Characterisation of Restrictive Horizontal Practices under Competition Law (Part 3)

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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 the anti-competitive effects of the conduct in issue must be proved and, even 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. As is the case with *bona fide* agreements that are embarked upon by competitors for a legitimate purpose, commercially reasonable ancillary restraints, even when concluded between competitors, ought not to be treated as automatically infringing section 4(1)(*b*) without further enquiry. For these purposes, the Competition Appeal Court (CAC) in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission (Dawn)* has developed a well-refined test to assess whether a restraint of trade within a broader agreement, such as a joint venture, falls within the scope of the prohibitions enacted by section 4(1)(*b*) of the Competition Act. Part 1 critically reviews the applicable South African framework and principles relevant to characterisation as developed in *American Natural Soda Ash Corporation v Competition Commission* and *Competition Commission v South African Breweries Ltd* and assesses the approach to whether conduct is anti-

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competitive by object or effect under article 101 of the Treaty on the Functioning of the European Union (EU). Part 2 builds on Part 1 by reviewing and assessing key facets of characterisation that have further emerged from notable cases such as *Aranda Textile Mills (Pty) Ltd v The Competition Commission of South Africa*, *Tourvest Holdings (Pty) Ltd v Competition Commission*, *Competition Commission of South Africa v Irwin & Johnson*, and *Competition Commission v Waco Africa (Pty) Ltd*. Part 3 reviews and assesses the approach relevant to characterisation of ancillary restraints of trade as developed by the CAC in *Dawn*. 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 light hereof, this article also considers the approaches in the United Kingdom, the EU and the United States. (Van Tonder "Characterisation of Restrictive Horizontal Practices under Competition Law (Part 1)" 2025 46(4) *Obiter* 872–886; Van Tonder "Characterisation of Restrictive Horizontal Practices under Competition Law (Part 2)" 2026 47(1) *Obiter* 1–14)

KEYWORDS: characterisation, restrictive horizontal practices, restraints of trade, ancillary restraints of trade

1 INTRODUCTION

Sections 4(1)(*a*) and (*b*) of the Competition Act 89 of 1998 (Competition Act) 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 the anti-competitive effects of the conduct in issue must be proved and, even 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.

As is the case with *bona fide* agreements that are embarked upon by competitors for a legitimate purpose, commercially reasonable ancillary restraints, even when concluded between competitors, ought not to be treated as automatically infringing section 4(1)(*b*) without further enquiry. For these purposes, the Competition Appeal Court (CAC) in *Dawn Consolidated Holdings (Pty) Ltd v Competition Commission (Dawn v CC)*[1] has developed a well-refined test to assess whether a restraint of trade within a broader agreement, such as a joint venture, falls within the scope of the prohibitions enacted by section 4(1)(*b*) of the Competition Act. Part 1 critically reviews the applicable South African framework and principles relevant to characterisation as developed in *American Natural Soda Ash Corporation v Competition Commission*[2] and *Competition Commission v South African*

1 [2018] ZACAC 2.

2 2005 (6) SA 158 (SCA).

Breweries Ltd,[3] and assesses 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 (TFEU). Part 2 builds on Part 1 by reviewing and assessing key facets of characterisation that have further emerged from notable cases such as *Aranda Textile Mills (Pty) Ltd v The Competition Commission of South Africa* (*Aranda v CC*),[4] *Tourvest Holdings (Pty) Ltd v Competition Commission (Tourvest v CC)*,[5] *Competition Commission of South Africa v Irwin & Johnson* (*CC v I&J*),[6] and *Competition Commission v Waco Africa (Pty) Ltd* (*CC v Waco*).[7] Part 3 reviews and assesses the characterisation of ancillary restraints of trade in the context of broader agreements, such as joint ventures, as developed in *Dawn*. 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 light hereof, this article also considers the approaches in the United Kingdom (UK), the European Union (EU) and the United States (US).

Under section 2, this article discusses why restraints of trade that are included in, and ancillary to, a broader cooperation or joint venture agreement can be commercially reasonable and legitimate. Section 3 then briefly discusses the main restrictive horizontal concerns that may arise from non-ancillary restraints of trade. Section 4 sets out the relevant test as provided by the CAC in *Dawn*. Section 5 provides a conclusion.

2 COMMERCIALLY REASONABLE RESTRAINTS

The literature, EU and UK competition guidance and case law recognise that restraints of trade in the context of joint ventures or cooperation agreements can serve a legitimate commercial purpose that is unrelated to collusion.

