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ADMINISTRATIVE PENALTIES IN SOUTH AFRICAN COMPETITION LAW

by

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Table of Contents

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Summary

Competition law has been defined as the rules or provisions which aim to ensure and sustain a market where vigorous, but fair competition will result in the most efficient allocation of economic resources and production of goods and services at the lowest price. The goal, which competition law wishes to attain, is to level the playing field where both small and large firms can compete with one another, fairly and competitively, which in turn leads to a greater benefit for the consumer.

South African competition authorities consider cartels as the most egregious of all competition law contraventions because of their harmful impact upon consumers, economic development and the market. Cartel activities are formed in secret and this renders these activities more dangerous, because it is difficult for competition authorities to detect and prosecute them. In South Africa, cartels are regulated in terms of section 4(1)(b) of the Competition Act 89 of 1998, which practices are *per se* prohibited. Section 4(1)(b) specifically lists the following activities as cartel practices: price fixing, bid rigging and market allocation.

Administrative penalties are a common retributive and preventative tool in numerous jurisdictions, including South Africa, which are imposed on firms which participate in cartel activities. Section 59 of the Competition Act postulates that an administrative penalty may be imposed by the Tribunal on a contravening firm, should it be found that such firm has engaged in such prohibited practices.

The penalty may be determined and enforced in one of two ways, either unilaterally by the Competition Tribunal in terms of section 59 of the Competition Act, or in terms of a consent agreement concluded between the contravening firms and the Competition Commission, which agreement needs to be approved and enforced by the Tribunal in terms of Section 58 of the Competition Act.

The primary objective of the imposition of administrative penalties on cartelists is to both prevent and deter cartel behaviour. It is not a perfect system and has faced its challenges over time. The issues which the competition authorities have had with the imposition of administrative penalties relates to, *inter alia*, the quantification thereof, the enforcement thereof and the economic and social impact that such penalties have on the contravening firms, its employees and the consumers in general.

This dissertation will interrogate the manner in which the competition authorities have approached the imposition of administrative fines. The focus will be on fines imposed for cartel conduct as set out in section 4(1)(b) of the Competition Act. The objective is to determine whether South Africa's approach to the imposition of administrative fines is in need of reform, and if so, to make suitable recommendations.

CHAPTER ONE: INTRODUCTION TO COMPETITION LAW IN SOUTH AFRICA

1.1 Introduction

Neuhoff *et al* defines competition law as a body of rules and regulations which set out to safeguard and maintain a market where robust, but fair competition will lead to the efficient allocation of economic resources and production of goods and services at the lowest price.[1] The goal, which competition law wishes to attain, is to level the playing field where both small and large firms can compete with one another, fairly and competitively, which in turn leads to a greater benefit for the consumer.[2]

1.2 Competition Law in South Africa

Competition law commenced with the enactment of the United States of America's Sherman Antitrust Act in 1890 (hereinafter "the Sherman Act").[3] The Sherman Act set out to target the abuses of power by large corporations and in turn attain markets which were competitive.[4] South Africa, in unison with many other countries around the world, have adopted the fundamental principles of American competition law, namely to limit and prevent harmful and anti-competitive conduct.[5]

The Regulation of Monopolistic Conditions Act of 1955 (hereinafter "the RMC Act") [6] was South Africa's first endeavour at comprehensively regulating competition law. This legislation was criticised as being overly cautious and permissive.[7] Over the 20 years in which the RMC Act was in operation, only 18 investigations were conducted into alleged

[1] Neuhoff *et al A Practical Guide to the South African Competition Act* (2017) 7.
[2] Neuhoff *et al* 7.
[3] Sherman Antitrust Act 1890 15 U.S.C. §§ 1-38.
[4] Sherman Antitrust Act s1 – 3.
[5] Neuhoff *et al* 7.
[6] Regulation of Monopolistic Conditions Act 24 of 1955.
[7] Prins and Koornhof "Assessing the Nature of Competition Law Enforcement in South Africa" 2014 *Law Democracy and Development* 138.

monopolies.[8] The overall view was that the enforcement of the RMC Act was, in large, ineffective.[9] In 1969, the practice of resale price maintenance was declared unlawful, which was the first anti-competitive practice which was criminalised in South Africa.[10] During the 1970's the Mouton Commission of Inquiry launched an investigation into the effectiveness of the RMC Act.[11] The Mouton Commission was, further mandated with drafting a report on prospective revised competition legislation.[12] The Mouton Commission found that the RMC Act had been unsuccessful in preventing a dramatic increase in oligopolies.[13]

The Mouton Commission Report[14] led to the transformation of South African competition law. The RMC Act was repealed and replaced by the Maintenance and Promotion of Competition Act of 1979 (hereinafter "the MPCA").[15] In terms of the MPCA, the Competition Board as appointed by the Minister of Trade and Industry, from time-to-time, had all the necessary powers to investigate all competition matters within the Republic.[16] This Act declared the restrictive practices of minimum resale price maintenance, horizontal collusion about price, terms or market share and bid rigging as *per se* unlawful.[17] The commission of these offences had to be proven beyond a reasonable doubt. The penalties which would be imposed for such convictions would be a fine, imprisonment or both. The competition law dispensation under the MPCA was, however, criticised for its inability to address all of the anti-competitive conduct, due to the high rate of more serious

