THE APPLICATION OF THE SINGLE ECONOMIC ENTITY DOCTRINE TO COMBAT CARTELS IN SOUTH AFRICA: LESSONS FROM GERMANY

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DECLARATION

I, **545920** (Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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ABSTRACT

The relationship between holding companies and their subsidiary companies is determined principally by the degree to which holding companies can exercise control over their subsidiary companies. The Companies Act regulates this relationship by assessing the control that holding companies exercise over subsidiary companies. The way these companies conduct their business can attract issues relating to competition which may attract the application of the Competition Act 89 of 1998. The anticompetitive behaviour of subsidiary companies has sparked controversy relating to whether holding companies should be held liable for their conduct. This research report discusses the Single Economic Entity Doctrine which deals with the attribution of liability of the conduct of a subsidiary company to a holding company. In particular, it assesses whether given the control that holding companies exercise over their subsidiary companies, they can be held liable for cartel infringements under section 4(1) of the Competition Act using the Single Economic Entity Doctrine. Drawing on the experiences of the European Union and Bundeskartellamt in Germany, this report argues that there is a need to expressly introduce and apply the Single Economic Entity Doctrine in South Africa with a view to allow the Competition Commission to hold holding companies liable for the cartel conduct of their subsidiaries which often cease to operate when cartel related charges are brought against them.

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I. INTRODUCTION

This research report evaluates whether holding companies[1] should be held liable for cartel conduct that involve some of the companies within their groups. Cartel conduct occurs when companies that are in a horizontal relationship decide to cooperate instead of competing with each other to the detriment of their respective customers and ultimately consumers.[2] This report discusses the extent to which cartel conduct liability can be established through the application of the Single Economic Entity Doctrine (hereafter SEE Doctrine).[3] The SEE Doctrine effectively states that companies can be related so closely to each other that it would be artificial to treat them as separate economic actors.[4] This report will demonstrate that the applicability or otherwise of this doctrine in South Africa is not clear.

The extent to which this doctrine can assist competition authorities to secure payment for administrative penalties and prevent companies from denying liability by relying on technicalities even though cartels have been established will also be discussed in this report. The discussion will also reflect on the challenges experienced by the German Federal Cartel Office (Bundeskartellamt) when it sought to prosecute companies that were involved in cartels due to the difficulty in holding parent/holding companies liable for cartel behaviours of their subsidiary companies. Subsequent legislative change in Germany that introduced the SEE Doctrine into the German competition law will also be assessed to determine lessons South Africa can draw from the German experience.

Part 2 of this report provides a general overview of the relationship between holding companies and their subsidiary companies to ascertain the extent of their dependence on and independence from each other. Part 3 discusses a Single Economic Entity (hereafter SEE). Here, the discussion will examine the relationships between companies which form part of a SEE and form the preliminary step which one needs to establish prior to applying the SEE Doctrine. Part 4 examines South African's position as it relates to the SEE Doctrine and the extent to which this doctrine has

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[1] Throughout this report the words holding, and parent company will be used interchangeably depending on the context.

[2] R Maphwanya 'Cartel likelihood, duration and deterrence in South Africa' in Jonathan Klaaren et al (ed) *Competition Law and Economic Regulation in Southern Africa* (2017) 49.

[3] *Competition Commission and Shoprite Checkers (Pty) Ltd and Computicket (Pty) Ltd* (183/CAC/Apr20) [2020] ZACAC 9 (27 October 2020) (*Shoprite Checkers*).

[4] Neil Mackenzie, Ingrid Rogers and Stephen Langbridge '*The Single Economic Entity Doctrine in South Africa and Its Implications for Competition Policy*' available at *https://pdf4pro.com/amp/download?data_id=46fd52&slug=the-single-economic-entity-doctrine-in-south* accessed on 13 January 2023.

been recognised in South Africa. Part 5 undertakes a comparative analysis by examining the experience of the Bundeskartellamt regarding holding parent companies liable for cartel conduct perpetrated by their subsidiaries. This comparative analysis will commence by examining the European Competition law and its recognition of the SEE Doctrine. It will proceed to assess the application of the SEE Doctrine in Germany. In part 6, the shortcomings of section 4(5) of the Competition Act[5] in relation to establishing the liability of holding company will be discussed with a view to assess lessons (if any) that South Africa can draw on from Germany and European Union. Recommendations for law reform will also be provided in part 6. Part 7 concludes the discussion.

II. HOLDING AND SUBSIDIARY COMPANIES

(a) Company Law Perspective

The Companies Act[6] regulates the relationship between holding companies and their subsidiary companies. It defines a holding company as a juristic person that controls a subsidiary either through the control of the majority of voting rights or having the right to appoint or elect the majority of votes on the board.[7] The holding company does not have any duties and/or responsibilities to or in respect of the subsidiary.[8] A subsidiary company is a company where the majority of voting rights are held by another juristic person or where another juristic person can have the majority voting rights on the board.[9] Botha argues that the exercise of control by a holding company over its subsidiary does not *per se* result in the subsidiary losing its legal personality.[10]

According to Cassim a '…holding company and its subsidiaries are together referred to, informally, as a "group of companies"'.[11] This relationship is predicated fundamentally on the ability of the holding company to control the subsidiary either at board meetings level or at a general meeting.[12] The Companies Act defines a group of companies as 'a holding company and

[5] 89 of 1998, as amended (Competition Act).
[6] 71 of 2008 (Companies Act).
[7] Companies Act section 1.
[8] Delport P, Vorster Q, Edgar S et al *Henochsberg on the Companies Act 71 of 2008* eds (2011) 32(9).
[9] Companies Act, section 3(1)(a).
[10] DH Botha 'Recognition of the group concept in company law' (1982) 15 *De Jure* 107 at 111.
[11] FHI Cassim, MF Cassim, R Jooste et al *Contemporary Company Law* 3 ed (2021) 255.
[12] Ibid at 262.

all of its subsidiaries'.[13] The holding company's ability to control or exercise control over its subsidiaries appears to be crucial.

In *A'Africa Pest Prevention cc and another v The Competition Commission of South Africa (A'Africa Pest),*[14] the Competition Appeal Court (hereafter CAC) held that '… section 3(1) of the 2008 Companies Act envisages a pyramid-like structure [where] "A" [is] at the top with "B" and "C" at the next tier below it and thus the three of them belonging to a single economic entity.'[15] The central tenet in the relationship between a holding company and its subsidiary is the ability of the holding company to exercise control over the subsidiary. This tenet, at face value, appears to contradict the principle of separate legal personality of each company.[16] This is because the underlying assumption in the relationship between a holding company and its subsidiary is that their activities are managed and co-ordinated centrally in a unified manner in the interest of the group as a whole.[17] The central control within a group of companies means that 'the group is managed as an economic unit [and] thus no longer carries out [its] own commercial activities [with the spirit] of economic independence.'[18]

