Characterisation of Restrictive Horizontal Practices under Competition Law (Part 1)

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SUMMARY

Sections 4(1)(*a*) and (*b*) of the Competition Act 89 of 1998 reflect the distinction in competition law between horizontal restrictive practices that may be evaluated either through a "rule of reason" analysis or treated as automatically unlawful under a "*per se*" approach. Section 4(1)(*a*) contemplates a "rule of reason" analysis in terms of which anti-competitive effects of the conduct in issue must be proved and, if such effects are demonstrated, they are susceptible to justification on technological, efficiency or pro-competitive grounds. By contrast, where the impugned conduct involves any of the restrictive horizontal practices listed in section 4(1)(*b*) – namely, price-fixing, market division or collusive tendering – it is prohibited "*per se*" in that the anti-competitive effect thereof is presumed and cannot be justified on technological, efficiency or pro-competitive grounds. Whether section 4(1)(*b*) includes or excludes pro-competitive agreements involving price-fixing, market division or collusive tendering depends on whether every agreement that directly falls into one of these prohibited categories automatically violates section 4(1)(*b*). This can be an issue because, on the face of it, not every agreement that involves price-fixing, market division or collusive tendering necessarily harms competition. Cooperation agreements, such as joint ventures, may have neutral or even positive effects on competition. Section 4(1)(*b*) must therefore be able to distinguish between conduct that should be condemned *per se* and conduct that has a legitimate purpose and requires, at the very least, a rule-of-reason analysis. This is the issue that characterisation seeks to address. It is settled in South African competition law that any conduct alleged to have contravened section 4(1)(*b*) must be properly

https://doi.org/10.17159/1qv68n24

characterised in order to ascertain whether the conduct in question squarely falls within the ambit of section 4(1)(*b*). In other words, it must be ascertained whether the impugned conduct, properly characterised, is the kind of conduct that is to be prohibited *per se* under section 4(1)(*b*), with no scope for justification. The main aim of this series of three articles is to review characterisation under section 4(1)(*b*) of the Competition Act, and to assess what it involves. Part 1 critically reviews the applicable South African framework and principles relevant to characterisation, as emerged from *American Natural Soda Ash Corporation v Competition Commission (ANSAC)* and *Competition Commission v South African Breweries Ltd (SAB)*. Pursuant to section 1(3) of the Competition Act, appropriate foreign and international law may be considered when interpreting or applying the Competition Act. This is complementary to section 1(2)(*a*), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2. In this light, this article also considers the approach to whether conduct is anti-competitive by object or effect under article 101 of the Treaty on the Functioning of the European Union. Part 2 builds on Part 1 by reviewing and assessing further key facets of characterisation that have emerged from the South African case law since *ANSAC* and *SAB*. Part 3 reviews and assesses the approach relevant to characterisation of restraints of trade, as developed in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission*.

KEYWORDS: characterisation, restrictive horizontal practices, European Union competition law

1 INTRODUCTION

Horizontal practices[1] are not necessarily anti-competitive or harmful to competition, although the legal presumption against them is sometimes thought to be strong.[2] An agreement, such as a joint venture, can, for example, allow a group of firms to operate on a larger scale or with broader scope, lower transaction or information costs, or address issues related to free-rider concerns. Competition policy must therefore be able to distinguish those agreements that pose significant anti-competitive concerns from those that do not.[3] If an agreement cannot facilitate a market-wide reduction in output below the competitive level or an increase in (collusive) prices above the competitive level, its aim must be to lower costs or improve a product or service.[4]

The Competition Act 89 of 1998 (the Competition Act) includes a "rule of reason" and "*per se*" provision to distinguish those horizontal practices that pose significant anti-competitive concerns from those that do not. Section 4(1)(*a*) contemplates a "rule of reason" analysis in terms of which anti-competitive effects of the conduct in issue must be proved and, if such effects are demonstrated, they are susceptible to justification on

1 A horizontal practice is an agreement between or concerted practice of firms or a decision by an association of firms in a horizontal relationship. For ease of reference, unless otherwise stated, in this article, the term "agreement" also covers concerted practices and decisions by an association of firms and "conduct" covers all three types of cooperation between firms – namely, agreements, concerted practices and decisions by associations.