[8] Competition Law and Policy in South Africa: An OECD Peer Review 2003 12.
[9] *Ibid.*
[10] GN R. 1038, published in GG 2442 of 25 June 1969.
[11] Prins and Koornhof 2014 *Law Democracy and Development* 139.
[12] *Ibid.*
[13] Competition Commission 1999 About Us http://www.compcom.co.za/about_us.htm (accessed 21-04-2020).
[14] Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act (1978).
[15] Maintenance and Promotion of Competition Act 96 of 1979.
[16] Neuhoff *et al* 7.
[17] GN 801, GG 10211 of 2 May 1986.

crimes dominating investigative resources.[18] The competition authorities, at the time, lacked the requisite expertise and resources in order to investigate and prosecute anti-competitive behaviour.[19]

The Department of Trade and Industry, in its Proposed Guidelines, stated that the Government intended remove competition law infringements from the criminal court's jurisdiction in order to avoid lengthy, complex and costly litigation.[20] It was due to the difficulties experienced under this Act that led Parliament to impose administrative penalties[21], as opposed to criminal sanctions[22], on infringing parties.

South Africa's competition law underwent a complete change subsequent to the country's transition to democracy in 1994, which saw the need to implement comprehensive rules intended at restricting business conduct which may prevent the efficient and competitive functioning of the South African markets.[23] The emergence of South Africa's new political dispensation post-1994, in conjunction with lengthy consultation processes with the relevant stakeholders, culminated in the current Competition Act 89 of 1998[24] (hereinafter "the Competition Act") being passed to regulate all competition matters.[25]

In terms of the Competition Act the Competition Commission,[26] which is an independent and impartial body,[27] is tasked with the duty to investigate and evaluate

[18] Department of Trade and Industry, Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development (27 November 1997) (hereinafter referred to as "the Proposed Guidelines") at 3.4.6.
[19] *Ibid.*
[20] Proposed Guidelines para 8.3.1.
[21] Competition Bill of 1998 s62 GG 18913 of 22 May 1998.
[22] Department of Trade and Industry, Explanatory Memorandum to Competition Bill, 1998, GG 18913 of 22 May 1998 at 63.
[23] Neuhoff *et al* 7.
[24] Competition Act 89 of 1998 (hereinafter "the Competition Act").
[25] Van Heerden & Botha "Challenges to the South African Corporate Leniency Policy and Cartel Enforcement" 2015 *TSAR* 308.
[26] Established in terms of s 19 of the Competition Act.
[27] The Competition Act s20(1).

the commission of antic-competitive practices[28] and to refer such matters to the Competition Tribunal for argument.[29] The Competition Tribunal is a tribunal of record and has jurisdiction throughout the Republic of South Africa.[30]

The Competition Act provides that the Competition Tribunal must conduct its hearings in public, as expeditiously as possible, and in accordance with the principles of natural justice.[31] These hearings are presided over either in an informal or an inquisitorial manner.[32] The Tribunal may, subject to the Rules of the Competition Tribunal[33], resolve any matter of procedure, with due regard to the circumstances of the case and the requirements set out in section 52(2) of the Competition Act.[34] The standard of proof that needs to be met under the Competition Act, save for the proceedings in terms of section 49C or criminal proceedings, is on a preponderance of probabilities,[35] and written reasons for its decisions must be publicly issued.[36] In order to ensure that matters heard in the Tribunal are procedurally fair, the Competition Act stipulates that decisions made by the Tribunal may be judicially reviewed by the Competition Appeal Court (hereinafter "the CAC").[37] The CAC has the power to review any decisions made by the Tribunal[38] or to consider an appeal launched by any party to a matter which was before the Competition Tribunal. Such appeals may relate to any of the Tribunal's final decisions other

[28] The Competition Act s21.
[29] Established in terms of s26 of the Competition Act.
[30] The Competition Act s26(a).
[31] The Competition Act s52(2)(a).
[32] The Competition Act s52(2)(b). In an inquisitorial process the judge is regarded as the only responsible person qualified to discover the truth. This judge-centred approach is premised on the idea that the judge will be involved in the following: the detection of offences, questioning in the pre-trial phase of the prosecution and the direction and conclusion of the trial all of which shall be guided by the independent research, instructions, supervision and authority of the investigating judge, who acts in the public interest as an agent of the state – Roodt "A Historical Perspective on the Accusatory and Inquisitorial Systems" 2004 *Fundamina: A Journal of Legal History* 139 – 140.
[33] Rules for the Conduct of Proceedings in the Competition Tribunal.
[34] The Competition Act s55(1).
[35] The Competition Act s68.
[36] The Competition Act ss 52(4) and (5).
[37] Established in terms of s36 of the Competition Act.
[38] The Competition Act s37(1)(a).

than a consent order made in terms of section 63[39] or any of its interim or interlocutory decisions.[40]

The stated purpose of the Competition Act is to stimulate and maintain competition in South Africa in order to, *inter alia*, promote the efficiency, adaptability and development of the economy[41] and to provide consumers with competitive prices and product choices.[42] The objectives of the Competition Act, as articulated in its preamble, are to, not only promote economic efficiency, but also to address the apartheid related economic disparities which have historically limited the full and free participation in the economy by all South Africans.[43]

The Competition Act, thus, not only aligns with the objectives set forth by our International Counterparts, whose competition laws the legislature considered when drafting the Competition Act[44], but also addresses the needs of a divided and young democratic society.