However, it must be noted that despite this apparent lack of separation, 'the legal relationship between the holding and subsidiary company is not altered'[19] and the word 'group' is used as a descriptive term.[20] The fact that companies may form a group does not mean that each company is not liable for its own conduct.[21] With reference to the relationship between the holding and subsidiary company, Botha argues that the term *economic entity* can be used to describe this relationship because 'the different holding and subsidiary companies, although independent, are regarded as part of the economic unit represented by the constituent group company'.[22]

It has been argued that the application of the economic entity construction would be justified by a court if certain factors are met. First, there must be complete control by the holding company

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[13] Companies Act section 1.
[14] *A'Africa Pest Prevention cc and another v The Competition Commission of South Africa* [2019] ZACAC 2 (2 July 2019).
[15] Ibid para 55.
[16] D Bhana 'The company law implications of conferring a power on a subsidiary to acquire the shares of its holding company' (2006) 232 *Stell LR* 234.
[17] Botha op cit note 10 at 107-108.
[18] Ibid at 108.
[19] Ibid at 123.
[20] Ibid at 122.
[21] Richard Stevens *The External Relations of Company Groups in South African Law: A Critical Comparative Analysis* (unpublished LLD Dissertation, University of Pretoria, 2011) 5.
[22] Botha op cit note 10 at 113.

over the subsidiary such that the group is continually subject to a form of unified control.[23] Secondly, there must be community of interest that runs between the companies within the group.[24] Thirdly, regarding each holding and subsidiary company in isolation should make it impossible to apply the law and to attain a level of justice under the circumstances.[25] This is what sits at the centre of a group of companies. Stevens suggests that the economic entity construction of a group can constitute what is an economic unit due to reasons of efficiency.[26]

(b) Competition Law Perspective

The Competition Act refers to the concept of a firm rather than a group of companies. It defines a firm as including 'a person, partnership or a trust.'[27] In this definition, the word 'includes' is used. It appears that the legislature contemplated a scenario where what is understood as a firm is not a closed list of entities. According to the CAC, the word 'firm' '… can mean different things in different contexts. It could mean an economic entity, or a group where the component parts of it are related to each other in such a way that they constitute a single economic entity'.[28] This illustrates that a firm is an entity that can take a wide and varied shape which does not necessarily fall into a neat and crisp definition.

In *Competition Commission v Delatoy Investments (Pty) Ltd and Others* (*Delatoy*),[29] the CAC held that South African 'law recognizes that one must focus on the economic activity of the entity concerned.'[30] In *Delatoy*, the CAC appears to have placed greater emphasis on economic activity and focused less on the form of the economic structure which carries out such economic activity. The CAC's recognition and acceptance that a firm could essentially be made up of several component parts which can constitute a SEE[31] appears to reflect that the concept of a firm can include various other entities which are capable of forming part of the firm. Because of the broad

[23] Ibid at 118.
[24] Ibid.
[25] Ibid.
[26] Stevens op cit note 21 at 98.
[27] Competition Act section 1(xi).
[28] *Competition Commission v Delatoy Investments (Pty) Ltd and Others* CR212Feb15 [2016] ZACT 37 (14 April 2016) para 40.
[29] Ibid.
[30] Ibid para 53.
[31] Ibid para 40.

nature with which the CAC approached the concept of a firm, it is important to understand how the relationship between entities that form part of a SEE are regulated from a competition law perspective. The question of control appears to play an important role in this regard.

The Competition Act approaches the question of control by assessing whether a firm (or holding company) can 'materially influence the policy of another firm'.[32] In *Caxton and CTP Publishers and Printers v Media 24 (Pty) Ltd and others (Caxton)*,[33] the CAC held that the phrase 'materially' in section 12(2)(*g*) of the Competition Act refers:

> '… not to the decisiveness of the power but to the range of matters over which it extends. The word ''ability'' in para (g), viewed in the context of the preceding paragraphs of the subsection, points to the power to do something (which may be the positive power to determine an outcome or the negative power to prevent an outcome).'[34]

This interpretation indicates the legislature's intention to ensure that it captures the widest range of influence over the affairs of a company which can be exerted by another company. This can demonstrate the degree of control which the holding company has over a subsidiary and the extent of its control over the subsidiary's affairs to meet the statutory requirements of being regarded as a holding company. The CAC's characterisation of control in *Caxton* connotes that the way control is exercised by a holding company can either be positive i.e., the ability to determine what a subsidiary should do or negative, which is the ability to prevent a subsidiary from doing something.

An examination of both the Companies Act and Competition Act reveals that the broad definition of a subsidiary contained in the Companies Act[35] and the way control can be exerted by a holding company over a subsidiary in terms of the Companies Act[36] provides companies with a broad framework which they can use to form their business relationships. The Competition Act equally adopts a broad definition and interpretation of control[37] to ensure that regardless of the structural arrangement which companies may adopted, the Competition Act can exercise oversight over those business relationships. By understanding the centrality of control, and by extension

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[32] Competition Act Section 12(2)(g).
[33] *Caxton and CTP Publishers and Printers v Media 24 (Pty) Ltd and others* [2015] ZACAC 5 (25 November 2015).
[34] Ibid para 48.
[35] Section 3(1).
[36] Section 3(2).
[37] Competition Act Section 12(2).

influence, which a holding company has over a subsidiary; plays a central role in understanding what the SEE Doctrine is and how it works.

III. THE SINGLE ECONOMIC ENTITY

Given the complex nature of corporate structures and the freedom with which natural persons are allowed to structure their corporate affairs, there is a possibility of abuse of these entities. Section 20(9) of the Companies Act[38] was enacted to codify a long-standing common-law doctrine[39] relating to the abuse of the corporate structure.[40] Much like the doctrine of piercing the corporate veil, the SEE Doctrine has its roots in ensuring that entities that ultimately seek to benefit from the anticompetitive conduct or behaviour of other entities within the corporate structure do not get away with it. As stated earlier in terms of the SEE Doctrine, '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.'[41] This lack of separation between juristic persons re-enforces the need for competition law principles to be applied in instances where there is anticompetitive behaviour of these entities such as cartel conduct.

At the heart of the SEE Doctrine is the degree to which one 'entity controls the conduct of another, [and whether] they constitute a [SEE].'[42] The establishment of this relationship is challenging and makes it difficult to determine whether entities within a corporate structure constitute a SEE. Firms that constitute a SEE effectively form a 'single force on the market.'[43] The notion of a single force in the market does not necessarily mean that only one firm participates in the market. This notion refers to the likely source of instruction through which the subsidiary entity within a corporate structure participates in the market.[44]

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[38] 71 of 2008.
[39] The doctrine of piercing the 'corporate veil'.
[40] *Salomon v Salomon* [1896] UKHL 1. See also *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A); *Airport Cold Storage (Pty) Ltd v Ebrahim* 2008 (2) SA 303 (C) paras 52 -53 where the principles in *Solomons v Solomons* were adopted and applied in South African law.
[41] Mackenzie, Rogers and Langbridge op cit note 4 at 1.
[42] Ibid at 14.
[43] O Odudu and D Bailey 'The Single Economic Entity Doctrine in Eu Competition Law' (2014) 51 *Common Market Law Review* 1721 at 1756.
[44] Ibid.

