, partnership or trust).

Regardless of the word that is used to describe the performer of economic activity in a particular jurisdiction, competition laws globally recognise the so-called single economic entity doctrine. This is the principle that juristic entities can sometimes be related so closely to each other that it would be artificial to treat them as separate economic actors for purposes of competition law.

In developed competition law jurisdictions, the concept of the single economic entity has been incorporated into the law by judicial interpretation. South Africa has chosen a different path. Instead of allowing the concept of a ‘firm’ to be developed by case precedent to incorporate the single economic entity doctrine, the legislature decided to give statutory recognition to the concept in section 4(5) of the Act. Section 4(5) exempts constituent firms within a single economic entity from the prohibitions in section 4(1) of restrictive horizontal agreements, decisions and concerted practices.

This paper is about the uncertainty that has been created by section 4(5), and the case law that has sought to interpret it and expand its reach beyond horizontal agreements only. Clearly, agreements between suppliers of substitutable products within a single economic entity are exempt from section 4(1). However, it is unclear whether a merger between those same two firms would be subject to the merger control provisions in the Act. There is similar confusion about whether the abuse of dominance provisions of sections 8 and 9, and the prohibitions of restrictive vertical agreements in section 5 would apply to commercial transactions between entities within a corporate group.

We address this issue by first describing the important practical implications of the single economic entity doctrine for firms doing business in the market, and for the enforcement policies and practices of the agencies tasked with applying the law (in South Africa, the Competition Commission). Second, we then explain the discord that section 4(5) has created in our competition law jurisprudence by examining the cases that have sought to define the reach of the single economic entity doctrine in South Africa. Third and finally, we suggest a solution based on the experience of the European Union’s competition law.

In short, we argue that section 4(5) is superfluous and therefore should not be used as the authoritative provision in future cases. Instead, the authorities should develop the definition of ‘firm’ in section 1 of the Act to include separate juristic persons within a single economic entity. This would ensure a clear and consistent application of this common sense doctrine to each situation where the word ‘firm’ is used in the Act, including section 4(1). The precise extent of the doctrine – what it

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1 Senior Associate, Candidate Attorney and Partner of Antitrust / Competition and Marketing Practice Group of Fasken Martineau in Johannesburg. Thanks to Farica de Bruyn for her assistance and research.
3 Competition Act No. 89 of 1998.
4 Only in section 5(1) of the Act is the word ‘party’ used instead of ‘firm’. This departure from the language used in section 4(1) cannot be readily explained, other than as a drafting inconsistency.
means for separate companies to be part of a single economic entity – can then be developed on a case-by-case basis, as the courts in the US and Europe have done.

SECTION 1 – WHAT IS A SINGLE ECONOMIC ENTITY?

Before proceeding with our analysis of the single economic entity doctrine in South Africa, it is necessary to describe in more detail what a single economic entity actually is. Pronouncements in the case law of the US and Europe are helpful for this purpose.

In the *Copperweld case*\(^5\) the US Supreme Court provides an invaluable explanation which begins from a most basic premise:

> **Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed, but suddenly increases the economic power moving in one particular direction.**\(^6\)

The Supreme Court concludes, in a paragraph of the *Copperweld* judgment that is cited often:

> The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common not disparate; their general corporate actions are guided or determined not by two separate consciousnesses but by one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver... If parent and a wholly owned subsidiary do agree to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for section 1 scrutiny.\(^7\)

The subsequent case of *American Needle* cites *Copperweld* and confirms that to determine whether firms form part of a single economic entity:

> The inquiry is whether the agreement in question joins together ‘‘separate economic actors pursuing separate economic interests’’ such that it ‘‘deprives the marketplace of independent centers of decisionmaking’’ and therefore of diversity of entrepreneurial interests and thus of actual or potential competition.\(^8\)

A further, and equally powerful justification for the single economic entity doctrine is that without it, competition laws would without justification apply different standards to corporations that organise themselves into unincorporated divisions, and corporations that choose to conduct their activities through incorporated legal entities.

The Supreme Court explains:

> …there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labour...

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\(^6\) *Copperweld* at page 769 and 770.

\(^7\) *Copperweld* at page 772.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits.9

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Such an incentive serves no valid antitrust goals, but merely deprives consumers and producers of the benefits that the subsidiary form may yield.10

The European Courts have recognised a similar position. In paragraph 50 of its judgment in the Viho case11, European Court of Justice quotes that court’s previous decision in Hydrotherm12:

…in competition law, the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal.

The Court of Justice elaborates that an ‘economic unit’ comprises:

…a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis.13

The consequence of this logical position is that:

Therefore, for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies as a result of their separate legal personalities.

…

Where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article 85(1) does not apply to the relationship between the subsidiary and the parent company with which it forms an economic unit.14

This means that in applying the competition law to a single economic entity the subsidiaries’ conduct is therefore to be imputed to the parent company.15

This principle was refined in the AKZO Nobel case, where the European Court of Justice held:

In the specific case in which a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable

9 Copperweld at page 772.
10 Copperweld at page 774.
14 Viho at paragraph 51.
15 Viho at paragraph 53.
presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.\textsuperscript{16}

Importantly, this means that when two wholly owned subsidiaries of the same parent company interact with each other, the consequences of each one’s conduct are imputed to the same parent company. Therefore, it is not only commercial engagements between a parent company and its subsidiaries that are exempt. Dealings between the two subsidiary companies will also be considered internal to the single economic entity.