2 Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* 3ed (2005) 194.

3 *Ibid*.

4 *Ibid*.

technological, efficiency or pro-competitive grounds. By contrast, where the impugned conduct involves any of the particular restrictive horizontal practices listed in section 4(1)(*b*) – namely, price-fixing, market division or collusive tendering – it is prohibited "*per se*" in that the anti-competitive effect thereof is presumed and it cannot be justified on technological, efficiency or pro-competitive grounds.

Whether section 4(1)(*b*) includes or excludes pro-competitive agreements that involving price-fixing, market division or collusive tendering depends on whether every agreement that directly falls into one of these prohibited categories automatically infringes section 4(1)(*b*). This can be an important issue because, on the face of it, not every agreement that involves price-fixing, market division or collusive tendering necessarily harms competition. Cooperation agreements, such as joint ventures, may have neutral or even positive effects on competition. Section 4(1)(*b*) must therefore be able to distinguish between conduct that should be condemned *per se* and conduct that has a legitimate purpose and requires, at the very least, a rule-of-reason analysis. This is the issue that "characterisation" seeks to address. It is settled in South African competition law that any conduct alleged to have contravened section 4(1)(*b*) must be properly characterised in order to ascertain whether the conduct in question squarely falls within the ambit of section 4(1)(*b*). In other words, it must be ascertained whether the impugned conduct, properly characterised, is the kind of conduct that is to be prohibited *per se* under section 4(1)(*b*), where there is no scope for justification.

The main aim of this series of three articles is to review characterisation under section 4(1)(*b*) of the Competition Act, and to assess what it involves. Part 1 critically reviews the applicable South African framework and principles relevant to characterisation, as emerged from *American Natural Soda Ash Corporation v Competition Commission (ANSAC)*[5] and *Competition Commission v South African Breweries Ltd (SAB)*.[6] Pursuant to section 1(3) of the Competition Act, appropriate foreign and international law may be considered when interpreting or applying the Competition Act. This is complementary to section 1(2)(*a*), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2. In this light, this article also considers the approach to whether conduct is anti-competitive by object or effect under article 101 of the Treaty on the Functioning of the European Union. Part 2 reviews and assesses key facets of characterisation that have further emerged from the South African case law since *ANSAC* and *SAB*. Part 3 reviews and assesses the characterisation of restraints of trade as developed in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission*.[7]

Under heading 2, this article starts with a discussion on the approach to considering whether conduct is anti-competitive by object or effect under

[5] 2005 (6) SA 158 (SCA).
[6] [2015] ZACAC 1.
[7] [2018] ZACAC 2.

article 101 of the Treaty on the Functioning of the European Union (TFEU).[8] This approach is relevant as it provides an established international approach to the assessment of potentially anti-competitive conduct as contemplated under section 4(1)(*b*). Under heading 3, the article then sets out and critically reviews the South African framework and principles relevant to characterisation. In this regard, two key cases have shaped the main principles and requirements relevant to characterisation and are therefore the main focus of this heading, namely the decision by the Supreme Court of Appeal (SCA) in *ANSAC* and the decision by the Competition Appeal Court (CAC) in *SAB*. Heading 4 provides a conclusion.

2 APPROACH TO OBJECT OR EFFECT RESTRICTIONS UNDER EUROPEAN UNION COMPETITION LAW

2 1 Statutory framework and content of article 101 of the TFEU

Article 101(1) of the TFEU provides:

> "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
> (b) limit or control production, markets, technical development or investment;
> (c) share markets or sources of supply;
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 101 covers undertakings in both a horizontal and vertical relationship. Horizontal cooperation occurs if an agreement is entered into between actual or potential competitors. In this regard, article 101(1) is aimed at catching all forms of collusion between actual or potential competitors that have as their object or effect (that is, regardless of the aim pursued and the subject matter thereof) a negative impact on competition in the European Union.