Integral to the determination of a SEE is the independence of the subsidiary company from its holding company. This independence (or lack thereof) essentially speaks to the ability of the subsidiary company to determine its own direction in the market.[45] However, the SEE Doctrine looks beyond the distinctness of the legal personality of a subsidiary. The SEE Doctrine focuses on the 'economic, organizational, and legal links between the different legal persons.'[46] These legal links ultimately constitute a group of companies which operate within a market. Whether a group of companies can be considered a SEE, requires a determination of whether the holding company 'exercised decisive influence over the subsidiary.'[47] Simply put at the heart of the SEE Doctrine is a need to determine whether the group of companies constitutes a SEE. This constitutes an important preliminary step in determining whether the SEE Doctrine can be applied.

IV. THE SOUTH AFRICAN POSITION

This section examines the South African position as it relates to the SEE Doctrine and the extent to which this doctrine has been considered and interpreted by the courts in South Africa.

Section 4(5) of the Competition Act states that:

> '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[48], 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).'[49]

This is the only section in the Competition Act where direct reference to a SEE is made. Section 4(5) of the Competition Act denotes that entities which constitute a group in terms of the

[45] J Seet 'Attribution of Liability Between Parent and Subsidiary Within A Single Economic Entity: The Singapore Experience' (2017) *Singapore Journal of Legal Studies* 124 at 127.
[46] P Cleynenbreugel 'Single entity tests in U.S. antitrust and EU competition law' (2011) available at https://orbi.uliege.be/bitstream/2268/201655/1/SSRN-id1889232.pdf (accessed on 13 January 2022) at 32. See also *Akzo Nobel NV and Others v Commission of the European Communities* ECLI:EU:C: 2009:536 (*AKZO Nobel)*.
[47] Seet op cit note 45 at 130.
[48] The Companies Act No.71 of 2008 articulates this principle under section 3(1)(b).
[49] Competition Act Section 4(5).

Companies Act or entities which form a SEE cannot be found to be in contravention of section 4(1) of the Competition Act. Sutherland and Kemp argue that section 4(5) of the Competition Act '…prevents firms that fall within it from being liable for [a] contravention of section 4.'[50] The aim of section 4(5) is to restrict the application of section 4(1) of the Competition Act by excluding companies constituting a SEE from its ambit. The motivation for this exclusion is that companies falling within the confines of a SEE would usually be controlled by a common mind and in a cohesive manner. Companies forming part of a SEE will not be prohibited from colluding among themselves in line with section 4(5). Section 4(5) of the Competition Act is seen as a defence which a group of companies or SEE can raise when entities within a group or 'economic entity [who] are also in a horizontal relationship'[51] and have concluded an agreement or agreed to a concerted practice in contravention of section 4(1) of the Competition Act.

In *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others* (*Loungefoam*) [52] the CAC explained that:

> '[t]he 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.'[53]

The CAC's interpretation of section 4(5) of the Competition Act alludes to the legislature's intention not to penalise companies within a group or firms within a SEE from interacting with one another. The wording used by the legislature in this provision suggests that this section must be understood in a restricted sense. In that section 4(5) must only be used as a defence against contraventions of restrictive horizontal practices i.e. cartel conduct.

Sutherland and Kemp argue that section 4(5) of the Competition Act 'cannot be used to establish liability of a controlling company where its subsidiaries were involved in [cartel

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[50] P Sutherland and K Kemp 'Competition Act of South Africa' *The Law of South Africa* Vol 1 Service Issue 23 (2020) 5-39.
[51] Mackenzie, Rogers and Langbridge op cit note 4 at 8.
[52] *Loungefoam (Pty) Ltd and others v Competition Commission and others; In re Feltex Holdings (Pty) Ltd v Competition Commission and others* [2011] JOL 27203 (CAC).
[53] Ibid para 65.

conduct].'[54] This means that the competition authorities cannot interpret section 4(5) of the Competition Act to impute liability on a holding company for cartel infringements which are committed by its subsidiary. The CAC in *Loungefoam* held that both Loungefoam and Vitafoam are liable under section 4(1) of the Competition Act for cartel offences that Loungefoam and Vitafoam were alleged to have committed and that they cannot rely on section 4(5)(*b*) to exempt them from individually liability.[55] In other words, whether the two entities constituted a SEE or were part of a larger group of companies,[56] did not exempt each firm from being held liable under section 4(1) of the Competition Act. The CAC was essentially of the view that each firm must answer for its own individual infractions of the Competition Act.

The CAC further held that the Commission could not rely on section 4(5)(*b*) of the Competition Act to extend liability to firms which were not part of the cartel conduct.[57] Further that section 4(5)(*b*) cannot be positively interpreted to effectively impute liability on a parent company.[58] This demonstrates that the CAC did not recognise section 4(5) of the Competition Act as providing for the application of the SEE Doctrine in South Africa.

This approach was followed by the Tribunal in *Shoprite Checkers (Pty) Ltd v Competition Commission* (*Shoprite*),[59] when it denied the Commission the opportunity to invoke the SEE Doctrine to hold Shoprite Checkers (Pty) Ltd (hereafter Shoprite) liable, under the Competition Act, for the conduct of its subsidiary company, Computicket (Pty) Ltd (hereafter Computicket). Shoprite was accused of abusing its dominance under section 8 of the Competition Act. The Tribunal held that:

> 'It is our view…that Computicket and Shoprite…are separate economic entities and should therefore be treated as such in respect of the allegations contained in the Commission's complaint referral.'[60]

After undertaking a detailed analytical analysis of the application of section 4(5) of the Competition Act and the SEE Doctrine, the Tribunal followed the narrow interpretation that was

[54] Sutherland and Kemp op cit note 50 at 5-39.
[55] *Loungefoam* supra note 52 para 66.
[56] Steinhoff International and Steinhoff Africa.
[57] *Loungefoam* supra note 52 para 66.
[58] Ibid para 66.
[59] *Shoprite Checkers (Pty) Ltd v Competition Commission* unreported case no CR228Dec18/DSM258Feb19 (2 April 2020).
[60] Ibid para 36.

adopted in *Loungefoam* regarding the restricted application of section 4(5) of the Competition Act.[61] The Tribunal further extended this interpretation to section 8 of the Competition Act.[62] In doing so, the Tribunal emphasised that the current framework of the Competition Act does not lend itself to the application and the interpretation of section 4(5) within the context of section 8 of the Competition Act.

The Tribunal's view in *Shoprite*, influenced by the CAC's approach regarding the ability to invoke the SEE Doctrine to hold a holding company liable for the conduct of its subsidiary appears to be a definitive step away from the approach it adopted in *Delatoy*. In *Delatoy*, the Tribunal observed that the word firm was capable of being interpreted to include an economic entity or '…a group where the component parts of it are related to each other in such a way that they constitute a [SEE].'[63] This was an unrestricted perspective regarding which section of the Competition Act could be used or applied to establish the liability of a holding company. This approach, it is submitted, was a step in the right direction in terms of being able to establish the liability of a holding company for conduct committed by its subsidiary.