2 1 Literature and competition guidance

The foundations for the approach that restraints can serve a legitimate purpose rest on the recognition that joint ventures, even between potential competitors, often have substantial economic benefits, including cheaper or better products through economies of scale, lower transaction costs, or the combining of different capabilities.[8] Restraints of trade may be required to realise these benefits, or indeed to form the joint venture in the first place.

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3 [2015] ZACAC 1.
4 [2021] ZACAC 1.
5 [2022] ZACAC 5.
6 [2022] ZACAC 8.
7 [2024] ZACAC 3.
8 Hovenkamp *Federal Antitrust Policy: The Law of Competition and Its Practice* 3ed (2005) (Hovenkamp) 201–203.

Areeda[9] and Hovenkamp[10] identify two types of restraints that are found in joint ventures, which the authors refer to as "production exclusivity" and "member exclusivity".[11] First, joint ventures "may limit the joint venture's membership, thus excluding others who might wish to join".[12] Secondly, joint ventures "might limit the right of existing members to engage in certain non-venture business, particularly if that business competes with the venture".[13]

A key justification for such restraints is to help the joint venture avoid free-rider concerns.[14] Free riding occurs when a party to a joint venture misappropriates investments made by others without compensation, thereby making those investments less valuable to their makers and, in turn, reducing the incentive to make them in the first place.[15] Similarly, the joint venture must also have some way of protecting the intellectual property, trade secrets and other learnings of the joint venture from being used in competition with the joint venture itself.[16] If such protection is inadequate, it may discourage the joint venture from being established at all.[17]

Related to and sometimes indistinguishable from the free-rider concern is the problem that a joint venture party engaging in a competing business outside of the joint venture may have incentives to invest its best resources in the outside business rather than the business of the joint venture.[18] In addition, an individual joint venture party's participation in a competing business outside of the joint venture may raise the significant prospect of a conflict of interest.[19]

Last, sometimes joint ventures may place limits on business outside the joint venture to ensure that participants make adequate commitments to the joint venture itself.[20]

Hovenkamp also notes that there may be legitimate reasons for such restraints:

> "The two types of exclusion noted above [that is, production and member exclusivity] may both be necessary to help the venture avoid free-rider problems, which make it impossible for the venture to capitalize on its own investment and risk-taking".[21]

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9 Areeda and Hovenkamp *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2024) Supplement 9/2024 (Areeda and Hovenkamp) par 2104a.

10 Hovenkamp 203–204.

11 Areeda and Hovenkamp par 2104a.

12 Hovenkamp 203. According to Areeda and Hovenkamp par 2104a, member exclusivity refers to a "venture's refusal to permit other firms, whether actual or potential competitors, from participating in the venture".

13 Hovenkamp 203. According to Areeda and Hovenkamp par 2104a, production exclusivity refers to "a venture's insistence that the members of a joint venture not make non joint venture sales".

14 Hovenkamp 203.

15 Areeda and Hovenkamp par 2223b.

16 Areeda and Hovenkamp par 2213c2.

17 *Ibid*.

18 Areeda and Hovenkamp par 2213c3.

19 *Ibid*.

20 Areeda and Hovenkamp par 2213c4.

21 Hovenkamp 203–204.

Guidance from the Competition and Markets Authority (CMA) and the European Commission (EC) is aligned with this logic.[22] Both competition authorities state that a non-compete obligation between the parent companies and a joint venture may be considered directly related and necessary to the implementation of the joint venture, where such obligations correspond to the products, services and territories covered by the joint venture agreement. The competition authorities state:

> "Such non-competition clauses reflect, *inter alia*, the need to ensure good faith during negotiations; they may also reflect the need to fully utilise the joint venture's assets or to enable the joint venture to assimilate know-how and goodwill provided by its parents; or the need to protect the parents' interests in the joint venture against competitive acts facilitated, *inter alia*, by the parents' privileged access to the know-how and goodwill transferred to or developed by the joint venture."[23]

Whish and Bailey and the EC and CMA guidance further note that such non-compete obligations can be regarded as directly related and necessary to the implementation of the joint venture for the lifetime of the joint venture:

> "obligations of this kind can be regarded as ancillary for the entire lifetime of the joint venture, not just for the period of two or three years envisaged in the case of the acquisition of a business from another undertaking".[24]

According to Whish and Bailey, and Bellamy and Child, non-compete obligations that last for the lifetime of the joint venture are often required where parties contribute different skills, knowledge and resources to create products and services that none of the parties would be able to do on their own.[25] Indeed, Bellamy and Child state that such restrictions reflect the reality of the parent companies' lasting withdrawal from the market assigned to the joint venture and are therefore recognised as an integral part of the joint venture.[26]

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[22] The ancillary restrictions concept is also used in the assessment of concentrations and mergers under the EU's and UK's respective merger regulations. Merger decisions and the guidance issued by the EC and CMA therefore provide helpful guidance on this point for joint ventures and cooperation agreements assessed under section 4 of the Competition Act. It is noted that, in the case of the EC's guidance, in particular, its practice has evolved over time so that earlier merger decisions arrive at results that may differ from the EC's more recent approach or that adopted in its ancillary restraints notice.