The presumption may in some cases also apply in respect of a virtually wholly-owned subsidiary – in the Elf Aquitaine case\textsuperscript{17} the Court of Justice confirmed that the presumption applied in relation to a parent which held 97\% of the shares in its subsidiary.

This is also recognised by the European Commission in its Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, which says:

\begin{quote}
\textit{The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors even if they are both active on the same relevant product and geographic markets.}\textsuperscript{18}
\end{quote}

In the recent Powercables decision\textsuperscript{19}, the European Commission fined Goldman Sachs Group as parent company and Pirelli as former parent company of Prysmian, one of the members to an international power cable cartel. The parents were held jointly liable for the unlawful conduct of the subsidiary, and the fine apportioned between them based on the period in which each held control.

From these various sources, the key requirement for firms to be part of a single economic entity is summarised by Whish and Bailey as follows:

\begin{quote}
The crucial question, therefore, is whether the parties to an agreement are independent in their decision-making or whether one is able to exercise decisive influence over the other, with the result that the latter does not enjoy ‘real autonomy’ in determining its commercial policy on the market.\textsuperscript{20}
\end{quote}

This requires examination of at least (1) the shareholding of a parent company in its subsidiary, (2) the composition of the company’s board of directors, and (3) the extent to which the parent company influences the strategy of the subsidiary.\textsuperscript{21}

**SECTION 2 – WHAT DOES THE SINGLE ECONOMIC ENTITY DOCTRINE MEAN FOR BUSINESS, AND FOR THE COMPETITION AUTHORITIES?**

The discussion above might make the single economic entity doctrine seem like a technical, legal issue – a point concocted by lawyers for use in procedural applications. This section explains why this would be an incorrect viewpoint. The single economic entity doctrine has critical implications for the application of all aspects of competition law, both by firms seeking to comply and by the competition agency enforcing the law and shaping competition policy.

\textsuperscript{16} Akzo Nobel NV and Others v Commission of the European Communities Case C-97/08 P at paragraph 60.
\textsuperscript{17} Elf Aquitaine v Commission Case C-404/11 P.
\textsuperscript{18} European Commission ‘Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements’ at paragraph 11.
\textsuperscript{20} R Whish and D Bailey, ‘Competition Law’ 2012, at page 94.
\textsuperscript{21} R Whish and D Bailey, ‘Competition Law’ 2012, at page 94.
Restrictive Horizontal Agreements

The quotes from the foreign cases set out in Section 1 above are explicit about the consequences of the single economic entity doctrine for prohibitions of anti-competitive agreements. In short, such agreements between separate juristic entities that are part of a single economic entity would be exempt from the enforcement action that would normally apply. If juristic persons are part of a single economic entity, they do not compete with each other, even though they may sell substitutable products.

An expansive interpretation of what constitutes a single economic entity would, therefore, logically result in a greater number of agreements being immune from enforcement action. This would reduce the burden on firms to ensure compliance of ‘intra-group’ agreements with competition law. It would also give firms that are subject to enforcement proceedings greater scope to argue that agreements between related entities should be exempt.

In one sense, this might seem to be an outcome that would frustrate enforcement action. One of the key tenets of any competition law enforcement program is deterrence. It might be argued that the more anti-competitive agreements are identified and successfully prosecuted, the greater the deterrent effect on firms considering breaching competition law. Therefore, the more agreements between related firms are able to escape application of competition law, the weaker the deterrent effect of enforcement action.

On the other hand, the Copperweld case explains that the key concern with agreements between firms is that they may ‘deprive the marketplace of independent centers of decisionmaking’ and therefore of diversity of entrepreneurial interests and thus of actual or potential competition. Logically, it follows that if firms are connected very closely to each other, the market will be deprived of only a small amount of ‘independent decision-making’ if those firms reach an agreement with each other not to compete. Put differently, the diversity of entrepreneurial interests that is destroyed by an anti-competitive agreement will be less, the more interconnected the firms are.

For example, consider a company, A, that owns 60% of the shares in two subsidiary companies – B and C – which produce substitutable products (say orange juice and apple juice respectively). On the basis that A derives benefit from sales of both B and C, there is a reduced incentive for B and C to seek to gain sales at each other’s expense by pricing aggressively as A shares the benefit and losses with a third party shareholder. By contrast, two firms with no links between them have greater incentives to win sales at each other’s expense because the winner will derive all the benefit of the successful pricing strategy.

This example shows that the reduction in competition arising from an agreement between competing firms is likely to be greater, the more independent those firms are from each other. It follows that perhaps the limited resources of a competition authority are better spent focusing on agreements between unrelated firms, which would have a greater incentive to compete with each other aggressively in the absence of an agreement between them.