The prohibition contained in article 101(1) is, however, not absolute. Article 101(3) of the TFEU provides that the prohibition can be inapplicable in the following circumstances:

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[8] Consolidated version of the Treaty on the Functioning of the European Union [2012] *OJ* C326/01 (TFEU).

> "The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
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> — any agreement or category of agreements between undertakings,
> — any decision or category of decisions by associations of undertakings,
> — any concerted practice or category of concerted practices,
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

An assessment of restrictions of competition by object or effect under article 101(1) is therefore only one side of the analysis under article 101.[9] The other side is the assessment of whether an impugned agreement meets the conditions of article 101(3).[10] Where it is established that an agreement restricts competition by object or effect within the meaning of article 101(1), article 101(3) can be raised as a defence.[11] No anti-competitive agreements are excluded from the possible application of article 101(3).[12] The only question is whether the impugned agreement fulfils the conditions laid down in this provision.

2 2 Analytical approach under article 101 of the TFEU

The assessment under article 101 of the TFEU consists of two steps.[13]

The first step is to assess whether an agreement between undertakings has an anti-competitive object *or* actual or potential restrictive effects on competition.[14] Having the restriction of competition as an object or as an effect are two alternative criteria.[15] Thus, it is necessary to consider first whether an agreement has as its object the restriction of competition.[16] If it does, it is not necessary to examine the effects of the agreement on competition.[17] If an agreement does not have the object of restricting

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9 European Commission Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023) *OJ C* 259/01 (EC Guidelines) par 35.

10 *Ibid*.

11 *Ibid*.

12 Bellamy and Child *European Union Law of Competition* 8ed (2018) 210.

13 EC Guidelines par 17.

14 *Ibid*.

15 In *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)*, the European Court of Justice indicated that the use of the conjunction "or" (in the then-article 85(1) EEC) means that the object of an agreement should be considered first. See Case C-56/65, *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)* [1966] ECLI:EU:C:1966:38 249.

16 See Case C-56/65, *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU) supra*.

17 *Ibid*.

competition, then it is necessary to determine whether competition has in fact been prevented, restricted or distorted to an appreciable extent.[18]

In the second step,[19] which only becomes relevant when an agreement is found to restrict competition within the meaning of article 101(1), it is necessary to determine whether the agreement satisfies the four cumulative conditions[20] of article 101(3) and, if it does, to assess whether those pro-competitive benefits outweigh the restrictive effects on competition. It is only within the specific framework of article 101(3) that the pro- and anti-competitive aspects of a restriction of competition may be weighed. Article 101(3) would lose much of its effectiveness if such an examination had already been carried out under article 101(1).[21] If the pro-competitive benefits to consumers do not outweigh the restriction of competition, article 101(2) provides that the agreement is automatically void.

2 3 Restrictions of competition by object or effect

2 3 1 By object

Certain types of agreement between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition and thus have as their object the restriction of competition.[22] In such cases, it is not necessary to examine the actual or potential effects of the agreement once its anti-competitive object has been established.[23]

The concept of restrictions of competition by object must be interpreted restrictively and should only be applied to certain types of agreement between undertakings that reveal a sufficient degree of harm to competition.[24] Indeed, the concept is interpreted narrowly because the European Commission is exempted from having to prove the anti-

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18 Case C-56/65, *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU) supra*; see also Case C-209/07*, Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECLI:EU:C:2008:643 par 15.

19 EC Guidelines par 18.

20 The four cumulative conditions are: (i) that the agreement helps to produce a benefit by contributing to improving the production or distribution of goods or to promoting technical or economic progress; (ii) that consumers are allowed a fair share of that benefit; (iii) that no restrictions may be imposed on the undertakings concerned which are not indispensable to the attainment of these objectives; and (iv) that such undertakings may not be afforded the possibility of eliminating competition in respect of a substantial part of the products in question.