[23] European Commission *Notice on Restrictions Directly Related and Necessary to Concentrations* (2005) *OJ C* 56/24 par 36; Competition and Markets Authority Mergers: Guidance on the CMA's jurisdiction and procedure (2024) *CMA2* Appendix C par 29.

[24] Whish and Bailey *Competition Law* 8ed (2012) 930; European Commission *Notice on Restrictions Directly Related and Necessary to Concentrations* par 36; Competition and Markets Authority Mergers: Guidance on the CMA's Jurisdiction and Procedure (2024) *CMA2* Appendix C par 29.

[25] Whish and Bailey *Competition Law* 930; Bellamy and Child *European Union Law of Competition* 8ed (2018) 756.

[26] Bellamy and Child *European Union Law of Competition* 756.

2 2 Case law

2 2 1 International case examples

Several cases in the US have recognised that joint venture parties may have legitimate concerns that justify the inclusion of a restraint, particularly where free riding is a risk.

In *United States Trotting Association v Chicago Downs Association*,[27] the United States Trotting Association (USTA) implemented a rule prohibiting members from racing at horse-racing tracks which were not USTA members. This was mainly done in an effort to prevent the Chicago Downs Association (Chicago Downs) and Fox Valley Trotting Club (Fox Valley) from holding races with USTA-registered horses and using the information contained on USTA registration and eligibility certificates, despite not having joined USTA as a regular member or contracting to purchase USTA's services.

The court characterised Chicago Downs and Fox Valley as "enjoy[ing] a paradigmatic 'free ride,' receiving all the benefits of USTA affiliation with none of the attendant costs."[28] The court found that there was concerted activity only in the sense that USTA is a membership organisation enforcing its by-law rules and that there was no showing of a purpose to exclude competitors since Fox Valley and USTA were not competitors.[29] The court held in particular that there was a strong showing that USTA was organised to ensure honest harness racing rather than to impose a "naked restraint of trade with no purpose except stifling of competition".[30] As such, since "(p)er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive", the court held that USTA was entitled to have the effects of the application of its rules evaluated under the rule of reason.[31]

In holding that USTA's conduct should be evaluated under the rule of reason, the court indicated that it did not have sufficient experience with firms such as USTA to justify the extension of the *per se* rule to the present case.[32] The court indicated that one manifestation of the disparity between the limits of their understanding and the rigidity of the *per se* rule is its failure to adequately address the issue of free riding faced by the USTA.[33] By classifying USTA's efforts to counteract this outcome as *per se* violations of the Sherman Antitrust Act of 1890 (Sherman Act), the court effectively precludes the firm from presenting any legitimate justifications for its conduct, potentially without yielding any pro-competitive outcomes.[34]

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27 (7th Cir 1981) 665 F 2d 781 788–789.

28 *United States Trotting Association v Chicago Downs Association* (7th Cir 1981) 665 F 2d 781 784.

29 *USTA v Chicago Downs supra* 788–789.

30 *Ibid*.

31 *Ibid*.

32 *USTA v Chicago Downs supra* 789.

33 *Ibid*.

34 *Ibid*.

In *Independent Entertainment Group Inc v NBA* (*Independent Entertainment Group v NBA*),[35] the plaintiff wanted to stage an annual one-on-one, pay-per-view basketball entertainment event. This event was to be played after the conclusion of the National Basketball Association (NBA) season by prominent and highly skilled NBA basketball players under contract with NBA teams. The NBA refused to approve the participation of two notable players, or any other NBA player, in the event "pursuant to agreements among the defendants and the National Basketball Players Association".[36] The plaintiffs alleged that the NBA's refusal to allow NBA players to participate in the event infringed sections 1 and 2 of the Sherman Act. The court applied the rule of reason and approved the NBA rule forbidding players from playing for teams outside the NBA league during the contract period. The court noted that this case, at bottom, is about the "plaintiffs' attempt to free-ride on the NBA's investment in its star players and in rebuilding the League during the 1980's" and that the agreements in question "lawfully prevent such free-riding as a matter of law".[37]