Vertical restrictive agreements

A vertical relationship means a relationship between a supplier and its customer. Firms in a vertical relationship therefore produce complementary goods. Each firm benefits if the other reduces price. Moreover, agreements between such firms could enable the firms to reduce prices and expand output. This has potential to benefit the firms involved and consumers.22

In those rare circumstances where a vertical agreement does have anti-competitive effects, it is unlikely that the single economic entity doctrine would provide reprieve. For example, consider an agreement between a producer, A, and a retailer, B, that required A to supply its entire production to B, to the exclusion of B’s rivals. If A and B are separate firms this agreement could be scrutinised as a potentially restrictive vertical agreement. If A and B are part of the same economic entity, the very same agreement could be analysed as a potential refusal to supply by the firm AB to B’s competitors.

If the agreement has the effect of foreclosing B’s rivals, and that in turn enables AB to increase prices to the detriment of consumer welfare, it would contravene competition law regardless of whether it is analysed as a vertical agreement or as an abuse of dominance.

**Abuse of dominance**

The single economic entity doctrine probably also has little relevance to abuse of dominance. It is extremely difficult to think of situations where a dominant company would marginalise its subsidiary or sister company in the market in order to increase prices to the detriment of consumers. If there is such misalignment between the dominant company and the victim of the abuse that such a strategy makes commercial sense, the two firms almost certainly do not have sufficient ‘unity of interest’ to be considered part of the same economic entity.

**Mergers**

The single economic entity doctrine means that the transfer of a business or part of a business from one entity to another within a corporate group would not constitute a merger between ‘firms’. The obvious upshot of this would be that the merger control requirements stipulated in competition law would not apply to the transaction.

It would be understandable to ask why the single economic entity doctrine would have any relevance in this area of competition law. If two companies already fall under the control of a common shareholder, then surely a merger between them would not give rise to ‘the establishment or acquisition of control by one firm over the whole or a part of the business of another’ (to use the wording of the South African law), so there is no merger and therefore no notification requirement anyway?

This line of argument makes absolute sense. However, one of the peculiarities of South Africa’s merger control regime is that it applies to the establishment or acquisition of direct or indirect control by one or more firms over the whole or a part of a business of another. Therefore, while an intra-group transaction may not cause an establishment or acquisition of ultimate (indirect) control, it may result in a change of direct control by one entity over the business of another entity.

This may seem like an overly technical and formalistic reading of the Act. However, as will be explained below, it is unclear and would benefit greatly by consistent application of the single economic entity doctrine.

Excusing mergers within a single economic entity from application of the law’s merger control provisions would have similar policy implications to excusing restrictive agreements. Fewer mergers would require notification, and the authorities’ resources could be better focused, more appropriately on mergers that join more disparate economic operators, which are likely to have a more profound effect on competition.

**Administrative penalties**

The implications of the single economic entity doctrine for firms’ liability for administrative penalties are twofold, and stem from a simple proposition – if the subsidiary contravenes competition law, so does the parent.

First, this means that legal entities within the single economic unit may be joint and severally liable for payment of any administrative penalty that arises from an infringement. Second, if the penalty regime calculates a maximum fine based on a percentage of the turnover of the ‘firm’ then the turnover of the entire economic unit could be used, rather than that of the contravening entity only.

This has profound consequences for enforcement policy. First, conglomerate firms are made responsible for the conduct of their subsidiaries. This increases their incentive to enforce and monitor competition law compliance initiatives throughout the group. Second, the maximum fines payable for

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23 Section 12(1)(a) of the Competition Act.
competition law violations would increase. As mentioned above, bigger fines cause a stronger general deterrence effect to other firms in the economy. The offending group will also have an increased incentive to avoid future infractions, because these could be considered repeat offences and therefore attract increased sanctions, even if the contravention is carried out by a rogue subsidiary.

Summary of policy consequences

Some may argue that the implications are overbroad and increasingly punitive upon firms in an over regulated economy. A contrary view is that a consistent application is likely to benefit compliant actors, but increase costs of non-compliant firms.

When viewed together, the implications of the single economic entity doctrine seem balanced, and altogether positive for the competition law system. In summary:

- Fewer arrangements would be subject to the prohibitions of restrictive agreements. This eases the compliance obligations on firms.
- The arrangements which are caught by these prohibitions will be those that are more likely to harm competition. This enables the authorities to focus their resources on higher impact cases.
- Fewer mergers would require notification. Once again, this eases firms’ compliance costs associated with intra-group transactions, and allows the Commission to focus on mergers that are more likely to have a broader effect on the market.
- Holding parent companies liable for the actions of subsidiaries strengthens the incentives of conglomerate firms to adopt a pro-active, strong and comprehensive approach to competition law compliance.
- Higher maximum limits on fines increase firms’ incentives to comply with the law. This includes infringing firms, whose risk of increased fines for recidivism increases, and other firms who observe the significant consequences of non-compliance and tailor their own behaviour accordingly.

Therefore, our view is that a consistent application of the single economic entity doctrine in each of these areas of competition law is a good thing. The next section explains why South African competition law has thus far been unable to achieve this consistent position, and instead suffers from on-going uncertainty in how the single economic entity doctrine applies.

SECTION 3 – THE SINGLE ECONOMIC ENTITY DOCTRINE IN SOUTH AFRICA

Whereas in Europe, the single economic entity derives from a functional (and, we would submit, logical) interpretation by the courts of the word ‘undertaking’, in South Africa the doctrine emanates from section 4(5) of the Act. This section says:

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

24 “An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if – (a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or (b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
(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 first and most obvious problem with this position is that, clearly, section 4(5)(b) only applies to exempt agreements between firms in an economic entity which are also in a horizontal relationship. We would argue that this makes section 4(5) both superfluous and incomplete.