The Tribunal's approach and reasoning in *Shoprite* appears to have been due to the novelty of the Commission's interpretation and application of the SEE Doctrine to an abuse of dominance provision. The application of this doctrine to contraventions of section 8 of the Competition Act was affirmed, or at least identified as being a possibility on appeal, by the CAC when it found that the conclusion by the Tribunal that neither a SEE nor section 8 contravention could be established was wrong.[64]

In dismissing Shoprite's cross-appeal, the CAC pointed out that all that the Commission needed to do in its founding papers was to 'clearly and unambiguously plead that it relies on the doctrine of Single Economic Entity, that the Single Economic Entity constitutes a firm as defined in the Competition Act and the common law, and that it is dominant in the relevant market.'[65] This recognition by the CAC of the application of the SEE Doctrine in section 8 to impose positive obligations to find liability of a holding company was a departure from its approach in *Loungefoam*. The CAC's recognition that a holding company could be held liable for its

[61] Ibid para 26 - 35.
[62] Ibid para 29 - 31.
[63] *Delatoy* supra note 28 para 40.
[64] *Shoprite Checkers* supra note 3 para 29.
[65] *Shoprite Checkers* supra note 3 para 29.

subsidiary's conduct was also a confirmation and endorsement of the existence of the SEE Doctrine and its application in South African competition law. Because section 4(5) of the Competition Act is the only section that refers to a SEE, it can be argued that the CAC in *Shoprite* implicitly recognised that this provision could be applied in a different manner to that which was previously recognised in *Loungefoam*.

It is submitted that the willingness to recognise the existence and application of the SEE Doctrine within the Competition Act must be welcomed. Sutherland and Kemp argued that 'the same doctrine should also be applied to other forms of anti-competitive behaviour.'[66] While the CAC appears to be of the view that the SEE Doctrine could be applied beyond the bounds of section 4(1) of the Competition Act, there has not been a decided case in South Africa endorsing this approach. The CAC's attempts to open the door for the Commission to properly make out a case for the application of the SEE Doctrine in *Shoprite* is an important step in the right direction to hold holding companies liable for the conduct of their subsidiaries.

Currently, there is no certainty on the ambit of this doctrine's application in South Africa. Whether this doctrine can be applied to section 4 contraventions or beyond is a question yet to be fully and definitively answered by the courts. It has been suggested that by interpreting the word firm broadly to include multiple entities within an economic unit or a single economic unit could allow for a better transplanting of the SEE Doctrine to other sections of the Competition Act[67] without having to worry about the apparent restriction in section 4(5) of the Competition Act. The CAC in *Shoprite Checkers* held that the Commission would need to not only make out a case for a SEE but also show that it constitutes a firm as defined in the Competition Act.[68] This suggests that to apply the SEE Doctrine to other parts of the Competition Act, it would be necessary to show that the SEE constitutes a firm. The definition of a firm[69] in the Competition Act appears to be broad enough to allow competition authorities to consider the inclusion of companies that constitute a SEE. According to Mackenzie, Rogers and Langbridge, a broader interpretation and understanding of the word firm to include several entities which form a SEE is likely to be consistent with section 4(5) of the Competition Act.[70]

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[66] Sutherland and Kemp op cit note 50 at 5-43.
[67] Mackenzie, Rogers and Langbridge op cit note 4 at 15.
[68] *Shoprite Checkers* supra note 3 para 29.
[69] Section 1 (xi) of the Competition Act defines a firm as including a person, partnership, or a trust.
[70] Mackenzie, Rogers and Langbridge op cit note 4 at 2.

Mackenzie, Rogers and Langbridge further argued that the source of the uncertainty regarding the application and scope of the SEE Doctrine was the insertion of section 4(5) in the Competition Act.[71] This effectively places the blame at the door of the legislature. However, the courts cannot be absolved from blame either given the divergence of decisions which have been observed above leading to a lack of legal certainty regarding the application of the doctrine in South African competition law. This invariably leaves the competition authorities vulnerable to novel and creative interpretations of this doctrine by holding companies to avoid liability for the conduct of their subsidiary companies. Such novelty to escape liability was observed in Germany and thus provides an opportunity for South Africa to draw valuable lessons.

V. COMPARATIVE STUDY

This section examines the European Commission's experience in applying the SEE (and by extension the SEE Doctrine) requirements as they originate from Europe.[72] It also considers how the Bundeskartellamt in Germany dealt holding p companies whose subsidiaries were involved in cartel infringements.

(a) European Union Experience

The SEE Doctrine is applied in the regulation of competition by the European Commission.[73] In *AKZO Nobel* the European Court (hereafter EU Court), third Chamber pointed out that in an instance where the holding company owns 100% of the shareholding in a subsidiary, 'there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.'[74] A subsidiary which is owned 100% by another company is in effect wholly owned by that company. As such, taking both companies as constituting a SEE would not be unreasonable. In *AKZO Nobel,* it was held that 100% ownership would be enough to exercise

[71] Ibid at 15.
[72] Sutherland and Kemp op cit note 50 at 5-42.
[73] Much like the Competition Commission of South Africa, The European Commission directly enforces EU competition rules, Articles 101-106 of the Treaty on the Functioning of the EU (TFEU). - https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/competition_en#:~:text=from%20this%20department,Responsibilities,and%20fairly%20on%20their%20merits. (accessed on 14 June 2023).
[74] *AKZO Nobel* supra note 46 para 60.

decisive influence over the subsidiary.[75] A 100% shareholding is therefore determinative of a parent company having control over a subsidiary.

As stated above, control is central to the SEE Doctrine[76] because this affords the parent company the ability to influence the conduct of the subsidiary company in the market.[77] When competition authorities undertake an assessment of the SEE; the factors that are considered as important are control and conduct or the behaviour of the subsidiary in the market.[78] In terms of European Union (EU) competition law, when assessing whether the impugned firm constituted a SEE, the first inquiry is whether the parent company had control over the subsidiary and whether this control was actually exercised.[79] The second step involves a factual enquiry which would be determined by assessing the actual behaviour in the market of the subsidiary at the instance of the parent company. The assessment of the conduct of the subsidiary would be undertaken through the determination of the extent to which the subsidiary can determine its own ability to operate within a particular market.[80]

The SEE Doctrine entails that when separate legal entities operate as a singular entity in their conduct in the market, they may effectively be grouped together.[81] Liability is therefore attributed to the parent company where control and lack of independence of action in the market (by the subsidiary) is determined and the unity of the group is viewed as being paramount.[82] This notion of attribution is a fundamental tenet of the SEE Doctrine. According to Freund, 'restructuring and transfers of companies and/or their respective assets within a group are therefore in principle irrelevant if the entities belong to the same economic unit …'.[83] In *Hoechst v Commission,*[84] the EU Court observed that:

> '… [for] the effective enforcement of competition law it may become necessary, by way of exception, to attribute a cartel offence not to the initial operator but to the new operator

[75] Ibid para 61.
[76] Cleynenbreugel op cit note 46 at 34.
[77] Ibid at 32.
[78] Ibid at 28.
[79] Seet op cit note 45 at 147.
[80] Cleynenbreugel op cit note 46 at 35.
[81] Odudu and Bailey op cit note 43 at 1756.
[82] *Imperial Chemical Industries v Commission* ECLI:EU:C: 1972:70 (*ICI)* para 135.
[83] B Freund 'Reshaping Liability – The Concept of Undertaking Applied to Private Enforcement of EU Competition Law' (2021) 70 *GRUR International* 731 at 742.
[84] *Hoechst v Commission* ECLI:EU:C: 1989:337.