Notably the Competition Act also stipulates[45] that it should be interpreted in a manner that gives effect to the letter and spirt of the Constitution.[46] When interpreting the Competition Act under the auspices of an open and democratic society based on human dignity, freedom and equality,[47] it is clear that consumer welfare plays a large part when the competition authorities consider an appropriate sanction.[48]

Chapter 2 of the Competition Act deals with, *inter alia*, the following prohibited practices; restrictive horizontal practices,[49] restrictive vertical practices[50] and the

[39] The Competition Act s37(1)(b)(i).
[40] The Competition Act s37(1)(b)(ii).
[41] The Competition Act s2(a).
[42] The Competition Act s2(b).
[43] The Competition Act Preamble.
[44] Neuhoff *et al* 12.
[45] Section 1(2)(a) of the Competition Act states that: This Act must be interpreted in a manner that is consistent with the Constitution and gives effect to the purposes set out in s2.
[46] The Constitution of the Republic of South Africa, 1996.
[47] The Constitution s1(a).
[48] Brassey *et al Competition Law* 4 ed (2007) 20.
[49] The Competition Act s4.
[50] The Competition Act s5.

abuse of a dominant position.[51] Horizontal practices refer to practices between a firm and its competitors,[52] whereas vertical practices refer to practices between a firm and either its suppliers or its customers.[53]

1.3 Administrative Penalties

The imposition of administrative penalties on firms which contravene competition laws is a common retributive and preventative tool in several jurisdictions around the world, including South Africa. Section 59 of the Competition Act postulates that the Tribunal may impose an administrative penalty on a contravening firm, should it be found that such firm has engaged in prohibited practices set out in the Act.[54]

The Tribunal quantifies and enforces an administrative penalty in one of two ways. Either, unilaterally in terms of section 59 of the Competition Act or in terms of a consent agreement concluded between the contravening firm(s) and the Competition Commission, which agreement needs to be approved and enforced by the Competition Tribunal in terms of Section 58[55] of the Competition Act.

Prins and Koornhof remark that the imposition of administrative penalties in South African Competition Law affiliates with how more established jurisdictions, enforce their competitions laws.[56] For example, Australia makes provision for "pecuniary penalties,"[57] Canada refers to "administrative monetary penalties,"[58] the United Kingdom refers to "penalties"[59] and both the European Union[60] and the

[51] The Competition Act s8.
[52] Van Heerden-Neethling *Unlawful competition* 2 ed (2008) 29.
[53] *Ibidd* 31.
[54] The Competition Act s59.
[55] The Competition Act s58.
[56] Prins and Koornhof 2014 *Law Democracy and Development* 141.
[57] Section 76, Part IV, Competition and Consumer Act 2010.
[58] Ss 74.1 and 79 of the Competition Act, RSC, 1985, C-34.
[59] Section 36 of the UK Competition Act 1998.
[60] Article 103 of the Treaty on the Functioning of the European Union (hereinafter "the TFEU").

United States[61] use the term "fines". In addition to imposing administrative penalties on the contravening firm, the Competition Tribunal may also utilise alternative remedies, where such firm has engaged in prohibited practices[62], namely prohibitory and mandatory interdicts[63] and compulsory divestiture[64].

Section 59(2) of the Competition Act stipulates that an administrative penalty imposed in terms of subsection (1) may not exceed 10 per cent of the firm's concerned annual turn-over in the Republic and its exports from the Republic during the firm's preceding financial year.[65] Section 59(2A), as recently amended by the Competition Amendment Act 18 of 2018, then goes on further to state that where the conduct of the firm is a "substantial repeat" of their previous prohibited practice then the administrative penalty may not exceed 25 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.[66]

The number of administrative penalties which have been imposed on contravening firms has escalated substantially since the inception of the Competition Act.[67] Minister Patel, who was the Minister of Economic Development in 2011, alluded that the success of competition authorities is directly linked to the total annual monetary value of the penalties imposed.[68] This success is, however not unconditional. Where a fine has been imposed it is evident that there has been anti-competitive behaviour which has been to the detriment of the South African economy and the consumer. It is, however, imperative that the aim of the Competition Act be at the core of what the

[61] The Sherman Act, 15 USC ss 1 and 2.
[62] Prohibited practice is defined in section 1(j) of the Competition Act as: "a practice prohibited in terms of Chapter 2".
[63] The Competition Act ss58(1)(a)(i), (ii) and (v).
[64] The Competition Act s60.
[65] The Competition Act s59(2).
[66] The Competition Act s59(2A) inserted by s33(c) of the Competition Amendment Act 18 of 2018.
[67] Van Jaarsveld "Administrative Penalties as they relate to consumer redress" 2012 *CILSA* 281.
[68] Minister Ebrahim Patel *Address on the occasion of the debate on Budget Vote 28 in an extended public committee meeting of the National Assembly* 12 April 2011 available at: http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=17730&tid=31888 (last accessed 19 March 2020).

competition authorities aim to achieve, which is to eradicate anti-competitive conduct and not to impose administrative penalties. Thus, it needs to be appreciated that the imposition of administrative penalties is merely ancillary to the core purpose of the Competition Act.