21 See Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities* [2003] EU:T:2003:281 par 107 and the case law cited there.

22 Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd supra* par 17; Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission* [2014] ECLI:EU:C:2014:2204 par 49–50; EC Guidelines par 22.

23 Case C-209/07, C*ompetition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd supra* par 16; EC Guidelines par 22.

24 Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission supra* par 58.

competitive effect of an agreement only where the agreement is, by its nature, harmful to the proper functioning of normal competition.[25]

The object of an agreement is determined by considering the content of its provisions, its objectives and the economic and legal context of which it forms part.[26] When assessing that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.[27] The intention of the parties is not necessary for establishing the anti-competitive object of an agreement, but it can be relevant.[28]

According to the European Commission, insofar as it is possible, pro-competitive effects of an agreement are raised by parties that are capable of calling into question the overall assessment of whether the agreement is sufficiently harmful to competition; those effects must be taken into account as elements of context for the purposes of categorising the agreement as a restriction by object.[29] However, the mere existence of pro-competitive effects cannot, as such, preclude the characterisation of an agreement as a restriction by object.[30] Such pro-competitive effects should be demonstrated, be relevant and be specifically related to the agreement concerned.[31] If this is the case, those pro-competitive effects must be sufficiently significant to justify a reasonable doubt about whether the agreement concerned caused a sufficient degree of harm to competition and, therefore, as to its anti-competitive object.[32]

Under European Union competition law, taking account of the pro-competitive effects of an agreement is not intended to undermine characterisation as a restriction of competition within the meaning of article 101(1), but merely to appreciate the objective seriousness of the practice concerned and, consequently, to determine the means of proving it.[33] Indeed, in *Generics (UK) Ltd v Competition and Markets Authority*, the European Court of Justice emphasised that this is in no way in conflict with the court's settled case law that European Union competition law does not recognise a rule-of-reason type of analysis, by virtue of which a weighing of the pro- and anti-competitive effects of an agreement should be undertaken

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25 *Ibid*; see also Bellamy and Child *European Union Law of Competition* 166.

26 Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission supra* par 53. According to the European Commission, restrictions can also be categorised as restrictions by object "on the basis of sufficiently reliable and robust experience for the view to be taken that the agreement in question is, by its very nature, harmful to the proper functioning of competition"; EC Guidelines par 24.

27 Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission supra* par 53; EC Guidelines par 24.

28 Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission supra* par 54; see also Bellamy and Child *European Union Law of Competition* 166.

29 EC Guidelines par 28.

30 Case C-307/18, *Generics (UK) Ltd v Competition and Markets Authority* [2020] EU:C:2020:52 par 106.

31 Case C-307/18, *Generics (UK) Ltd v Competition and Markets Authority supra* par 107.

32 *Ibid*.

33 *Ibid*.

when it is to be characterised as a restriction of competition under article 101(1).[34]

2 3 2 By effect

In cases where an agreement does not reveal a sufficient degree of harm to competition by object, the effects of the agreement have to be considered in order to classify the agreement as a restriction of competition within the meaning of article 101(1).[35] For these purposes, it is necessary to identify the factors that establish that competition has, in fact, been prevented, restricted or distorted to an appreciable extent.[36]

For an agreement to have restrictive effects on competition, it must have, or be likely to have, an appreciable, adverse impact on at least one of the parameters of competition in the market, such as price, output, quality, variety or innovation.[37] To establish whether this is the case, it is necessary to assess competition within the factual context in which it would occur if the agreement had not existed (commonly referred to as the "counterfactual").[38] According to the European Commission, in order to assess whether an agreement has restrictive effects, the following factors are relevant:[39]

- the nature and content of the agreement;
- the actual context of the agreement;[40]
- the extent to which the parties individually or jointly have or obtain some degree of market power and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power; and
- the restrictive effects on competition may be actual and potential, but they must, in any case, be sufficiently appreciable.