It is superfluous because, as recognised in the paragraph of the European Commission’s Horizontal Cooperation Guidelines quoted above, a horizontal relationship is defined in the Act as a relationship between ‘competitors’. It is highly doubtful that firms within a single economic entity, as described in Section 1 above, could ever be true competitors. When used in the context of separate firms, competitors simply means that the firms produce substitutable goods. It is in any such firm’s interest to win sales from other producers of substitutable goods, in order to maximise its profits. This is the essence of competition.

We would argue that, by contrast, it does not make sense for firms within a single economic entity to win sales from each other, as to do so would not maximise profits. Put differently, and borrowing the language of the Copperweld judgment of the US Supreme Court, those firms would have a complete unity of interest, their objectives would be common not disparate and they would be not unlike a multiple team of horses drawing a vehicle under the control of a single driver. They could hardly be said to be ‘competitors’ in the first place, even if they produced substitutable goods.

This makes section 4(5) superfluous. It simply recognises a position that would exist anyway as a matter of logic.

The section is incomplete because it does not recognise application of the single economic entity doctrine to mergers, vertical agreements, abuse of dominance or to the attribution of liability to parent companies for the actions of their subsidiaries. As described above, these are matters with critical policy implications.

The following discussion examines how the Competition Tribunal and the Competition Appeal Court have tried to remedy this situation.

**Distillers – mergers**

The first time that the South African authorities were confronted with the single economic entity doctrine was in the Distillers case. This case dealt with a situation where two firms with identical shareholders sought to merge. Therefore, while there would, technically, be a change in ‘direct control’ – one entity would acquire control over the other – there would be no change in ultimate (or ‘indirect’) control.

Citing the US and European cases mentioned above, the Tribunal recognised:

…that a limited class of transactions exists where that obligation [to notify] 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.

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25 Bulmer (SA) (Pty) Ltd v Distillers Corporation (SA) Ltd 94/FN/Nov00 and 101/FN/Dec00.
26 CT Distillers at page 18.
The Tribunal reached this position, however, by ‘importing’ the notion of a single economic entity spelt out in section 4(5) of the Act, rather than by interpreting the word ‘firm’ to include multiple juristic persons within a single economic entity. The Tribunal explained:

A clear example of when one would not be required to notify is the case of a company and transactions between it and its wholly owned subsidiaries or between its wholly owned subsidiaries, in the manner contemplated in section 4(5)(a). It is less clear that we should also recognise the situations envisaged section 4(5)(b), as this section… provides for a wider class of related firms to qualify as a single economic entity but it is unclear from the language what the extent of that class is. All the section says is that the class must be “similar in structure to those referred to in (a)”. At this early stage of our jurisprudence we can say no more than that transactions within the ambit of section 4(5)(b) may be recognised as a single economic unit, for purposes of section 12, but the provision must be interpreted strictly.27

On the facts, the Tribunal found that the merging parties did not constitute a single economic entity. However, a promising foundation had been established for incorporation of the doctrine beyond horizontal restrictive agreements only. This encouraging start, however, was muddied when the case went on appeal to the Competition Appeal Court.

The CAC dismissed the merging parties’ appeal. On its own, this would suggest that the Tribunal’s adoption of the single economic entity doctrine into the merger control regime was upheld. However, one statement made by the CAC confuses the position. In dealing with the merging parties’ contention that only acquisitions or establishments of ‘ultimate’ control constitute a merger, the CAC says:

Such an interpretation is not mandated by the express wording of section 12(1). To the contrary, section 12(1) makes no express provision for the exclusion of transactions between a company and its wholly owned subsidiary, from the definition of merger.28

On one interpretation, all the CAC means is that the wording of section 12(1) does not expressly include application of the single economic entity doctrine to mergers. This does not mean that application of the single economic entity doctrine cannot be ‘read in’, in appropriate circumstances. After all, the CAC did not dispute the Tribunal’s view that this is precisely what should happen. This appears to be the Tribunal’s reading of the CAC’s judgment because in a subsequent case, discussed below, the Tribunal says:

We note, and we will imminently return to this, the only matter in which the ‘single economic entity’ concept has thus far been considered by the Tribunal was in respect of a claim that a merger of two firms, allegedly part of a single economic entity, was not subject to the scrutiny of the Act – in other words, the Tribunal on that occasion permitted the ‘importation’ of the concept underlying Section 4(5) into a procedure under Section 12.29

A more conservative view, however, would be that the effect of this paragraph is that transactions between a company and its wholly owned subsidiary are not excluded from section 12(1). The effect of this interpretation would be that the CAC dispelled the possibility of the single economic entity doctrine applying to mergers. The Legal Services Division of the Commission appears to acknowledge, through its analysis in an advisory opinion30, that the single economic entity doctrine may apply to certain merging parties however goes on to make reference to the CAC’s ambiguous wording and then leave the issue unsettled.