All the monies which are collected as a result of the administrative penalties are paid into the National Revenue Fund[69] in accordance with section 213 of the Constitution.[70]

Due to the proceeds of the administrative penalties being paid directly into the National Revenue Fund the consumer or the complainant, may not immediately benefit from the payment of such penalty. The benefit is generally a broader benefit to competitors and consumers in that the contravening firm no longer engages in anti-competitive practices, which is in line with what the Competition Act aims to achieve. The money in the National Revenue Fund is also used by Government for other purposes which may benefit consumers in general.

1.4 Research Question

This dissertation will interrogate the manner in which the competition authorities have approached the imposition of administrative fines. The focus will be on fines imposed for cartel conduct as set out in section 4(1)(b). Applicable principles will be distilled which will subsequently be compared to that of the EU as comparative jurisdiction dealt with in Chapter 3. Eventually the objective is to determine whether South Africa's approach to the imposition of administrative fines is in need of reform, and if so, to make suitable recommendations.

[69] The Competition Act s59(4).
[70] The Constitution s213(1).

1.5 Research Methodology

This dissertation will predominantly consist of desk-based research, delving into the provisions set out in the Competition Act as well as any other relevant regional and foreign legislation. It will also interrogate relevant policy documents, reports, books, case law and journal articles to inform the conclusions of the study and the recommendations that will be made.

1.6 Chapter Layout

Chapter One: Introduction to Competition Law in South Africa

Chapter One will introduce the topic and set out the brief history of South African Competition Law. This Chapter will also map the objectives of the Competition Act and briefly mention the prohibited practices, which the Act was intended to regulate. This chapter will briefly deal with administrative penalties and the manner in which it is approached in South African Competition Law. The Chapter, further, sets out the scope and nature of the dissertation, the research methodology and the chapter layout.

Chapter Two: Approach to Administrative Penalties in South African Competition Law

Chapter Two will illustrate the manner in which administrative penalties have been imposed on contravening firms that have engaged in cartel conduct in South Africa. I will critically analyse the legislative framework pertaining to administrative penalties and evaluate how such penalties have been dealt with by the relevant competition authorities. The Chapter will also seek to broadly determine the direct and indirect impact that administrative penalties have on the consumer in South Africa.

Chapter Three: Approach to Administrative Fines in the European Union

Chapter Three will evaluate the manner in which administrative fines are regulated in the European Union. It will be determined whether these fines have served as a retributive and/or a preventative measure and whether these penalties have been successful in achieving their stated purposes. The chapter evaluate the impact that administrative fines have on the consumer in the European Union and compare that with South Africa.

Chapter Four: Conclusion and Recommendations

This will be the final Chapter, wherein I will draw on the similarities and differences between South Africa and the European Union and the manner in which administrative penalties are regulated and enforced. I will further draw on both the strengths and the weaknesses of the current penalty system in South African competition law and make recommendations as to how this can be improved.

Chapter Two: Approach to Administrative Penalties in South African Competition Law

2.1 Introduction

Section 4 of the Competition Act regulates the relationships between competitors who are in a horizontal relationship.[71] Section 1 of the Competition Act defines a "horizontal relationship" as one that exists between competitors.[72] As pointed out by Sutherland and Kemp this relationship between competitors will be viewed as a relationship on a horizontal level where the parties concerned operate in the same line of business.[73] Notably, section 1 of the Competition Act does not define "competitor". However, it is trite in South African competition law that firms will be viewed as competitors should it be shown that they compete in the same market in respect of the same or inter-changeable or substitutable goods or services.[74] It has also been submitted by Sutherland and Kemp that the word "competitors" in section 4 of the Competition Act should transcend to "potential" competitors.[75] This ideal of a "potential competitor" should, however, not be interpreted too widely.[76] Potential competitors as envisaged by Sutherland and Kemp are inclusive of firms which have the ability to be competitors, even if they are not competing at the moment when the purported infringement occurs.[77]

Section 4(1)(a) of the Competition Act is a "rule of reason prohibition"[78], which entitles the firm who is being accused of such prohibited act, to raise efficiency[79],

[71] Competition Act s4.
[72] Competition Act s1.
[73] Sutherland and Kemp *Competition Law of South Africa* (2016) 1-3.
[74] Sutherland and Kemp 7.
[75] Sutherland and Kemp 7.
[76] Sutherland and Kemp 7.
[77] Sutherland and Kemp 8.
[78] Neuhoff *et al* at 73 defines "rule of reason prohibitions" as those acts which will only be condemned once it has been established from the facts of the case that they affect competition negatively and efficiency, pro-competitive gains or technological gains cannot be raised as a defence.

pro-competitive gains[80] or technological gains[81] as a defence for the joint conduct.[82] Section 4(1)(b) of the Competition Act, the provision upon which this Chapter shall focus, deliberately thwarts the *per se* prohibitions (cartels) of price fixing, division of market and collusive tendering.

In terms of section 4(2)(a) and (b) of the Competition Act, where a firm partakes in a restrictive horizontal practice, an agreement to engage in such a practice is *presumed* to exist between two or more firms if any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common.[83]

Should a firm be found to have contravened the *per se* prohibitions postulated in section 4(1)(b), then there will not be an enquiry into the technological, efficiency or other pro-competitive gains which the firm believes may have emanated from these prohibited practices. [84]

This hard stance on *per se* prohibitions was confirmed by the Supreme Court of Appeal in the case of *American Natural Soda Ash Corporation and Another v The Competition Commission of South Africa (*hereinafter the *ANSAC* case*)*.[85] This means that there is no right of recourse for the firm which contravened this section.