3 APPLICABLE FRAMEWORK AND PRINCIPLES

3 1 Section 4(1) of the Competition Act: analytical structure and key differences

Section 4(1) provides:

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[34] Case C-307/18, *Generics (UK) Ltd v Competition and Markets Authority supra* par 107; see also to that effect Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] EU:C:1966:41 343.

[35] Case C-67/13 P, *Groupement des cartes bancaires (CB) v European Commission supra* par 52.

[36] *Ibid*.

[37] EC Guidelines par 30.

[38] Case C-56/65, *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU) supra* 250.

[39] EC Guidelines par 32.

[40] In particular, the legal and economic context in which the undertakings in question operate, the nature of the goods or services affected, and the real conditions of the functioning and the structure of the market or markets in question.

> "(1) 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–
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> *(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 pro-competitive gain resulting from it outweighs that effect; or
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> *(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;
>
> (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
>
> (iii) collusive tendering."

There are important differences between the methods and application of paragraphs *(a)* and *(b)* of section 4(1), respectively.

- Section 4(1)(*a*) provides for a rule-of-reason analysis in terms of which the complainant bears an onus to prove that the conduct complained of has the effect of substantially preventing or lessening competition in a market. If such effects are demonstrated, they are nonetheless susceptible to justification on technological, efficiency or pro-competitive grounds. The rule-of-reason standard requires detailed analysis of market power and effects, as well as consideration of possible efficiency or pro-competitive gains. This includes defining the relevant market in which the conduct occurred and weighing up both pro- and anti-competitive effects to determine whether or not the conduct, on balance, is anti-competitive.
- By contrast, where conduct involves any of the particular restrictive horizontal practices listed in section 4(1)(*b*), namely, price-fixing, market division or collusive tendering, it is prohibited and deemed unlawful *per se*. What this label means in practice is that (a) neither a relevant market nor an estimate of the defendant's market power must be established in order to prove that the practice is unlawful, (b) harmful effects to competition will be presumed, and (c) the defendant will not be permitted to justify the practice on efficiency or pro-competitive grounds. Indeed, these three categories of conduct are listed without reference to their effects on competition or to technological, efficiency or pro-competitive gains to which they may give rise.

Section 4(1) thus draws a distinction between conduct that, on the one hand, is almost always harmful and prohibited *per se* and, on the other hand, conduct that is only potentially harmful and therefore permits a rule-of-reason justification.

The rationale behind the *per-se* infringements intended to be captured under section 4(1)(*b*) is that there is, almost certainly, harm to competition from such conduct, and rarely, if ever, are there redeeming features that might outweigh such harm.[41] As a result, these infringements can conclusively be presumed to be unreasonable and therefore illegal without an elaborate enquiry as to the precise harm they have caused or the

[41] *Tourvest Holdings (Pty) Ltd v Competition Commission* 195/CAC/Oct21 par 44.

commercial justifications for their use. Areeda and Hovenkamp indicate that the rationale of the rule of *per-se* illegality depends on the premises that:

> "(a) judicial experience with a particular class of restraints shows that virtually all restraints in that class operate so as to reduce output or increase price; and (b) particularized inquiry into the output or price effects of such a restraint is not worth its costs. As a result, (c) once a restraint is placed in such a class, summary condemnation 'as a matter of law' is appropriate".[42]

This contrasts with other infringements covered in section 4(1)(*a*), where there is far less judicial or economic certainty as to the overall harm, and therefore a rule-of-reason approach is required, whereby harm must be demonstrated and weighed up against any potential technological, efficiency or pro-competitive gains. Indeed, section 4(1)(*a*) sets the rule-of-reason approach as the point of departure for considering restrictive horizontal practices.

3 2 The requirement of proper characterisation and its constituent elements

The requirement of proper characterisation was established in South Africa by the SCA in *ANSAC*.[43] Prior to being heard by the SCA, the matter was heard by the Competition Tribunal and the CAC, where it was alleged by the Competition Commission that the American Natural Soda Ash Corporation had engaged in price fixing and market division in contravention of section 4(1)(*b*).