> of the undertaking which participated in the cartel if the new operator may in fact be regarded as the successor to the original operator, that is if he continues to operate the undertaking which participated in the cartel if there was no possibility of imposing a penalty on an entity other than the one which committed the infringement, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes.'[85]

The EU court's recognition of the need to attribute liability to a firm which may not have necessarily been involved in the cartel infringement or offence underscores two critical points. First, to ensure that competition laws relating to cartels are effectively enforced, the authorities must be willing to refuse to be distracted by complex corporate structures and restructurings to ensure that there is accountability. The EU courts also appear to be willing to apply or consider the economic continuity test in an instance where the legally responsible entity, like a subsidiary, has ceased to exist to ensure accountability.[86]

Secondly, the EU Courts are alive to what a corporate structure ultimately represents, which is an economic unit. By examining a corporate structure involving a parent company and its subsidiary as a single entity represents a desire to consider the functional reality of these relationships.[87] The EU courts appear to be willing to consider a wider entity to impose a sanction.[88] Through the SEE Doctrine, the EU courts can ensure that where anticompetitive conduct has been established, companies and/or their parents are held responsible. In short, EU competition law holds the economic entity liable for competition law infringements through the SEE Doctrine.[89]

(b) The Bundeskartellamt Experience

In Germany, the Bundeskartellamt was confronted by companies it fined for cartel conduct taking advantage of a gap in the law that allowed them to avoid financial liability for their conduct.

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[85] Ibid para 51.
[86] Freund op cit note 83 at 742.
[87] Cleynenbreugel op cit note 45 at 27.
[88] Ibid at 2.
[89] C Koenig 'Digital Economy, Antitrust Damages and More: The 9th Amendment to the German Competition Act' (2017) 261 at 285.

Liability for competition law violations in Germany are considered administrative offences.[90] In terms of the German Act on Regulatory Offences (ARO) liability is determined based on fault.[91] Responsibility for competition law infringements is derived from 'the legal person's *behaviour* and thus it cannot be transferred or made subject to legal succession.'[92]

(i) The prohibition of Cartels in Germany

The German competition law concerning cartel conduct has evolved steadily since the first world war. Initially, there was a view that 'in Germany organized markets, cartels and agreements were natural and progressive developments, leading economies and societies away from the chaos and disruption associated with competition and price wars.'[93] This position has since changed. The establishment of the Bundeskartellamt through the Act against Restraints on Competition (ARC)[94] in 1957, signalled a shift towards 'freedom of competition and the prevention of the emergence of economic power where it might impair effectiveness of competition.'[95]

Currently in Germany, the Bundeskartellamt may impose fines, a party negatively affected by the cartel conduct may sue for damages in a civil court or the individuals involved in the cartel conduct can be criminally prosecuted.[96] The fines that can be imposed on a company found to have engaged in cartel conduct can be up to ten percent of that company's total turnover in the financial year preceding the Bundeskartellamt's decision.[97] Criminal liability is only possible in the case of fraud and cartel agreements aimed at undermining the public sector, like tender agreements.[98]

(ii) The Sausage Cartel

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[90] M Schunke & M Walter 'Piercing The Corporate Veil: The German Sausage Saga' in Marco Corradi and Julian Nowag (ed) *The Intersections between Competition Law and Corporate Law and Finance* (2021) at 3.
[91] Sec. 12 ARO.; see also Ibid at 3.
[92] Schunke & Walter op cit note 90 at 3.
[93] S Quack & M Laure Dielic 'Adaptation, Recombination And Reinforcement: The Story Of Antitrust And Competition Law In Germany And Europe' in Wolfgang Streeck and Kathleen Thelen *Beyond Continuity* (ed) (2005) 10-4.
[94] In German this is referred to as the Gesetz gegen Wettbewerbsbeschränkungen (GWB).
[95] M Wise 'The Role of Competition Policy in regulatory Reform' in *OECD* (2003) https://www.oecd.org/germany/33841373.pdf at 11 accessed on 2 February 2023.
[96] T Wein 'Cartel Behaviour and Efficient sanctioning by criminal sentences' (2020) Working Paper Series in Economics https://www.leuphana.de/institute/cri/personen/thomas-wein.html accessed on 10 February 2023 at 7.
[97] Ibid at 8.
[98] Ibid at 2-3.

The sausage cartel in Germany involved twenty-two (22) sausage producers that colluded to fix prices of sausages in Germany. Members of this cartel concluded agreements relating to the exchange of information regarding price increases of poultry and pork products between 2003 and 2008.[99] These producers consulted each other over the phone and agreed on the appropriate timing of price increases.[100] The exchange of information resulted in joint price range increases for the sale of sausage products.[101] This practice resulted in illegal price-fixing agreements.[102]

The sausage producers collaborated with large retail chains in the German food retail sector on meat and sausage products made from poultry or pork in respect of prices.[103] As a result, food retailers in Germany were forced to pay higher prices for poultry products in general and were unable to negotiate and bargain with other sausage producers for better deals, thereby seriously compromising competition in the market.[104]

Various companies that participated in this cartel were restructured and ceased to exist as legal entities.[105] Two of the cartel members, who were initially fined €128 million, belonged to the largest German sausage manufacturer which was a holding company.[106] Two of the cartel members, Böklunder Plumrose and Könecke Fleischwarenfabrik who belonged to the same corporate group escaped fines by internally reorganizing their corporate structure and Böklunder Plumrose and Könecke Fleischwarenfabrik ceasing to exist. This kind of internal reorganisation resulted in the Bundeskartellamt being unable to collect fines totalling around €238 million.[107] This became known as the sausage gap (Wurstlücke) in Germany.[108]

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[99] Bundeskartellamt 'Sausage Cartel' Ref: B12-13/09 B12-13 https://www.09.pdf;jsessionid=FC7E45AB758FE8F7136CBCAA118071FF.2_cid390 (bundeskartellamt.de) at 2-3. accessed on 9 February 2023.

[100] 'German 'sausage cartel' prompts €6.5 million fine' 10 February 2018 https://www.dw.com/en/german-firm-fined-millions-in-sausage-cartel-case/a, accessed on 9 February 2023.

[101] Anja Naumann 'Fines and files – news of the German sausage cartel' 16 April 2018 https://www.lexxion.eu/en/coreblogpost/fines-and-files-news-of-the-german-sausage-cartel/, accessed on 9 February 2023.

[102] Schunke & Walter op cit note 90 at 2.

[103] Bundeskartellamt op cit note 99 at 2.