In *Stop & Shop Supermarket Co v Blue Cross & Blue Shield of R.I.*,[38] two health insurers concluded an agreement to share one another's closed networks of pharmacies, while excluding other pharmacies. The court held that this was an ancillary restraint because it tended to give the pharmacies higher volume and thus lower costs. On this basis, the court held that the closed network in issue is not a *per se* contravention of the Sherman Act.[39]

In the UK, two cases have found that on the basis of an agreement's factual or legal context, if the object of an agreement is to promote competition by, for example, strengthening competition on a market, opening up a market or allowing a new competitor entry to a market, a necessary restriction on the commercial independence of a party can, when an arrangement is viewed as a whole, give way to the aim of promoting competition.[40]

In *Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd*,[41] the Court of Appeal considered an agreement to promote a new entrant into a market previously occupied by only one other firm. In short, the interests aligned with the defendant racecourses (AMRAC) had

35 (C D Cal 1994) 853 F Supp 333.

36 *Independent Entertainment Group Inc v NBA* (C D Cal 1994) 853 F Supp 333 335.

37 *Independent Entertainment Group v NBA supra* 338–340.

38 (1st Cir 2004) 373 F 3d 57.

39 See also *Inter-County Title Co v Data Trace Info Servs, LLC* (9th Cir 2004) WL 1238266 (unpublished) 105 Fed Appx 136 137–138, where multiple title insurers who owned a database of real property records were held not to contravene section 1 of the Sherman Act by refusing to share it with the plaintiff. The record indicated that the plaintiff was merely complaining about the price. However, the evidence showed that the price was not significantly above its reproduction costs. Accordingly, the court held that the plaintiff had "failed to demonstrate anticompetitive effects" and that "undisputed evidence provide[d] a legitimate justification" for the activity. See also Areeda and Hovenkamp par 2213c.

40 See the Opinion of Advocate-General Trstenjak in C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* ECLI:EU:C:2008:467 par 53.

41 [2009] EWCA Civ 750.

set up "Turf TV" to rival a broadcast service provided by interests aligned with the claimant bookmakers (BAGS/SIS). In finding that the objective aim of the cooperation[42] was to sponsor the entry of AMRAC into the market, the court stated:

> "85. It seems to me that […] the object of the arrangements […] was to establish a second broadcaster [i.e., AMRAC] which would be able to act as a rival to BAGS/SIS both in the upstream and in the downstream markets. To achieve that, it is agreed, the broadcaster would have to acquire LBO [i.e. licensed betting office] media rights for a minimum number of racecourses on an exclusive basis. It is not something that any racecourse could have achieved by itself. Given that the incumbent operator was dominated by the interests of the purchasers in the downstream market, given the high cost of entry, and given the very long period in which no other operator had shown any interest in entry to these markets, it seems to me that it was obviously necessary that the new entrant would have to be promoted by or in association with a number of racecourses, and that it would need to be protected, at the stage of its establishment, from competition from the incumbent, since otherwise it would never get off the ground.
>
> 86. The proposition that the arrangements were designed to improve the profitability of the racecourses is correct, but I cannot agree with the submission that this was to be done by restricting competition. On the contrary, it was to be done by introducing competition into the previously monopsonistic upstream market. Nor is increasing profitability objectionable in itself. It is, after all, the motive of most commercial activity".[43]

In *Agents' Mutual v Gascoigne Halman*,[44] the Competition Appeal Tribunal (CAT) considered an agreement to create a new online property portal which restricted members' use of other similar portals. The CAT held that restricting the members' use of other portals did not restrict competition by object (or effect) in circumstances where it would not have been possible to enter the market without such provisions. The CAT observed that the barriers to entry for a new portal are formidable, given the two-sided nature of the market and the strong network effects on the property portals market. Indeed, the CAT considered that the entry of a new property portal is, in principle, likely to have been pro- rather than anti-competitive, in two respects:

> "[…] First, in terms of providing an additional digital platform to benefit both the estate agents and the property-buying public by increasing choice in the portal market.
>
> […] Secondly, in terms of providing a lower-cost resource to participating estate agents and thus providing the potential to benefit consumers in the estate agency market".[45]

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[42] That is, the racecourse owners' collective selling of media rights to horse racing events in support of that purpose. See also *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd supra* par 111–123.

[43] *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd supra* par 85 and 86.