27 CT Distillers at page 19.
28 Distiller Corporation v Bulmer 2002(2) SA 346 CAC at page 25.
29 Competition Commission vs Patensie Sitrus Beherend Beperk 37/CR/Jun01 at paragraph 57.
In light of these divergent positions adopted by different branches of the competition law enforcement system, firms seeking to avoid unnecessary scrutiny of intra-firm transactions would have to adopt the conservative view.

In the thirteen years since the CAC’s judgment in *Distillers*, the application of the single economic entity doctrine to mergers has not been raised before the Tribunal or the CAC. There may be a number of reasons for this. It may be that firms for the most part adopt a conservative view to intra-group transactions, and notify them to the Commission if the requisite thresholds are met. Alternatively, firms may take a robust approach and proceed with such transactions without submitting a notification, cognisant of a very low risk that they will be discovered by the Commission.

Whichever influence is stronger in South Africa’s competition law compliance culture is neither here nor there. What is clear is that the law itself on this subject remains uncertain.

**Patensie Sitrus Beherend Beperk – abuse of dominance**

Almost two years after its judgment in *Distillers*, the CAC was again faced with a question of whether the single economic entity doctrine could apply outside of the narrow exemption in section 4(5).

Patensie is a company that provided packing and marketing services to its members, who are citrus farmers. Its articles of association required its members to deliver their entire output to Patensie for packing and marketing. A few disgruntled farmer-members complained that this was restrictive of competition. In particular, they alleged that the relevant provisions in Patensie’s articles constituted “requiring or inducing a supplier or customer not to deal with a competitor”, in contravention of section 8(d)(i) of the Act.

In its defence, Patensie argued that it and its farmer members were so closely related that they should be considered a single economic entity. The logical consequence of such a finding would be, according to Patensie, that a single entity cannot abuse itself in the market, so the provisions of section 8 and 9 should not apply.

The Tribunal said of the single economic entity doctrine captured in section 4(5):

> *In our view this concept is equally pertinent for enquiries under Sections 5 or 8 – just as a party cannot merge with itself or conspire with itself, so can it not abuse itself or conclude a vertical agreement with itself.*

The CAC agreed with this in principle, but on the facts the Tribunal and the CAC found that Patensie and its members did not have a sufficient unity of interest to qualify as a single economic entity. This is not surprising in our view. It is difficult to conceive of circumstances where two entities are sufficiently interdependent that they could be considered a single economic unit, but one restricts the other’s ability to compete in the market to the extent that competition is impaired. Where one firm complains that another is unfairly excluding it from the market, it is extremely unlikely that those two firms are part of a single economic entity.

The application of the single economic entity doctrine in the Patensie case is also peculiar having regard to the nature of the competitive harm that was alleged. The result of Patensie’s requirement that its members employ its packing and marketing services would be most likely to inflict competitive disadvantage on rival packing and marketing service providers. Whether Patensie and its members constituted a single unit or not would make little difference to this enquiry. Whether the conduct was framed as a restrictive agreement between Patensie and its members, or as a refusal to supply by Patensie as a single vertically integrated firm, resulting in Patensie’s upstream rivals suffering ‘customer foreclosure’ should make little difference to the ultimate outcome. The question is whether the restrictive provision substantially lessens or prevents competition.

The facts in the Patensie case were an anomaly. However, the legal outcome was that the Tribunal expanded the single economic entity doctrine from application to horizontal agreements.

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31 CT *Patensie Sitrus Beherend* at paragraph 57.
32 *Patensie Sitrus Beherend* vs *The Competition Commission* 16/CAC/Apr02.
(section 4(5)) and mergers (Distillers) to apply to restrictive vertical agreements and abuse of dominance. The CAC dismissed Patensie’s appeal, without explicitly disagreeing any of these comments by the Tribunal.

**Parent and subsidiary liability - Loungefoam**

The next instalment in this saga came some years later. Although an outline had emerged of what the single economic entity doctrine meant, until the Loungefoam case the Tribunal had not yet been called upon to determine the critical question of whether, in South Africa, the single economic entity doctrine means a parent company is responsible for the anti-competitive conduct of its subsidiary.

As explained above, this would have three important consequences: (1) a contravention by one entity in the group could attract an administrative penalty of up to 10% of the entire group’s turnover, (2) each company within the single economic entity could be jointly and severally liable for payment of an administrative penalty and (3) subsequent infringements by other companies in the group could be considered repeat offences.

The Commission had alleged a cartel between three companies – Vitafoam, Loungefoam and Feltex. Vitafoam and Loungefoam argued that the claims of collusion between the two of them were incompetent, because they were controlled by a common holding company – Steinhoff. The Commission’s position was that if Vitafoam, Loungefoam and Steinhoff were indeed part of a single economic entity, then Steinhoff should be held responsible for its subsidiaries’ collusion with Feltex, and the administrative penalty payable should be 10% of the group’s South African turnover, rather than just that of Vitafoam and Loungefoam.

The CAC began in a tone that suggested it supported the Commission’s contention:

> In order to pursue this claim it will be necessary for the Commission to show that Steinhoff International and Steinhoff Africa are, together with Loungefoam and Vitafoam, an economic unit. That will require a consideration of the corporate structures of the group, the manner of its management and the relationship between the different companies in the group. In order to deal with it the Steinhoff appellants will be required to lead evidence of the operation of the different entities within the group. This goes beyond merely the relationship between Loungefoam and Vitafoam.33

This statement would seem to indicate that it is possible for the Commission to attribute responsibility to other companies within a single economic entity, provided it can produce evidence of the corporate structures of the group, the manner of its management and the relationship between the different companies in the group which supports a finding of an ‘economic unit’.