The SCA observed that an agreement that involves, among other things, price-fixing, is prohibited in terms of section 4(1)(*b*), and nothing can be advanced to justify the conduct.[44] However, the SCA questioned when the prohibited price-fixing had occurred and indicated that this is not always simple to determine.[45] To answer this question, the SCA explained that, referencing the approach in the United States,[46] the following enquiry is required:

> "In the United States the enquiry is approached by 'characterising' the conduct complained of to determine whether it constitutes that form of conduct that the courts have through case precedents labelled "price-fixing" but have not

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42 Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2024) Supplement 9/2024 Wolters Kluwer par 1911a.

43 *Supra*.

44 *ANSAC supra* par 43.

45 *Ibid*.

46 The principle of characterisation was adopted by the SCA from the majority decision of the United States Supreme Court in *Broadcast Music, Inc v Columbia Broadcasting System, Inc* 441 US 1 (1979). As the majority of the Supreme Court pointed out in *Broadcast Music, Inc v Columbia Broadcasting System, Inc* 441 US 1 9 (1979): "Literalness [when interpreting the phrase 'price-fixing'] is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act […] Thus, it is necessary to characterise the challenged conduct as falling within or without that category of behaviour to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter."

> comprehensively defined. In this country, where the prohibition is decreed by legislation rather than by judicial intervention, the prohibited form of conduct must be established by construing section 4(1)(b).
>
> Once the ambit of subparagraph (b)'s prohibition has been established the enquiry can move to whether or not the conduct in issue falls within the terms of the prohibition. That is a factual question that must be answered by recourse to relevant evidence."[47] (own emphasis added)

According to the SCA, characterisation involves two key elements. These elements may be pursued in any order. The one element requires a definition of the scope of the particular section 4(1)(*b*) infringement, which must be determined through the statutory interpretation of this section. In other words, a court must determine whether the impugned conduct is of a prohibited form of conduct as statutorily constructed in the relevant section. The other element requires an enquiry into whether the conduct complained of falls within the terms of the prohibition as construed. In other words, the true nature of the impugned conduct must be identified. This is a factual question that must be answered by recourse to relevant evidence. The SCA stated:

> "There is in principle no reason why the enquiry should not be conducted in reverse. The enquirer might choose first to identify the true character of the conduct that is the subject of the complaint, and only then turn to whether the conduct (so characterised) constitutes price-fixing as contemplated by section 4(1)(b). (This is how the enquiry is conducted in the United States, though there the two elements tend to be elided, because the scope of the prohibition is itself a matter of judicial rather than legislative determination.)
>
> Whichever approach is adopted, the essential enquiry remains the same. It is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct: and this process necessarily embodies two elements. One is the scope of the prohibition: a matter of statutory construction. The other is the nature of the conduct complained of: this is a factual enquiry. In ordinary language this can be termed 'characterising' the conduct – the term used in the United States, which Ansac has adopted."[48] (own emphasis added)

The SCA therefore determined that any conduct alleged to contravene section 4(1)(*b*) must be properly characterised in order to ascertain whether such conduct squarely falls within the ambit of section 4(1)(*b*).[49] In other words, it must be ascertained whether the impugned conduct, properly characterised, is the kind of conduct that is to be prohibited *per se* under section 4(1)(*b*), with no scope for justification.

3 3 The steps and purpose of characterisation

The CAC in *SAB*[50] set out the history, United States jurisprudence and underlying reasoning for characterisation.[51] The CAC explained that the

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47 *ANSAC supra* par 44–45.

48 *ANSAC supra* par 46–47.

49 *ANSAC supra* par 44–47.

50 *Supra*. The Competition Commission referred a complaint against South African Breweries and its 13 appointed distributors for engaging in conduct in contravention of sections 4(1)(*b*)(ii), 5(1), (2) and 9(1) of the Competition Act.