[44] [2017] CAT 15. Upheld on appeal in *Gascoigne Halman Ltd v Agents' Mutual Ltd* [2019] EWCA Civ 24.

[45] *Agents' Mutual v Gascoigne Halman supra* par 166.

Mention may also be made of the EC's approach (discussed further under section 4) in *Areva SA and Siemens AG*,[46] recognising that a restraint may be necessary – for the duration of a joint venture – to protect the individual joint venture parties' investments and ensure that the joint venture parties do not undermine the joint venture by competing with it. With reference to the ancillary nature of the non-compete clause, the EC stated the following regarding the clause's operation during the lifetime of the joint venture:

> "Non-compete obligations applicable during the lifetime of the joint venture aim at protecting the individual parent companies' investments, which are 'locked in' the joint venture during its lifetime. If the parent companies started to compete against their own joint venture, this could effectively eliminate the existence of the joint venture as such. Only one parent company starting to compete against the own joint venture would increase that parent company's share of profits to the detriment of the other joint venture partner".[47]

2 2 2 Local case law

South African case law likewise recognises that restraints of trade in the context of a broader agreement can serve a legitimate commercial purpose.

In *Compagnie Gervais Danone Clover Beverages/Clover SA (Pty) Ltd, Danone-Clover (Pty) Ltd*,[48] the Competition Tribunal found that the impugned restraint of trade was permissible for purposes of protecting the investments made within the joint venture, and that this would be the case for the duration of the joint venture (including five years thereafter):

> "The Commission highlighted the existence of the non-compete clause in the Shareholders' Agreement between Danone, Clover and Clover Beverages. In terms of this provision, Danone and Clover will not compete with Clover Beverages in the manufacture and marketing of their products while they are shareholders in Clover Beverages and for a period of 5 years after. Similarly, Danone and Clover will not compete with Danone Clover in respect of the marketing and distribution of its product range. We accept the parties' contentions that such a restraint is commercially reasonable for parties entering into a joint venture in order to protect their investment."[49] (own emphasis added)

In *Heinz Foods South Africa and Today Frozen Foods*,[50] the Competition Commission highlighted the restraint-of-trade clause contained in the joint venture agreement, as well as the long-term supply agreement between Pioneer Foods and Today Frozen Foods. The Competition Tribunal similarly found that:

> "In terms of the restraint, the parties essentially undertake not to compete, directly or indirectly with the joint venture in the manufacture, distribution, sale or promotion of any of the products that fall within any of the product categories in which the joint venture trades. The restraint is applicable only for

46 Case COMP /39736 (18 June 2012).

47 Case COMP/39736 (18 June 2012), European Commission, *Siemens/Areva* par 45.

48 04/LM/Jan03.

49 *Compagnie Gervais Danone Clover Beverages and Clover SA (Pty) Ltd Danone-Clover (Pty) Ltd supra* par 8.

50 42/LM/Aug03.

> the duration of the partnership and terminates as soon as one of the parties is no longer a shareholder in Heinz Foods.
>
> The parties submit that these restraints have no impact on competition and are commercially justifiable as intended to protect their investments and the motivations of the parent companies. We accept, as we have elsewhere, that such a restraint is commercially reasonable for parties entering into a joint venture."[51] (own emphasis added)

The CAC in *Dawn* (discussed under section 4) found that a restraint of trade against a potential competitor in the production of high-density polyethylene (HDPE) that had entered into a joint venture with an existing producer of HDPE piping was legitimate. The CAC recognised that a restraint of trade may be necessary to protect a joint venture partner from being undermined by the other partner to whom it had "opened up its business" and who had access to its know-how and confidential information:

> "The more sensible approach, however, is to acknowledge that, although Dawn was unlikely to enter the HDPE pipe manufacturing market for as long as it remained a shareholder of Sangio, WST and Warren could not reasonably have been expected to place their trust solely in the good faith of their partner. They were opening up their business to a well resourced minority shareholder which could notionally go into competition with them. Although the circumstances prevailing at the time the shareholders agreement was concluded may not have made this at all likely, those circumstances might have changed with the passing years."[52] (own emphasis added)

The CAC in *CC v I&J*[53] held that, properly construed, the manufacturing agreement in question enabled Karan Beef to manufacture, and Irvin & Johnson to market and sell, the relevant processed meat products by making use of their respective capabilities and including only "permissible commercial restraints".