However, in paragraph 65 of its judgment the CAC says of section 4(5):

> The purpose of this section is to prevent companies operating within a group of companies, or firms operating within a single economic entity similar to a group of companies, from being accused of perpetrating restrictive horizontal practices in consequence of their interactions with one another as part of the group. The purpose of the section is exclusionary. It is not creative of obligations going beyond that exclusionary purpose. Its operation is restricted to s 4 of the Act and to relationships between members of the group, whether a group of companies or a group of firms.

This paragraph does two things. First, it clearly rules out the possibility that a parent company can be held liable for the competition law transgressions of its subsidiary. It follows that the turnover that should be used for calculating an appropriate administrative penalty should be limited to that of the contravening entity.

33 Loungefoam (Pty) Ltd and Others v Competition Commission South Africa and Others 102/CAC/Jun 10 at paragraph 28.
It is difficult to conceive of any logical or policy justification for this position. Either the single economic entity doctrine is recognised by our law, or it is not. If it is, firms are either part of a single economic entity, or they are not. If they are, it would seem highly artificial to deem their degree of unity sufficient to exclude liability for coordination between them, but insufficient to impute liability for one’s conduct to the other.

In particular, recall the argument in Copperweld quoted above that a firm may be organised into various unincorporated business divisions, or into multiple registered entities, and that it would be arbitrary for competition law to distinguish between these two scenarios. What the CAC does is to recognise the arbitrariness of this distinction for the one purpose (excluding liability), but not the other (including liability).

Second, it casts significant doubt over whether the previous case precedent applying the single economic entity doctrine to mergers, vertical agreements and abuse of dominance remains binding. A literal interpretation of the statement that operation of section 4(5) is restricted to s 4 of the Act would be that the single economic entity doctrine, which is founded in section 4(5), does not have application outside section 4.

Alternatively, the CAC may have meant that section 4(5) only applies to section 4, but the broader concept of the single economic entity doctrine should remain applicable to other behavioural prohibitions. If this is the case, it begs the question – what is the legal basis for the single economic entity doctrine in relation to those provisions? It cannot exist in a vacuum. Should we presume that the previous cases have expanded the word ‘firm’ to include multiple entities in a single economic entity? This is not borne out by the words of those decisions. And if the CAC’s intention was that the single economic entity doctrine should live on outside of section 4, does the same standard apply as was set out in Loungefoam? In other words, can the parent company of a firm that abuses its dominance be held liable for its subsidiary’s abusive conduct?

This position of uncertainty is not helped by the CAC’s decision in the Commission’s application for leave to appeal, where it says:

_The section does not provide any basis for making a holding company liable for administrative penalties imposed on its subsidiaries. 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)._

This paragraph simply confirms that section 4(5) cannot be relied upon to attribute liability to a holding company for the anti-competitive actions of its subsidiary, but then tantalisingly suggests that there may be other ways to attribute liability to a holding company in particular circumstances. We do not know what these circumstances are.

The CAC has left us with two options – either the single economic entity doctrine has been banished, apart from its narrow application to horizontal agreements, or it lives on, but its legal basis and scope are entirely unclear.

In practice, the scope of a firm’s turnover for purposes of determining an administrative penalty in terms of section 59(2) is also not entirely clear. The Act limits the administrative penalty for a contravention to ‘the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year’.

In Pioneer, the Commission requested that the Tribunal impose an administrative penalty of 10% of Pioneer’s total group turnover. The Tribunal imposed an administrative penalty of 10% of Pioneer’s bread baking division’s national bread turnover only, without commenting on whether the group turnover can be taken into account in calculating an administrative penalty.

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35 _Competition Commission vs Pioneer Foods (Pty) Ltd 15/CR/Feb07_.

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The lack of clarity in application of the section was also recognised in the Southern Pipeline Contractors case, where the CAC said:

*The concept of ‘turnover’ is not defined in the Act and is only referred to in s59(2), being annual turnover. There is thus some uncertainty as to the precise meaning of ‘turnover’.*

The CAC found that affected turnover should be used in the initial determination as to a penalty to be formulated in terms of s59(3), which was later confirmed in the six step approach set out in the Reinforcing Mesh Solutions case. In RMS, the Tribunal said that the approach of fining parent companies for the contraventions of its subsidiaries was a factor which distinguished the EU approach to penalties from that followed in South Africa, suggesting that parent company or group turnover is not recognised in our law for purposes of determining an administrative penalty.

There are two aspects to consider: which legal entity is to be penalised (presumably the Tribunal can only have jurisdiction over the person cited as respondent), and which turnover can be taken in to account in determining the maximum penalty (where ‘firm’ may be interpreted to include a controlling parent company, the whole of a single economic entity). Again, a clear interpretation of the word ‘firm’ by the authorities would give certainty on the provision and have a greater deterrent effect.