South African legislature, when it passed the Competition Act, favoured a statutory rule rather than a judicially constructed rule as preferred in the United States. The court therefore held:

> "the 'characterisation' that is required under our legislation is to determine (i) whether the parties are in a horizontal relationship, and if so (ii) whether the case involves direct or indirect fixing of a purchase or selling price, the division of markets or collusive tendering within the meaning of s 4(1)(b)."[52] (own emphasis added)

The CAC thus clarified that characterisation consists of two steps. The first step involves assessing the economic relationship between the parties and whether, for purposes of section 4(1)(*b*), they are competitors. If this is found to be the case, the second step is to assess whether the conduct complained of is of the character contemplated within the scope of section 4(1)(*b*). Both issues, the existence of a horizontal relationship and the characterisation of the impugned conduct, can involve legal, factual and/or economic matters depending on the facts of the case.

The first step seeks to unlock the true economic nature of the relationship between the parties.[53] It is, in essence, a jurisdictional point. The Competition Tribunal and CAC only have jurisdiction to determine whether harmful restrictive conduct has occurred if it is established that the conduct occurred between parties who can be described as "competitors" in terms of the Competition Act.[54] This is key because characterisation in recent cases has mainly revolved around whether the parties, when they concluded an agreement, were in a horizontal or vertical relationship.[55]

In relation to the second step, the CAC stated:

> "since characterisation in this sense involves statutory interpretation, the bodies entrusted with interpreting and applying the Act (principally the Tribunal and this Court) must inevitably shape the scope of the prohibition, drawing on their legal and economic expertise and on the experience and wisdom of other legal systems which have grappled with similar issues for longer than we have."[56] (own emphasis added)

Categorising conduct as having the character of prohibited price-fixing, market division or collusive tendering, as contemplated in section 4(1)(*b*), will require the decision-maker to confer an analogous character on the

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51 *Competition Commission v South African Breweries Ltd supra* par 25–47. The process of characterisation was applied by the CAC in *SAB* with particular reference to the distinction drawn in United States antitrust law between *per-se* violations and conduct tested by the rule of reason. The CAC observed that the distinction between the prohibitions in section 4(1)(*a*) and (*b*) broadly mirrors the distinction in United States antitrust law (judicially developed) between horizontal conduct to be tested by the rule of reason and *per-se* violations.

52 *Competition Commission v South African Breweries Ltd supra* par 37.

53 *Competition Commission v South African Breweries Ltd supra* par 43.

54 *Ibid*.

55 See, for example, *Competition Commission v Waco Africa (Pty) Ltd* [2024] ZACAC 3; *Tourvest Holdings (Pty) Ltd v Competition Commission supra*; *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission supra*; *Competition Commission v South African Breweries Ltd supra*.

56 *Competition Commission v South African Breweries Ltd supra* par 37.

conduct in question.[57] Therefore, it will be necessary to envision the qualitative character of the kind of conduct intended to be prohibited.[58] Characterisation in this sense involves statutory interpretation to give content to the scope of the prohibition and will naturally draw on the experience of other legal systems. Moreover, "whether conduct is of such a character that no defence should be entertained is informed both by common sense and competition economics".[59]

The CAC then proceeded to summarise the purpose of characterisation as follows:

> "The purpose of the characterisation principle, in the manner in which we have outlined it, is reflective that the *per se* prohibitions contained in s 4(1)*(b)* are the most serious legislative prohibitions against a defendant. There is no defence which can be offered, if the requirements of the section are met. The animating idea of the characterisation principle is to ensure that s 4(1)*(b)* is so construed that only those economic activities in regard to which no defence should be tolerated are held to be within the scope of the prohibition."[60] (own emphasis added)

4 CONCLUSION

Section 4(1)(*b*) incorporates within the context of South African competition law a *per-se* approach to determine whether horizontal conduct should be prohibited, whereas section 4(1)(*a*) contemplates a rule-of-reason approach. The purpose of section 4(1)(*b*) is to capture anti-competitive conduct that is so egregious that no rule-of-reason type justification is permitted. For these purposes, the SCA in *ANSAC* made clear that it is necessary to characterise the impugned conduct to determine the potential for the conduct to result in harm to competition under section 4(1)(*b*) where there is no scope for justification. The essential enquiry is to establish whether the character of the conduct complained of coincides with the character of the prohibited conduct. This process comprises two constituent elements: one is the scope of the prohibition – a matter of statutory interpretation; and the other is the nature of the conduct complained of – a factual enquiry.