> "On a proper analysis of the evidence and the law, Karan was only precluded from supplying I&J and Karan branded burgers. Karan continued to sell house branded products to the retail trade and no-name burger patties to the food services sector. The Manufacturing Agreement is, therefore, not the type of limitation that is envisaged as a per se contravention. These are perfectly permissible commercial restraints as described in SAB. This restraint does not reach the threshold of a cartel agreement in contravention of s 4(1)(b)(ii)."[54] (own emphasis added)

In addition, the CAC in *Dawn* also recognised that non-compete obligations are often imposed after the termination of joint ventures, particularly when one party buys out the other, in a bid to protect their investment and secure the viability of the joint venture.[55]

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[51] *Heinz Foods South Africa (Pty) Ltd and Today Frozen Foods (a business unit of Pioneer Foods (Pty) Ltd) / John West (a division of Heinz SA (Pty) Ltd) / Heinz Wellington (Pty) Ltd supra* par 14–15.

[52] *Dawn supra* par 37.

[53] *Supra*.

[54] *CC v I&J supra* par 123.

[55] *Dawn supra* par 39 and 40.

3 RESTRAINTS OF TRADE CAN RAISE RESTRICTIVE HORIZONTAL CONCERNS

Naked restraints are serious restrictions of competition that will, in general, cause harm to the market and consumers and are not indispensable to the attainment of pro-competitive or efficiency-enhancing effects. A naked restriction in this context refers to a restraint on competition that is unequivocally and inherently harmful to competition and has no pro-competitive justification or purpose. Such restrictions do not have ambivalent effects on competition. These restrictions are generally grouped into the following categories:

a) the fixing of prices;
b) the limitation of output or sales;
c) the allocation of markets or customers; and
d) bid rigging.

These types of restrictions are typically not part of a broader, legitimate collaboration between firms and are assessed as *per se* restrictions under section 4(1)(*b*). In each of these categories, the harm to competition that results from the agreement itself, and the lack of any legitimate purpose or redeeming virtue behind it, is likely to make it a naked restriction under section 4(1)(*b*). This means that it is considered anti-competitive by its very nature, regardless of its potential effects on competition.

Areeda and Hovenkamp define a particular restraint of trade as "naked" if "it is formed with the objectively intended purpose or likely effect of increasing price or decreasing market wide output in the short run, with output measured by quantity or quality".[56] These restraints threaten to reduce market output or increase price, particularly where a horizontal arrangement does not truly integrate some legitimate activity of the participants, such that it can be said to be efficient.[57] By contrast, a restraint is ancillary "if its objectively intended purpose or likely effect is lower prices or increased output as measured by quantity or quality".[58]

Restraints can limit competition on the relevant market in several ways, including, for example, by leading to collusion between the parties or to anti-competitive foreclosure. For instance, such agreements may:

- decrease or limit the parties' decision-making independence and, as a result, increase the likelihood that they will coordinate their behaviour in order to reach a collusive outcome;[59]
- make harmful coordination easier, more stable, or more effective for parties that were already coordinating before entering into the joint venture;[60]

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56 Areeda and Hovenkamp par 1906a.
57 Areeda and Hovenkamp par 2130.
58 Areeda and Hovenkamp par 1906a.
59 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 21.

- afford the parties mechanisms and opportunities for communication, which may, for instance, lead to the disclosure of competitively sensitive information or result in greater symmetries and commonalities in cost structure, allowing them to coordinate market prices and output more easily; [61]
- prevent or restrict the parties' competitors from competing effectively, for example, by denying them access to an important input or by blocking an important route to the market;[62] or
- place competitors that are not party to the agreement at a significant competitive disadvantage as compared to the firms that are through the exchange of competitively sensitive information.[63]

4 THE RELEVANT TEST AS SET OUT IN *DAWN*

4 1 Key background context

The CAC in *Dawn* considered whether a non-compete clause in a shareholder's agreement between Dawn Consolidated Holdings (Pty) Ltd (DCH) and Warplas Share Trust in respect of Sangio Pipe (Pty) Ltd (Sangio), a company in which DCH held 49 per cent, infringed section 4(1)(*b*)(ii) of the Competition Act by restricting competition in the market for HDPE piping. The clause in question restrained DCH and its subsidiaries from manufacturing HDPE piping in South Africa and applied for as long as DCH or its associates held shares in Sangio.

The Competition Commission initially approved a merger where DCH would become the sole shareholder of Sangio, but later raised concerns about the non-compete clause in the shareholders' agreement. As a result, the Competition Commission initiated a complaint and referred the matter to the Competition Tribunal. The Competition Tribunal found that the non-compete clause contravened section 4(1)(*b*)(ii) because it was a restrictive horizontal practice by which markets were divided.