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[79] The Competition Commission has defined "efficiencies" to mean a reduction in costs incurred by firms, reduction in search costs incurred by consumers, or other changes that result in fewer resources being used to produce and transact. Competition Commission Guidelines para 2.10.
[80] The Competition Commission has stated that "pro-competitive gains" refer to increases in the total surplus or value realised by firms and consumers arising from trade due to an action and/or conduct by the firm. Competition Commission Guidelines para 2.14.
[81] Neuhoff *et al* at 66 states that Technological gains are broadly defined as the 'act of awarding patents or exclusive licences, which encourage innovation and technological progress.'
[82] Competition Act s4(1)(a).
[83] Competition Act ss4(2)(a) & (b). Author's emphasis.
[84] Neuhoff *et al* 75.
[85] *American Natural Soda Ash Corporation and Another v Competition Commission of South Africa* 2005 1 CPLR (SCA) the Court stated that "It is clear from the juxtaposition with s4(1)(a) that s4(1)(b) is aimed at imposing a *per se* prohibition: one, in other words, in which the efficiency defences expressly contemplated in sub-para (a) cannot be raised."

The illegality of these practices is established by their mere occurrence. Thus, once it is established that the prohibited conduct in fact occurred, the firm concerned will not be able to raise any defence to justify such conduct.[86]

As pointed out by Fletcher, horizontal agreements are scrutinised in competition law due to the manner in which the coordinated activities of cartels allow the cartel to act like a monopolist and hamper healthy competition within the specific market in which the cartel operates, which in turn is to the detriment of consumers insofar as prices and choice of products are concerned.[87] Furthermore, identifying and prosecuting cartels is a difficult task due to the secretive nature thereof. In its review of the 10 years of competition law enforcement (1999 – 2009), the Competition Commission noted that in addition to the lack of competitive dynamism, innovation and poor service delivery that cartels have in a particular market, such cartels are to the detriment of the consumer and general economic efficiency.[88]

Is, is, thus imperative that the competition authorities investigate and prosecute cartel activities in the most effective ways possible. The retributive and deterrent strength of cartel enforcement is directly related to the ability that competition authorities have to investigate and prosecute cartelists.

2.2 Cartel Activities (*Per Se* Prohibitions)

As stated above, section 4(1)(b) prohibits cartel behaviour entailing price fixing, dividing markets and collusive tendering, as these practices are considered to be the most egregious defilements of competition law.[89]

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[86] *Ibid.*
[87] Fletcher "The lure of leniency: maximising cartel deterrence in light of *La Roche v Empagram* and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004" 2005 *Transnational Law and Contemporary Problems* 341.
[88] Competition Commission "*Horizontal agreements: the harm they can do Unleashing Rivalry (1999 – 2009) Ten years of enforcement by the South African competition authorities".* Available at www.compcom.co.za (accessed 17 April 2020).
[89] Neuhoff *et al* 76.

Moodaliyar and Weeks contend that the legislator's resolution to categorise price fixing, market allocation and collusive tendering together as they appear in section 4(1)(b) suggest that they have been given a specific meaning, which in turn confers on them a certain character.[90] The Supreme Court of Appeal (hereinafter "the SCA") in the *ANSAC* case formulated a two-stage test in characterising *per se* prohibited practices.[91] Firstly, the scope of section 4(1)(b) must be established, which establishment may be merely based on statutory interpretation.[92] Secondly, once the scope of the section has been established, the enquiry may move to whether or not the conduct complained of falls within the ambit of the section in question, which can be answered by referring to the relevant evidence.[93]

Notably the CAC in the matter of *Competition Commission v South African Breweries Ltd and Others*[94] held a different view to that of the SCA in *ANSAC*. The CAC held that the "characterisation" under the Competition Act requires an analysis of two aspects. Firstly, a determination of whether the parties are in a horizontal relationship. Should the answer be in the affirmative then the Tribunal needs to see whether the case involves direct or indirect fixing of a purchase or selling price, division of the markets or collusive tendering within the meaning of section 4(1)(b).[95]

2.2.1 Price Fixing

In terms of section 4(1)(b)(i) of the Competition Act, an agreement[96] between, or concerted practice[97] by firms, or a decision by an association of firms[98], is prohibited

[90] Moodaliyar and Weeks "Characterising price fixing: a journey through the looking glass with *ANSAC"* 2008 *SAJEMS* 3.
[91] *ANSAC* para 47.
[92] *ANSAC* para 44.
[93] *ANSAC* para 45.
[94] *Competition Commission v South African Breweries Ltd and Others* 134/CR/Dec07.
[95] *South African Breweries* para 36.
[96] Section 1 of the Competition Act states that an "agreement, when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable" The definition of "agreement" was substituted by s1(b) of Act No. 39 of 2000. The Competition Appeal Court in the matter of *Netstar (Pty) Ltd v Competition Commission* at para 25 defined an 'agreement' to mean actions and discussions among the parties directed at arriving at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest.