**Right question, wrong facts – South African Breweries**

The most recent case to address the issue of the single economic entity doctrine was the SAB case. It is particularly interesting because, on the surface, it was not about the single economic entity doctrine at all.

SAB has a number of beer distributors which are appointed specifically to serve particular geographic areas. SAB also distributes beer in its own name. The Commission’s argument was that SAB and its appointed distributors therefore compete with each other, or are at least potential competitors. This means that SAB’s allocation of specific exclusive territories to each appointed distributor constituted market division between firms in a horizontal relationship in contravention of section 4(1)(b)(ii), so the Commission’s argument went.

SAB’s response to this allegation was that its commercial relationship with its distributors was so integrated that it would be inappropriate to apply the *per se* prohibitions of section 4(1)(b). Curiously, perhaps because of the restrictive approach adopted in Loungefoam, it did not claim that it, together with its appointed distributors constituted a single economic entity.

The Tribunal accepted SAB’s position, explaining:

*Legally the ADs are firms separate from SAB and one another. But this case raises the question whether one views the ‘firm’ for the purpose of the Act, solely as a self-standing legal entity or whether it has to be additionally, a self-standing economic unit.*

Although purporting not to pass any judgment on application of the single economic entity doctrine, the Tribunal seems to be asking precisely the question – do SAB and its appointed distributors constitute a single firm? In other words, are they part of a single economic entity?

In our view, this is the first and most coherent framing of the enquiry that should be conducted when dealing with conduct by connected entities – do the separate juristic persons constitute a single firm?

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36 Southern Pipeline Contractors and Another v Competition Commission (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6 (1 August 2011) at paragraph 51.
37 The Competition Commission vs Aveng (Africa) Ltd t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing 84/CR/Dec09.
38 RMS at paragraph 151.
40 South African Breweries at paragraph 81.
Unfortunately, the Tribunal scuppers this promising start by proceeding to try and carve out a new category of interconnectedness where firms are not a single economic entity, but also not separate enough to fall subject to section 4(1)(b). It does this through what in our view is a misdirected attempt at following the process of ‘characterisation’ invented in the US case of *BMI / ASCAP*. A detailed critique of the Tribunal’s approach is beyond the scope of this paper. Suffice to say that the facts in that case were probably not suited to application of the single economic entity doctrine – the appointed distributors clearly do not fall within the SAB group of companies.  

We understand that the *SAB case* is currently on appeal before the CAC. This provides an ideal opportunity for the CAC to untangle the discord that has developed in the preceding cases. All that would be required is for the CAC to explain that the single economic entity doctrine applies when multiple juristic persons are so united that they comprise a single ‘firm’. The outcome of applying this idea to SAB would not matter. It would seem very unlikely that SAB and the appointed distributors would qualify for protection under this doctrine.

**SECTION 4 – SUMMARY OF THE PROBLEM AND OUR PROPOSED SOLUTION**

So where does this leave the status of the single economic entity doctrine in South African competition law? In summary:

- Section 4(5) exempts competing firms from section 4(1) if they are part of a single economic entity.

- However, according to *Loungefoam*, section 4(5) does not allow one company in a single economic entity to be lumped with responsibility for the competition law contraventions of another.

- The maximum fine for contraventions of the Act is 10% of the turnover of the firm, leaving it open to interpretation whether this refers only to the person or rather the ‘firm’ that contravened.

- *Distillers* probably imported the notion of the single economic entity from section 4(5) to mergers under section 12, although this is not completely clear.

- *Patensie* did the same thing for vertical agreements and abuse of dominance.

- *Loungefoam*, however, seems to have backtracked and limited application of the doctrine to section 4(1) only.

- *SAB* gave credence to the idea that a ‘firm’ as defined may constitute more than one legal person, but did not develop this idea.

In our view, the end result is a highly undesirable position of great uncertainty. This uncertainty makes compliance with the law difficult, but also deprives the enforcement system of the beneficial policy implications described in Section 1 above.

In particular, certainty on application of the single economic entity doctrine to mergers is of practical importance. The current position not only creates unnecessary risks and costs for business, it is also logically incoherent that competing firms within a corporate group may fix prices with one another (under the cover of section 4(5)), but may not merge without approval. There can be no competitive harm that can manifest through a merger that could not be achieved by direct price fixing.

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42 *South African Breweries* at paragraph 87 confirms this.
43 In passing, we note that a more promising characterization would be of SAB and the appointed distributors’ relationship as one principally between firms in a vertical relationship.
and market division. It therefore makes no sense for intragroup agreements to enjoy immunity, but for intragroup mergers to require notification and approval.

It is submitted that the source of this uncertainty is the legislature’s inclusion of section 4(5) in the Act. The result has been that each case, instead of determining the applicability and scope of the single economic entity doctrine itself, has been preoccupied with the wording of section 4(5), and whether it can or cannot be ‘imported’ to other areas of our competition law.

In our view there is a simple solution. Section 4(5) should be disregarded henceforth. In its place a line of jurisprudence should begin to interpret the meaning of the word ‘firm’ as defined in the Act. The definition of that word is deliberately broad – a firm ‘includes a person, partnership or a trust’. This open-textured construction lends itself to a simple and logical analogy that ‘firm’ should not be confined to one juristic person, but may include multiple entities within a single economic unit.