[104] Michelle Fitzpatrick 'Bangers and Cash: German Sausage makers fight 'cartel' fine''https://www.thejakartapost.com/news/2017/12/19/bangers-and-cash-german-sausage-makers-fight-cartel-fine.html, accessed on 9 February 2023.

[105] The sausage gap was exploited when in 2016 and 2017 Böklunder Plumrose GmbH & Co. KG, Könecke Fleischwarenfabrik GmbH & Co. KG, Bell Deutschland Holding GmbH, formerly Abraham Schinken GmbH and Zimbo Fleisch- und Wurstwaren GmbH & Co. KG, Marten Vertriebs GmbH & Co. KG and Sickendiek Fleischwarenfabrik GmbH & Co. KG were restructured and ceased to exist.

[106] Schunke & Walter op cit note 90 at 2-3.

[107] Ibid at 3.

[108] Naumann op cit note 101.

The prescripts of German corporate law at the time required that for accountability to be established a specific natural person or a corporate body must have acted on behalf of the legal entity i.e., Rechtsträgerprinzip.[109] Therefore, when a fine is imposed it would be imposed on either a natural person who worked for the corporate body or on the corporate body itself. This establishes a direct relationship between the imposed fine and the corporate body.

When the impugned corporate body's assets are transferred and the corporate body subsequently ceases to exist through liquidation for example, 'the chain of liability is cut.'[110] The imposed fine cannot be recovered because the corporate body which is impugned in the conduct no longer exists. German corporate law at the time did not allow for the attribution of liability to an ultimate parent company.

(iii) Prosecution of the Sausage Cartel

Following an anonymous tip off, the Bundeskartellamt became aware that the sausage producers frequently contacted each other with a view to manipulate prices.[111] In July 2009, after its investigation, the Bundeskartellamt imposed hefty fines on cartel members.[112] In June 2017, The Bundeskartellamt referred for prosecution cartel members involved to the General Prosecutors Office in Düsseldorf.[113] The fines which the Bundeskartellamt imposed in 2013 and 2014 totalled around €338.5 million.[114]

On 9 June 2017, the German legislature introduced the 9th amendment to the ARC.[115] This amendment was intended to close the sausage gap by allowing the Bundeskartellamt to prosecute holding companies who are also legal and/or economic successors of companies involved in cartel conduct. The 9th amendment to the ARC was also intended to 'harmonise German law with EU practice concerning liability for cartel fines.'[116] In introducing the 9th amendment to the ARC, the legislature was responding to the way the Bundeskartellamt struggled to collect the fines it had

[109] Schunke & Walter op cit note 90 at 3.
[110] Ibid at 4.
[111] Fitzpatrick op cit note 104.
[112] Naumann op cit note 101.
[113] Bundeskartellamt op cit note 99 at 1.
[114] Ibid.
[115] C Horstkotte and N Kredel *German Competition Law Amendment came into force* https://www.globalcompliancenews.com/2017/06/12/german-competition-law-amendment-20170612/ accessed on 24 February 2023.
[116] Schunke & Walter op cit note 90 at 6.

imposed on the twenty-two members of the sausage cartel. Fines could only be imposed on natural and legal persons who were directly involved in a competition law infringement. 'Unlike EU competition law, the German Competition Act did not allow for [the] fining of parent companies for [the] competition law infringements of their subsidiaries.'[117] This difference between the German competition Act and the EU competition law fundamentally means that the EU competition law is able to put the 'parent company's assets at stake in addition to those of the subsidiary…'[118] This allows the EU commission and the European Court of Justice and other EU courts to ensure that they can effectively enforce competition law infringements and recover imposed fines. This is something which the German Competition Act was not able to do before the 9th amendment of the ARC.

The reality of this inability to effectively enforce competition law infringements and recover fines was laid bare when the Bundeskartellamt's decision to impose fines, following their discovery of the sausage cartel, resulted in two alleged participants of the cartel (who were partnerships with limited liability) deciding to appeal their respective fines.[119] Following the appeals, the two limited liability partnerships transferred their assets. The assets were transferred to other entities within the broader group. The two partnerships were subsequently liquidated which resulted in the fines which were imposed on them ceasing to exist.[120] The Bundeskartellamt therefore had to drop the fines it had imposed against these two companies.

(iv) Closing the Sausage Gap

Following the identification of this gap, the Bundeskartellamt proposed that the legislator (Bundestag) reconsider the law to ensure that parent companies and/or acquirers of companies who are fined for cartel conduct are held liable at least for administrative penalties which are levelled against them because of contraventions of German competition laws. The sausage gap had to be closed to prevent well-resourced holding companies from escaping liability for the anti-competitive conduct of their subsidiaries which later cease to exist.

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[117] Koenig 'op cit note 89 at 264.
[118] C Koenig 'An Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law' (2017) 13(2) *Journal of Competition Law & Economics* 281 at 326.
[119] Schunke & Walter op cit note 90 at 2.
[120] Ibid at 3.

The 9th amendment amended section 81 of the ARC. The new subsection 81(3a) allows for the imposing of fines also on legal persons or groups of persons who are part of the relevant undertaking and have exercised, during the time of the infringement, a 'decisive influence' over the conduct of the legal person or group of persons infringing the competition laws. The new subsections 81(3b) and 81(3c) allow for the imposing of fines on legal or economic successors. Schunke and Walter argue that the amendment to the German competition law meant that:

> 'If a 'person in a leading position' commits an administrative offence by which the competition law duties of the 'undertaking' have been infringed, fines can also be imposed on other legal persons that 'made up' (formed) the undertaking at the time of the infringement and that exercised direct or indirect decisive influence over the management of the entity which infringed [the] competition law.'[121]

Under Section 81(3a) of the ARC, the German legislature attempted to ensure that legal persons who occupy positions of management in corporate bodies are held accountable. This provision ensures that, where applicable, legal persons who belong to an entity which controlled or exercised direct or indirect influence over the management of an entity which contravened the competition provisions of Germany can be held liable. This would be in circumstances where the corporate body which did infringe the competition provisions of Germany has ceased to exist. Schunke and Walter further observe that:

> '…liability of the legal successor was tightened by introducing unlimited liability for the legal successor (s 81 (3b) ARC) and stipulating the liability of the economic successor (s 81 (3c) ARC). This means that the universal legal successor is liable in cases where the legal entity responsible under competition law no longer exists. In addition, a singular legal successor (e.g., acquirer of assets) can be liable, even where the legal entity continues to exist but has become economically irrelevant. Thus, every transfer of a business unit that was involved in a competition law infringement can cause a liability for fines in respect of the successor.'[122]

[121] Schunke & Walter op cit note 90 at 6.
[122] Ibid.

Under section 81(3b) and section 81(3c) of the ARC, the German legislature ensured that it covers both a legal successor and economic successor. Section 81(3b) appears to cover instances where a company that infringed the competition law provisions of Germany is acquired by another company either in its entirety or the majority of its shares. In other words, the German legislature also covered instances of successor liability. Section 81(3c) covers an instance where the assets of a company which infringed the competition law provisions of Germany are acquired. In both instances, the company which committed the competition law infringement ceases to exist in the market.