if it is between parties in a horizontal relationship and if its involves directly or indirectly fixing a purchase or selling price or any other trading condition.[99] Price fixing occurs whenever a contract, arrangement, or understanding has the effect or likely effect of fixing, controlling or maintaining prices, discounts, allowances, rebates or credits in relation to goods or services bought or sold by any party in competition with another. [100] The SCA stated in the *ANSAC* case that price fixing encapsulates some form of collusion between competitors with the intention of eliminating their relevant competition.[101] The parties achieve this by collectively fixing their respective prices by, *inter alia*, setting uniform prices or by other means with the intended effect of market competition on their prices.[102]

The SCA, however, warned that just because competitor's goods have reached the market at a uniform price, as a result of a mere arrangement, does not necessarily mean that price fixing has occurred.[103] The Court went on further to state that the concept of price fixing must be analysed under both lay language and the language utilised by the Act.[104] By doing so, price fixing may be limited exclusively to collusive conduct by competitors, which is intended to avoid competition, as opposed to conduct that merely has that incidental effect.[105]

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[97] Section 1 of the Competition Act states that a "concerted practice means co-operative or co-ordinated conduct between firms, achieved through direct or indirect contact, that replace their independent action, but which does not amount to an agreement." Sutherland and Kemp point out that the Competition Act expressly distinguishes between 'concerted practices' and 'agreements'. The Appeal Court in the *Netstar* case at para 25 confirmed that the distinction between an agreement and concerted practice is important as it appears in their respective definitions. Sutherland and Kemp at 30 are of the view that when it comes to a concerted practice, there is an apparent meeting of minds in the background, but that such meeting is not as explicit, as in the case of an agreement.

[98] The phrase 'decision by an association of firms' is not defined in the Competition Act. Kelly, however, proposed that 'decision by an association for firms' should be understood to refer to a body that promotes the interests of a number of firms, like trade and industry associations or professional bodies. Kelly *et al Principles of Competition Law in South Africa* (2017) 83.

[99] Sutherland and Kemp 57.

[100] Neuhoff *et al* 76.

[101] *ANSAC* para 48.

[102] *Ibid.*

[103] *ANSAC* para 49.

[104] *ANSAC* para 49

[105] *ANSAC* para 49.

Sutherland and Kemp are of the opinion that the definition of price fixing formulated by the SCA in the *ANSAC* case is broad, which in turn, prohibits any setting of collusion between competitors to set prices.[106] They, further, indicate that the definition formulated in the *ANSAC* case possibly validates the view that price fixing is regarded as the most heinous form of anti-competitive practice.[107] Sutherland and Kemp also point out that the prohibition on price fixing is not only directed at selling prices but also on purchase prices.[108] They further confirm that price fixing can be conducted by both purchaser and/or sellers. Price fixing will not only occur where minimum prices are fixed, but also where maximum prices are fixed between competitors.[109] Notably Sutherland and Kemp point out that the fixing of maximum selling prices by sellers is often clouded by minimum price fixing, alternatively it is used as a means by firms to co-ordinate prices at upper competitive levels.[110]

The fixing of purchase or selling prices prohibited by section 4(1)(b) can either occur directly or indirectly.[111] Direct price fixing of a purchase or selling price arises where competitors reach an express agreement on the price which they will charge or pay for a certain product or service.[112] Indirect price fixing, on the other hand, occurs where the firms do not actually or expressly agree on the price that will be charge or paid, but the competitors establish a co-ordinated price by indirect means.[113]

In the *Pioneer Foods*[114] case, the Competition Tribunal concluded that a firm needs to verbally object when a competitor suggests or invites him or her to engage in cartel conduct. If the person does not verbally object to such conduct, he or she will be deemed to have knowingly consented to the conduct. The Competition Commission's Guidelines on the Exchange of Information between Competitors

[106] Sutherland and Kemp 57.
[107] Sutherland and Kemp 57.
[108] Sutherland and Kemp 57.
[109] Sutherland and Kemp 58.
[110] Sutherland and Kemp 58.
[111] Sutherland and Kemp 61 - 62.
[112] Sutherland and Kemp 60.
[113] Sutherland and Kemp 61.
[114] *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb07.

under the Competition Act No.89 of 1998 (as amended)[115] also states that as a general rule, where a firm expresses its intentions regarding future conduct, or what it anticipates or expects regarding future conduct, this will be considered anti-competitive, as it expedites the end result of realising a collusive understanding amongst firms.[116] Any discussion among competitors about their future prices will in most instances be considered as giving rise to an anti-competitive price-fixing agreement in contravention of section 4(1)(b) of the Competition Act.[117]

Sutherland and Kemp caution that it may be difficult to differentiate between direct and indirect price fixing, which may in any event be a fruitless task as both direct and indirect pricing are both *per se* prohibited practices in terms of the Competition Act.[118] Competition authorities are cautioned not to regard any conduct as price fixing, save for when there is a clear nexus between concertation and the establishment of prices by the firms involved in it.[119]

The fixing of trading conditions, in addition to price fixing, is also prohibited in South Africa.[120] The Competition Act requires firms to independently set their trading conditions, including credit terms, delivery charges, delivery schedules, minimum quantities, interest charges, or anything which affects the economics of the transaction.[121] The Competition Tribunal in the matter of the *Competition Commission v Patensie Sitrus Beherend Bpk*[122] in some way defined "trading conditions" as mentioned in section 4(1)(b) of the Competition Act by stating the following:

> The range of "trading conditions" hit by this sub-section is limited by the contextual cobbling together of price fixing and the fixing of "any trading condition", which in our view, points to aspect of a particular trade or transaction that are intimately related to price, i.e. quantity and

[115] Competition Commission Guidelines on the Exchange of Information between Competitors under the Competition Act No.89 of 1998 (as amended) (hereinafter "the Commission's Guidelines").
[116] Commission's Guidelines para 6.5.1
[117] *Ibid.*
[118] Sutherland and Kemp 61.
[119] Sutherland and Kemp 61.
[120] Sutherland and Kemp 66.
[121] Neuhoff *et al* 82.
[122] *Competition Commission v Patensie Sitrus Beherend Bpk* 37/CR/Jun01.