Once this straightforward finding has been made, a consistent meaning could be attributed to the single economic entity doctrine wherever appropriate in the Act. This would avoid the artificial transplanting of the principle in section 4(5) to particular areas, but not others, which has caused great confusion to date. It would also allow an organic development of the scope of the single economic entity doctrine, having regard to the beneficial policy implications described above. Questions such as what degree of ownership or control required for companies to constitute a single firm, can be answered on a case-by-case basis, thereby expanding or reducing the scope of the doctrine’s application as the circumstances may require.

In many cases, ‘firm’ will be limited to primary economic actors, being the separate natural or juristic persons, such as companies which conclude formal contracts. No expansive interpretation is required. However, given that competition authorities are and should be called upon only to investigate and intervene in markets where there is a potential harm to competition (in cases of prohibited practices), or the opportunity to consider future conduct of firms which may cause harm in markets (in cases of merger review), it is appropriate to look beyond the immediate individual actors to the relevant economic unit which controls these actors.

This approach would also be relatively easy to implement. That does not mean to say there is no need to consider matters on a case by case basis, that is the role of the authorities to build a body of precedent, by guideline or decision which will gradually narrow disputed cases on the margin. There would be no need to amend the Act. An interpretation of ‘firm’ that includes multiple entities within an economic unit could be consistent with and live beside section 4(5). The section would simply become superfluous.

Piercing the veil?

One criticism of this approach may be that it would allow the Commission to ‘pierce’ or ‘lift’ the corporate veil by attributing liability to direct shareholders and possibly the ultimate parent of a company that contravenes the Act, disregarding the separate legal personality upon which our commercial law is based. We would contend that this argument would be incorrect because it is not an individual juristic entity that contravenes the Act – it is a firm. Had the legislature wished to limit application of the Act to individual juristic entities, it would have used words such as company, close corporation, partnership, or trust instead of ‘firm’. Alternatively, it should have defined firm as ‘a natural person or juristic person’.

By choosing to use the word ‘firm’, and entrenching inherent flexibility in the scope of that word’s meaning by defining it as ‘including…’, the legislature has, in our view opened sufficient scope for application of the Act to corporate groups comprising multiple entities in particular circumstances. An interpretation by the Tribunal or the CAC along these lines would therefore not, in our view, pierce the corporate veil. To the extent that there is any veil-piercing, this is the work of the legislature – a category of statutory exemption.

Also in this regard, we draw attention to the introduction of section 20(9) of the Companies Act, which effectively permits a court on application of an interested person to disregard the juristic

44 The Companies Act No. 71 of 2008 includes in its definition of ‘juristic person’, a foreign company and a trust. A close corporation is defined as juristic person incorporated under the Close Corporations Act.
personality of a company where there is an 'unconscionable abuse' of such separate legal personality. The approach we suggest does not mean that each alleged contravention or abuse of the Act by a juristic person requires examination as to whether it is equivalent to an 'unconscionable abuse', permitting the authority to lift the corporate veil or disregard legal personality. Firstly, as pointed out, the very language of the Act permits an examination of the conduct of economic unit, however constituted. Secondly, where there is an attempt to use corporate structuring to avoid responsibility, this may well constitute an abuse of the type anticipated by section 20(9), permitting the authority to disregard such structuring, or lift the veil\textsuperscript{45}.

**Settlements**

While our law may not explicitly extend liability to parent companies for contraventions of the Act by their subsidiaries, in practice this is not uncommon. The Tribunal has sanctioned numerous consent agreements where holding companies admit liability and agree to pay a penalty for the unlawful actions of their subsidiaries.

The recent fast-track settlement process in the construction industry has several examples of consent agreements with parent companies admitting liability on behalf of their subsidiaries and paying administrative penalties based on the affected turnover of the group.

Not only has the extended liability of parent companies been recognised, but also that of a subsidiary on behalf of other group companies. In the Schenker case\textsuperscript{46}, a South African subsidiary company accepted liability for competition contraventions by a non-resident affiliated company under common control of the same parent company, in which it played no direct part.

Importantly, consent agreements are also sanctioned by order of the Tribunal\textsuperscript{47}. The Tribunal has therefore in effect, through its sanction, given the single economic entity doctrine its stamp of approval.

**CONCLUSION**

The competition authorities should seek only to evaluate the impact on competition of past and potential future conduct by economic actors, whether the actors be single legal entities, or form part of a collection of multiple different persons which are controlled by a single economic actor or decision maker.

An interpretation of the term 'firm' to include single economic entities, with each application judged on a case by case basis, is a way open to the authorities to clarify a number of uncertainties in our competition law.

It will, we submit, allow for an appropriate balance and achieve policy goals of deterrence and appropriate punishment, but avoid unwarranted interference based upon formalistic structuring of the legal entities within the same economic unit.

\textsuperscript{45} See the very useful discussion in *Ex parte Gore NO and others NNO [2013] 2 All SA 437 (WCC)* on the common law and the introduction of section 20(9) of the Companies Act.

\textsuperscript{46} *Competition Commission v Schenker South Africa (Pty) Ltd* CT 96/CR/NOV11

\textsuperscript{47} Section 27(1)(d) read with section 58(1)(a)(iii) of the Act.
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