While the intention behind the 9th amendment was to close the sausage gap, Schunke and Walter argue that the measure which the Bundestag promulgated went further than that.[123]A reading of these measures suggests that they provide a clear intention by the Bundestag to ensure that no firm or corporate restructuring slips through the cracks and evades liability for cartel conduct. The 9th amendment not only codifies the SEE Doctrine into German competition law but is also a positive step in the fight against cartel conduct. Measures similar to this could prove positive for South Africa because of the adverse economic effects which cartels have and the imperative for cartelist to be punished for their conduct.[124]

VI. LESSONS FOR SOUTH AFRICA

(a) Overview

In its current form, section 4(5) of the Competition Act makes it difficult to hold holding companies liable for the cartel conduct of their subsidiaries. Under the EU competition law, the EU Courts holds parent companies liable for antitrust infringements by their subsidiaries through the SEE Doctrine and allows the European Commission to fine them accordingly.[125] This crisp and succinct interpretation of the SEE Doctrine by the EU Courts provide for the perfect example from which the South African competition authorities can learn when interpreting and applying the SEE Doctrine. The case law which has been referred to above from the EU has shown that the EU courts regard the economic entity which includes the holding company as being liable for

[123] Ibid.
[124] L Kelly 'The Introduction of a Cartel Offence into South African Law' (2010) 21 *Stell LR* 321 at 322-323.
[125] C Koenig op cit note 118 at 281.

competition law infringements and must be held ultimately liable.[126] By holding parent companies liable for competition law infringements, the EU ensures that the possibility of companies escaping liability is limited. This is a paramount lesson which South Africa can learn from the EU.

The current dangers facing the South African competition authorities are firstly that section 4(5) of the Competition Act appears to not go far enough to prevent the difficulties faced by the Bundeskartellamt. Secondly, that the different adjudicative bodies (the Tribunal and the Competition Appeal Court) have interpreted section 4(5) differently which contributes to a lack of clarity and legal certainty. If a provision similar to the 9th amendment of the ARC is not enacted, South Africa may struggle to avert a possible manifestation of the sausage gap. Failure to make such an amendment will lead to the continued struggles of the South African competition authorities to interpret and hold holding companies liable for their subsidiary's cartel conduct and more broadly competition law infringements accountable.

(b) Suggested Interpretation of Section 4(5) of the Competition Act

As pointed out above the construction of section 4(5) of the Competition Act envisions a scenario where section 4(1) of the Competition Act does not apply. It creates a legal framework that enables holding companies and companies which form a SEE not to be found guilty of cartel conduct under section 4(1) of the Competition Act.[127] Section 4(5) of the Competition Act is intended to provide clarity regarding the specific complaints into cartel conduct which can be screened out[128] from the application of section 4(1) of the Competition Act. According to Charter, section 4(5) of the Competition Act is a screening measure for cartel complaints but recognises that the CAC has held that its application is exclusionary and not creative of obligations beyond the exclusionary purpose.[129] This limited application of section 4(5) of the Competition Act simultaneously denotes the weaknesses of the section.

The recognition of a company and its wholly owned subsidiary in terms of the Companies Act as well as the combination of firms which form part of the SEE speak to the structure of entities

[126] Ibid at 286.
[127] Sutherland and Kemp op cit note 50 at 5-59.
[128] C Charter '*The Application of the Single Economic Entity doctrine in South African Competition Law Enforcement: in Need of Singling Out*' http://www.compcom.co.za/wp-content/uploads/2014/09/C-Charter-August-2014.pdf accessed on 13 January 2023 at 2.
[129] *Loungefoam* supra note 52 para 65.

which are exempt from section 4(1) of the Competition Act. It does not speak to the possibility of being able to hold them liable. In illustrating the corporate structure which explains the SEE, the CAC has endorsed the example of a carriage which is being drawn by multiple horses under the control of one driver.[130] Sakata and Sekgobela argue that 'section 4(5) of the [Competition]Act is based on the presumption of control and/or decisive influence by a parent company over its wholly-owned subsidiary.'[131] This presumption of control and/or decisive influence by a holding company appears, under section 4(5) of the Competition Act, to operate as a basis to determine why non liability under section 4(1) of the Competition Act would be applicable to companies or constituent firms within a SEE. This is a crucial distinction because one of the factors that are required to establish that a holding company is liable for cartel conduct under the SEE Doctrine is a determination of the 'amount of control which a parent company actually exercised [over its subsidiary].'[132] In other words, the SEE Doctrine requires a further examination and determination of the quantity or quality of control which a holding company exercised over its subsidiary and not just a presumption which determines control.

Section 4(5) of the Competition Act not only recognises companies which are governed by the Companies Act but also constituent firms which are within a SEE. The Competition Act defines the word firm to 'include a person, partnership or a trust.'[133] This definition uses the word 'include', which signifies the non-exhaustive nature of this definition. When understood within the context of section 4(5)(*b*) of the Competition Act, the structural formulation of a SEE can be extended beyond companies by including close corporations and sole proprietorships.[134] This recognition under section 4(5) of the Competition Act does not extend to the realm of holding a firm liable for the conduct of another company.

What is more is that a distinction needs to be made between a SEE and the SEE Doctrine. The former considers the relationship between companies within a group and the degree to which 'a parent exercises decisive influence over the subordinate entity, such that the [subordinate entity]

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[130] *A'Africa* supra note 14 para 42.
[131] Nelly Sakata and Temosho Sekgobela '*Child collusion a parent's responsibility – Sanctioning the parent company in terms of South African Competition Law*' http://www.compcom.co.za/wp-content/uploads/2014/09/Parent-liability-Article-by-Temosho-and-Nelly-Final-21Aug13.pdf, accessed on 4 February 2023 at 5.
[132] Owen T Prell '*Copperweld Corp v Independence Tube Corp: an end to the interenterprise conspiracy doctrine?'* 1986 *Cornell Law Review* 1151 at 1174.
[133] Competition Act. Section 1(xiii).
[134] Sutherland and Kemp op cit note 50 at 5-43.

does not enjoy real autonomy in determining its own market conduct'[135]. The latter considers a scenario of attributing liability of a distinct legal entity such as a subsidiary to another legal entity such as a holding company if both legal entities form a SEE.[136] This appears to be in line with the intention of the legislature to have the Competition Act apply to the widest economic activity which has an effect within South Africa.[137]

It is submitted that section 4(5)(*b*) of the Competition Act does not relate to the SEE Doctrine but is rather limited purely to a recognition of a specific type of corporate structure, namely the SEE. The CAC held that '…the defining substance of the company law structure, of [a] holding company and wholly-owned subsidiary- as defined in the 2008 Companies Act- must be the litmus test of the [type of] structure being measured up for compliance with section 4(5)(b) [of the Competition Act].'[138] The CAC recognised that section 4(5)(*b*) of the Competition Act is concerned with a particular corporate structure and not with the attribution of liability from one firm to another. Section 4(5)(*b*) of the Competition Act can only be interpreted as an exemption which can be raised by firms within a SEE from being held liable under section 4(1) of the Competition Act.[139]

Mackenzie, Rogers and Langbridge argue for the disregarding of section 4(5) of the Competition Act.[140] This is to avoid the artificial transplanting of the SEE Doctrine in section 4(5) of the Competition Act. These authors propose a more open-texted definition of the word firm that must be adopted as this would allow for a natural understanding to be developed and applied to the SEE Doctrine.[141] However, in line with the CAC's approach in *A'Africa*, which provided an important interpretative overlay of section 4(5) of the Competition Act and its application,[142] an assertion that section 4(5) of the Competition Act should be disregarded is misplaced.