> quality. Hence for a "trading condition" to be hit by this section of the Competition Act it should be part of the price quantity–quality nexus of the concerned transaction or trade. This naturally includes an agreement that seeks to limit output, but it would also likely include the fixing of a discount structure or repayment condition.[123]

The fixing of trading conditions was an extension of the prohibition placed on price fixing[124] both of which are *per se* prohibited.[125] Notably the extension of the prohibition of price fixing to fixing of trading conditions was adopted from the Treaty on the Functioning of European Union (hereinafter "the TFEU").[126]

The fixing of purchase or selling prices as well as the fixing of trading positions are all *per se* prohibited practices and, as such, it would not be possible for the contravening firms to argue that they were charging a reasonable price, or that they were stabilising process or that that they were trying to ensure the viability of a competitor.[127]

2.2.2 Dividing the Market

It has been indicated above that price can be controlled by direct price-fixing agreements. In addition, as pointed out by Neuhoff *et al*, price may also be controlled indirectly by agreements amongst firms not to compete with one another, by colluding to divide the market.[128] Market division is regulated in terms of section 4(1)(b)(ii) of the Competition Act and is a *per se* prohibited practice.[129]

The ramifications of market division agreements are on the same par as those resulting from price-fixing agreements.[130] Neuhoff *et al* observe that in numerous cases the elimination of certain competitors from certain geographical areas or certain product or customer segments furnishes the remaining market participant

[123] *Patensie Sitrus Beherend* para 35.
[124] Sutherland and Kemp 66.
[125] Sutherland and Kemp 67.
[126] Article 101(1)(a) of the Treaty on the Functioning of European Union (hereinafter "the TFEU").
[127] Sutherland and Kemp 59.
[128] Neuhoff *et al* 84.
[129] Sutherland and Kemp 68.
[130] Neuhoff *et al* 84.

with a monopoly over that product, customer group or region.[131] This means that the monopolist firm is in a position free from competition not only in relation to prices, but also in respect of quality, service and innovation.[132]

Market division occurs where competitors allocate direct markets or parts of a market to participants to enable such competitors to exercise some market power in their allocated spheres.[133] There is, thus, a reciprocal agreement between competitors to allocate customers, suppliers, geographical territories, or specific goods or services.[134] Based on the aforementioned interpretation it is submitted that a unilateral decision by a competitor not to enter a market cannot be viewed as market division.[135] The Competition Tribunal has, however ruled in the case of *Nedschroef Johannesburg (Pty) Ltd v Teamcor (Ltd) and Others*[136] that reciprocity is not a legal requirement for prohibited market division to occur.[137] What the Tribunal looks at is the grounds on which a party decides not to enter a specific market to determine whether or not there has been market division.[138] Market division takes place in various forms, namely by allocating markets shares, customers, suppliers, territories or specific types of goods or services.[139]

2.2.3 Collusive Tendering

Sutherland and Kemp define "collusive tendering" as any agreement between competitors which place pre-emptive obligations on the parties to either offer or withhold an offer to bid with a third party.[140] In most cases collusive tendering occurs where firms agree to either place a higher or lower bid, dependant on what role they play in the agreement. It is generally the lowest bid, to the tender specification, that

[131] Neuhoff *et al* 84 - 85.
[132] Neuhoff *et al* 85.
[133] Sutherland and Kemp 69.
[134] Neuhoff *et al* 87.
[135] *Ibid.*
[136] *Nedschroef Johannesburg (Pty) Ltd v Teamcor Ltd and Others* 95/IR/Oct05.
[137] *Nedschroef* para 87.
[138] Neuhoff *et al* 87.
[139] Competition Act s4(1)(b)(ii).
[140] Sutherland and Kemp 75.

is awarded the bid.[141] Collusive tendering constitutes anti-competitive behaviour due to it resulting in market allocation or market division.[142] There are three main forms of collusive tendering, namely complementary tendering[143], bid suppression[144] and bid rotation.[145]

2.3 Administrative Penalties imposed on Cartels

The imposition of an administrative penalty on a contravening firm is both a retributive and deterring contrivance, which the Competition Tribunal may utilise where such firm has participated in an anti-competitive practice prohibited by the Competition Act or contravened the terms of an order made by the Competition Tribunal or the CAC.[146] An administrative penalty may be determined and enforced in one of two ways. Firstly, it may be determined unilaterally by the Competition Tribunal in terms of section 59 of the Competition Act.[147] Secondly, it may formulated in terms of a consent agreement concluded between the contravening firm and the Competition Commission, which agreement would subsequently be approved and enforced by the Competition Tribunal in terms of section 58 of the Competition Act.[148]