4 2 The relevant test

The CAC in *Dawn* was asked to determine the correctness of the Competition Tribunal's decision. The key question was whether the non-compete clause was a reasonably permissible restraint of trade or an anti-competitive practice. Based on the principle of characterisation, the CAC similarly recognised that commercially reasonable ancillary restraints, even when concluded between competitors, ought not to be treated as automatically prohibited *per se* without further enquiry.

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60 EC Guidelines par 21; Competition and Markets Authority Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements (2023) *CMA184* (CMA Guidelines) par 3.31.

61 EC Guidelines par 21; CMA Guidelines par 3.31.

62 EC Guidelines par 21; CMA Guidelines par 3.32.

63 *Ibid*.

To test whether a restraint could be characterised as falling outside of the scope of section 4(1)(*b*), the CAC considered the approach in the EU,[64] and then set out the following approach to determine whether a restraint contravenes section 4(1)(*b*):

> "(a) Is the main agreement (ie disregarding the impugned restraint) unobjectionable from a competition law perspective?
> (b) If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement?
> (c) If so, is the particular restraint reasonably proportionate to the requirement served?"[65]

The CAC stated that the character of the restraint must not be assessed as if it stood on its own.[66] It must be viewed in the context of the transaction as a whole and the parties' circumstances at the time they concluded the agreement.[67] The CAC also stated that the EU requirement that the restraint should be objectively "necessary" is too strict and indicated that the appropriate test is rather one that requires the restraint to be "reasonably required" and "reasonably proportionate".[68] The first question thus seeks to characterise the main agreement in question, whereas the second and third questions seek to characterise the restraint.

The CAC confirmed that the test is an objective one, and since the burden of proof in a section 4(1)(*b*) case rests on the referring party, it is for the Competition Commission or private complainant to prove that these requirements are not met.[69] Put differently, where the characterisation of an agreement is in issue, the onus rests on the Competition Commission or complainant to establish that the agreement, properly characterised, falls within the prohibition.[70]

4 2 1 Is the main agreement unobjectionable from a competition law perspective

This question seeks to characterise the main agreement in question. For an agreement to be held to restrict competition *per se,* it must, by its very nature, reveal a sufficient degree of harm to competition without any redeeming virtues, having regard to its specific legal and economic context.

In determining whether an agreement reveals a sufficient degree of harm, factors such as the content of its provisions, its objectives, the rationale of

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64 The test set out by the CAC in *Dawn* is based on the European Commission's guidelines on the application of article 101(3), which sets out the approach in the EU. See European Commission Guidelines on the Application of article 81(3) of the Treaty (2004) OJ C 101/97 section 2.2.3. This approach, as well as the approach set out in *Dawn*, is also echoed in the EU's recent EC Guidelines. See EC Guidelines par 34.

65 *Dawn supra* par 32.

66 *Ibid*.

67 *Ibid*.

68 *Ibid.*

69 *Dawn supra* par 33.

70 *Ibid*.

the parties and its economic and legal context may be relevant. In determining that context, the nature of the products that are the subject of the agreement and the structure and functioning of the market or markets in question must be considered.

4 2 2 Is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement

This is a factual enquiry that questions whether the agreement itself would be difficult to implement or sustain in the absence of the restraint in question. Where it is not possible to separate a restraint of the commercial autonomy of one or more of the parties from the main agreement without jeopardising its existence and aims, the restraint will not contravene section 4(1)(*b*) if the main agreement does not infringe the provision, notwithstanding that such a restraint may appear on the face of it to be restrictive.[71] In this regard, it is necessary to examine whether the main agreement would be difficult to carry out or sustain in the absence of the restraint in question.

The CAC in Dawn found that the restraint in question was reasonably required because it protected against the misuse of proprietary information by one of the joint venture partners that might have, via its competition with the joint venture, undermined the investments made in the joint venture:

> "I am satisfied, in the present case, that a non-compete clause was reasonably required for the conclusion and implementation of the shareholders agreement. Dawn, through its nominees to Sangio's board, would have access to Sangio's confidential information and know-how. Dawn could thereby acquire knowledge and insight into the successful conduct of the business of manufacturing HDPE piping, a business in which it had no experience and expertise at the time the transaction was concluded. The uncontested evidence is that Warren insisted on such a clause, and his conduct in so doing was reasonable, given his legitimate concerns about the potential abuse of Sangio's confidential information and know-how."[72] (own emphasis added)

4 2 3 Is the particular restraint reasonably proportionate to the requirement served

In addition, the restraint in question must be proportionate to the achievement of the main operation or activity, that is to say, the product, geographical and temporal scope of the restraint must be evaluated.[73] A restraint is likely to be considered as satisfying the principle of proportionality if it is duly limited in time, space and subject matter.