An open-texted interpretation of the word firm appears to be unnecessary given that a SEE has been found to have a place in South Africa through its recognition by the legislature in section 4(5)(*b*) of the Competition Act.[143] There is no need to expand the definition of the word firm as it

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[135] *A'Africa* supra note 14 para 31.
[136] *ICI* supra note 82 para 135.
[137] Competition Act. Section 3(1).
[138] *A'Africa* supra note 14 para 53.
[139] *Loungefoam* supra note 52 para 13.
[140] Mackenzie, Rogers and Langbridge op cit note 4 at 15.
[141] Ibid 15.
[142] *A'Africa* supra note 14 para 34 – 61.
[143] Ibid para 61.

is already understood as a broad term.[144] There is however, a need for an adequate provision encapsulating the SEE Doctrine in the Competition Act, in line with the German experience. According to Sakata and Sekgobela, when one considers the clandestine nature of cartel conduct and the difficult evidentiary burden which competition authorities must overcome to successfully prosecute them, it is important to ensure that every possible loophole is closed, and a clear message of deterrence is sent to companies and firms which may decide to engage in cartel conduct.[145] While the shortcomings of section 4(5)(*b*) of the Competition Act to hold a holding company liable are glaringly obvious, the Tribunal and the CAC's attempts to apply the SEE Doctrine in South Africa have not been successful,[146] which necessitates legislative reform.

The ability of the German legislature to effect legislative amendments that not only closed the sausage gap but also ensured that once subsidiary companies have been found guilty of cartel conducts no amount of corporate restructuring by their holding companies would allow such holding companies to escape liability should be a model for law reform in South Africa. The application of the SEE Doctrine by the EU courts can also serve as a model for the way in which the South African courts can approach the interpretation and application of a provision codifying the SEE Doctrine.

The restricted nature of section 4(5) of the Competition Act in holding parent or holding companies liable is plain. Despite the CAC's approach in *Shoprite Checkers* where it was alluded to the possibility of a holding company being held liable for the anticompetitive conduct of its subsidiary if the Commission can clearly '[spell] out (i) what it means by an SEE, (ii) why Computicket and Shoprite constitute an SEE and (iii) why and how the SEE is a dominant firm.'[147] However, until such time that a case is properly brought before the Tribunal, the South African competition authorities' ability to successfully attribute liability to a holding company for the cartel conduct of its subsidiary is unclear. The German approach provides an attractive application of the SEE Doctrine. It is submitted that this approach must be adopted by South Africa.

Finally, the failure to amend the Competition Act in line with the German experience would enable holding companies to evade liability for the anticompetitive conduct of their subsidiary companies because of internal group restructuring when anticompetitive charges are preferred

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[144] *Delatoy* supra note 28 para 40.
[145] Sakata and Sekgobela op cit note 131 at 12.
[146] *Loungefoam* supra note 52.
[147] *Shoprite Checkers* supra note 3 para 11.

against their subsidiaries. Ensuring that firms that are alleged to have contravened section 4(1) (or any provision for that matter) of the Competition Act are held liable is crucial to the effective enforcement of the Competition Act. The Tribunal has recognised the danger of parent or holding companies not escaping liability by holding that '[w]e cannot have a situation where penalties imposed on the Allens Mescho Group (AMG) and its companies cannot be recovered because of corporate changes that render one or more of the companies that form part of the AMG mere shells.'[148] The recognition of the importance to ensure that penalties are recoverable, by the Tribunal, is also part of the central tenet of the SEE Doctrine. In acceding to the Commission's request for the reopening of its case[149] against the AMG, the Tribunal appears to have avoided the manifestation of the sausage gap in South Africa. This avoidance is temporary given the fact that this matter is yet to be finalized before the Tribunal.

VII. CONCLUSION

The relationship between holding companies and their subsidiaries plays a crucial role in understanding the internal workings and the degree or level of control that a holding company has over its subsidiary despite such subsidiary being an independent entity. Both the Companies Act and the Competition Act can be regarded as important pieces of legislation that govern the relationship between holding companies and subsidiary companies and the regulation of competition between companies within or having an effect on the South African economy respectively. The two pieces of legislation appear to recognise that companies can construct their business affairs in a variety of ways purely for economic efficiency reasons. The degree or level of control (or influence) that a holding company has over a subsidiary is important. The application of the SEE Doctrine is centred on the ability to attribute liability to a holding company to avoid instances where companies escape liability through corporate restructurings. The identification and establishment of a SEE is a crucial first step on this pathway to establishing the application of the SEE Doctrine. The Bundeskartellamt's experience with the sausage cartel shows the potential consequences when the SEE Doctrine has not been provided adequate legislative recognition. The

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[148] *Allens Meshco (Pty) Ltd; Hendok (Pty) Ltd; Wire Force (Pty) Ltd;Agri Wire (Pty) Ltd; Agri Wire North (Pty) Ltd; Agri Wire Upington (Pty) Ltd; Cape Wire (Pty) Ltd; Forest Wire (Pty) Ltd; Independent Galvanising (Pty) Ltd; Associated Wire Industries (Pty) Ltd T/A Meshrite And Competition Commission* unreported case no. CR093Jan07/SEP086Aug16 (3 March 2017) (*AMG*) para 33.
[149] Ibid para 35.

9th amendment to the ARC appears to be an appropriate legislative injunction to codify the SEE Doctrine and ensure that holding company liability is established.

The CAC's recognition in *Shoprite Checkers* that the SEE Doctrine can be used to attribute liability if properly pleaded i.e., by making out a case for a SEE and showing that it constitutes a firm as defined in the Competition Act is a positive injunction. Section 4(5) of the Competition Act appears to establish a defence for holding companies which constitute a SEE and allows them to escape liability for the anticompetitive behaviours of their subsidiary companies. This clearly illustrates that the SEE Doctrine is not applicable in regarding to cartel conducts in South Africa. This report argued that the German approach should be adopted in South Africa in order to ensure better and stronger cartel infringement enforcement in South Africa.

The fight against cartel conduct has become more and more difficult with the CAC demanding that greater consideration be given to the characterisation[150] of cartel conduct especially under section 4(1)(b) of the Competition Act. This will inevitably lead to a much greater need for the investment of significant resources in the prosecution of cartel conduct.

[150] *Competition Commission of South Africa v Irwin & Johnson and Another* [2022] ZACAC 8 (2 August 2022) para 100-109.

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