The CAC in *SAB* provided further meaning to the characterisation required under section 4(1)(*b*), and clarified that the characterisation requirement:

- applies to all the forms of conduct prohibited under section 4(1)(*b*);
- first requires a determination whether or not the parties are in a horizontal relationship (that is, whether or not they were actual or potential competitors in the absence of the impugned agreement); and
- if so, secondly, requires a determination whether the conduct complained of involves conduct within the meaning of section 4(1)(*b*) (that is, whether the conduct complained of constitutes an economic activity in regard to which no defence should be tolerated, because it

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57 *Competition Commission v Waco Africa (Pty) Ltd supra* par 77.
58 *Ibid*.
59 *Competition Commission v South African Breweries Ltd supra* par 44.
60 *Ibid*.

lacks any redeeming virtue and its purpose or design was to eliminate competition).

According to the approach in the European Union, in order to determine whether conduct causes a sufficient degree of harm to competition, such that it may be considered a restriction of competition by object, within the meaning of article 101(1) of the TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. The parties' intentions may be relevant, but competition authorities or courts are not obliged to take these as determinative. It is thus apparent that the by-object prohibitions contained in article 101(1) of the TFEU are also only intended to capture conduct that will plainly have negative effects on certain key economic parameters such as the price, quantity and/or quality of goods or services.

Based on *ANSAC* and *SAB*, and considering the approach to object or effect restrictions under European Union competition law, the following points can be made on the applicable South African framework and principles relevant to characterisation.

- Certain types of agreement can be said to be, by their very nature, likely to be anti-competitive. Their anti-competitive effect can be presumed.
- In this, it may be said that although the SA in *ANSAC* and the CAC in *SAB* mainly considered characterisation with reference to the jurisprudence of the United States, where *per-se* illegal conduct under the Sherman Antitrust Act of 1890 broadly aligns with *per-se* restrictive horizontal practices under section 4(1)(*b*), support for this approach can also be found in European Union competition law. Article 101(1) of the TFEU prohibits horizontal conduct that has as its object or effect the prevention, restriction or distortion of competition. Conduct that is restrictive by object, rather than by effect, corresponds broadly to the conduct prohibited by section 4(1)(*b*) and *per-se* illegal conduct in the United States.
- In the case of a *per-se* infringement, it is not open to the parties to the agreement to argue that it does not restrict competition. It belongs to a category of agreement that is by law regarded as restrictive of competition. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources – to the detriment, in particular, of consumers.
- Given that the finding of a *per-se* restriction removes the need for a consideration of the anti-competitive effects of an agreement, there is a symbiosis between *per-se* restrictions and rule-of-reason restrictions. *Per-se* restrictions should not be used as a means of avoiding a difficult investigation of anti-competitive effects. In short, the harm to competition that might be expected in the case of a *per-se* restriction needs to be clear-cut and pronounced without an examination of the effects.

- While the whole point of a *per-se* restriction is to avoid the need for an effects investigation, it is clear that the anti-competitive restriction needs to be seen and considered in context, and evidence relating to the nature, purpose and effect of the agreement may be relevant factors.
- This evaluation of harm is not the same as considering the economic effects of the agreement, which is a distinct exercise. Nevertheless, the agreement must be capable of having some impact on the market or markets in question. Assessing this possible impact is a strictly limited exercise, not involving a full examination of market effects, or any balancing of anti- or pro-competitive effects.
- The concept of *per-se* restrictions should be interpreted restrictively in the sense that it should only be applied to those categories of agreement whose harmful nature is easily identifiable in the light of experience and well-established economic analysis.