Indeed, the CAC in *Dawn* found that:

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71 Case C-382/12 P, *MasterCard v Commission* [2014] ECLI:EU:C:2014:2201 par 89.

72 *Dawn supra* par 42.

73 See COMP/39736 *Siemens/Areva*, commitment decision of 18 June 2012 par 63–76 on proportionality; Bellamy and Child *European Union Law of Competition* 408.

> As to whether the restraint was proportionate to the legitimate interests served thereby, the restraint was only to operate for as long as Dawn was a shareholder in Sangio. There can be no legitimate objection to the restraint in regard to its duration. Indeed, a restraint of limited duration after Dawn ceased to be a shareholder might also have been acceptable. As to geographic extent, Sangio supplied customers throughout South Africa, although its focus was KwaZulu-Natal and Gauteng. A countrywide restraint was not unreasonable. WST and Warren themselves accepted a countrywide restraint in the circumstances contemplated in clause 19."[74] (own emphasis added)

5 CONCLUSION

The reason for distinguishing between "ancillary" and "naked" restraints is to determine whether the agreement is part of a (broader) cooperation agreement with prospects for pro-competitive or other efficiency-enhancing effects. If the agreement is part of such a broader arrangement, it should not be condemned *per se*. Rather, a rule-of-reason assessment of the arrangement is then required. If it is not, it serves no useful purpose and can readily be condemned under section 4(1)(*b*) without a rule-of-reason assessment and without fear of efficiency losses. Commercially reasonable restraints that are ancillary to a broader agreement should not be treated as automatically infringing section 4(1)(*b*) without further enquiry. Indeed, several concerns may justify such limitations, including free riding, the threat of dilution of the parties' efforts, ensuring that the joint venture or agreement attains an efficient scale, or facilitating entry in the first place.

The CAC in *Dawn* has developed a well-refined test to assess whether a restraint of trade in the context of a broader agreement contravenes the Competition Act. This test is consistent with the relevant principles that set out when and why such restraints of trade may be legitimate. It is apparent from the CAC's decision that if a main agreement does not fall under the prohibition provided in section 4(1)(*b*) due to its neutrality or positive effect in terms of competition, then a restraint on the commercial independence of one or more parties involved in that agreement is also not subject to this prohibition, provided that the restraint is (a) reasonably required for the conclusion and implementation of the agreement and (b) reasonably proportionate to the objectives of the main agreement. In this context, an ancillary restraint is any alleged restriction of competition which is reasonably required for the conclusion and implementation of a main non-restrictive agreement and reasonably proportionate to it. This does not necessarily mean that an ancillary restriction is always lawful, but rather that *per se* condemnation is not automatically appropriate in such cases and should rather be evaluated under the rule of reason.

On this basis, the key facets of the characterisation of ancillary restraints of trade can be considered in the following stages.

- First, there must be a given main agreement (involving an operation or activity) that is not caught by section 4(1)(*b*) because it is not objectionable from a competition law perspective due to its neutrality or positive effect in terms of competition.

[74] *Dawn supra* par 43.

- Secondly, there must be inherent to this main agreement, but ancillary to it, a restraint of commercial activity that would, but for its relation to that main agreement, be caught by the section 4(1)(*b*) prohibition.
- Thirdly, the relationship between the main agreement that is not prohibited and the restraint that would otherwise be prohibited must be such that, without the restraint, the primary operation or activity covered by the main agreement could not be carried out. In a sense, this requirement is captured by the terms “inherent” and “ancillary” in the previous paragraph, but the test is less stringent when compared to the EU. As the CAC in *Dawn* pointed out, it is necessary to inquire whether the restraint of the kind in question is reasonably required for the conclusion and implementation of the main agreement. In the EU, the mere fact that the removal of the restraint would render the primary operation or activity less profitable or more difficult, or would have adverse consequences for its functioning, is not enough. It is necessary to inquire whether that operation would be impossible to carry out in the absence of the restriction in question.
- Fourthly, the restraint must not only be reasonably required for the implementation of the main agreement, but it must also be reasonably proportionate to the underlying objectives of the main agreement in terms of its duration, geographic scope and subject matter.
- Lastly, if it is found that the restraint does not fall under section 4(1)(*b*), then the restraint is not necessarily immune to scrutiny and falls to be assessed under the rule of reason in terms of section 4(1)(*a*).