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[141] Neuhoff *et al* 89.
[142] Neuhoff *et al* 89.
[143] Sutherland and Kemp at 75 state that this type of collusive tendering occurs where competitors bid on a contract, but that the one firm will submit the lowest bid, alternatively submit the only bid which contains the correct terms and in turn divide the work and/or the proceeds amongst itself and its colluders. The firm who submitted the lowest bid this time may be required to submit the higher or objectionable bid the next time.
[144] Sutherland and Kemp at 75 state that bid suppression occurs where several competitors agree not to bid on a contract, alternatively they withdraw from the tender process which in turn results in the remaining competitor being awarded the contract as it was uncontested. In exchange for this sacrifice, the parties who withdraw from the initial bidding process may be given the privilege of submitting their uncontested bids in future bids.
[145] Sutherland and Kemp at 75 state that bid rotation occurs where all the potential competitors in a market agree to submit their tenders, but only one of the competitors will submit the lowest tender inclusive of all the right clauses.
[146] The Competition Act s59(1). See also Brassey *et al* at 324 – 325.
[147] The Competition Act s59.
[148] Section 58(1)(b) of the Competition Act provides that the Competition Tribunal may confirm a consent agreement in terms of section 49D as an order of the Tribunal. Section 49D of the Competition Act states that "If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b)."

Cartel enforcement has become a major priority for South African competition authorities.[149] A firm that is found to be participating in cartel conduct can have an administrative penalty of up to 10% of that firm's turnover in the Republic and its exports from the Republic in the preceding financial year, imposed upon them.[150] In terms of the most recent amendments to the Competition Act there is even a possibility of having an administrative penalty imposed of up to 25% of a firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year, where the conduct of that firm is substantially a repeat by the same firm of the conduct previously found by the Competition Tribunal to be a prohibited practice.[151] The Competition Act, further, allows for the victims of cartel activity to institute claims for damages.[152]

In South Africa, administrative penalties have been regarded as the most appropriate deterrent against cartels.[153] The Competition Act stipulates that the Competition Tribunal has the exclusive power to impose an administrative penalty on a firm or group of firms which have contravened section 4(1)(b) of the Act.[154] The Competition Act, further, places an obligation on the Competition Tribunal to take the factors stipulated in section 59(3) into cognisance when making a determination on an appropriate penalty.[155]

The mitigating and aggravating factors which the Tribunal needs to take into account when deciding upon an appropriate administrative penalty are as follows: (a) the nature, duration, gravity and extent of the contravention; (b) any loss or damage suffered as a result of the contravention; (c) the behaviour of the respondent; (d) the

[149] Van Heerden & Botha 2015 *TSAR* 309.
[150] The Competition Act s59.
[151] The Competition Act s59(2A). This subsection was inserted by s33(c) of Act No. 18 of 2018.
[152] The Competition Act s65. See also Ratz "Competition Law Damages and Their Quantification in South African Law" 2016 *LLD Thesis* University of Pretoria. See also Munyai "Claims for Damages Arising from Conduct Prohibited Under the Competition Act, 1998" 2017 *De Jure*.
[153] Aproskie and Goga "Administrative penalties – Impact Alternatives" 2011 *Journal of Economic and Financial Sciences* 133.
[154] The Competition Act ss59(1)(a) and (b).
[155] The Competition Act s59(3).

market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact on the small and medium businesses and firms owned or controlled by historically disadvantaged persons; (e) the level of profit derived from the contravention; (f) the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; (g) whether the respondent has previously been found in contravention of this Act; and (h) whether the conduct has previously been found to be in contravention of this Act or is substantially the same as conduct which Guidelines have been issued by the Competition Commission in terms of section 79.[156]

The Amendment to the Competition Act now states that the Competition Tribunal may increase the administrative penalty referred to in subsection (2) and (2A) to include the turnover of any firm or firms that control the respondent, where it can be shown that the controlling firm or firms knew or should reasonably have known that the respondent was engaging in the prohibited conduct and that the controlling firm or firms be jointly and severally liable for the administrative penalty imposed.[157]

The Competition Tribunal has been tasked on various occasions with determining an *appropriate* administrative penalty which should be imposed on contravening firms. Neuhoff *et al,* however, remark that unfortunately the wide discretion imposed on the Tribunal has resulted in numerous inconsistencies regarding the manner in which the penalty is quantified.[158]

Commentators have described the optimal fine as being one that fulfils the aim of deterrence.[159] The Competition Tribunal held in *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd* that the efficacy

[156] The Competition Act ss59(3)(a) – (h).
[157] The Competition Act ss59(3A)(a) and (b). This subsection was inserted by s33(e) of Act No. 18 of 2018.
[158] Neuhoff *et al* 442.
[159] Wehmhörner "Optimal Fining Policies" Paper presented at the Remedies and Sanctions in Competition Policy Conference, Amsterdam Centre for Law and Economics 2005 at 8.

or appropriateness of an administrative penalty should, therefore, be measured with reference to the degree of deterrence which that penalty will ultimately yield.[160]

Wils is a proponent of setting the fine as high as possible, provided that; the fine does not exceed the firm's ability to pay, the burden of the fine is proportional to the actual harm caused to society and the gravity of the fine does not discourage firms from engaging in conduct which would otherwise represent an efficiency gain.[161]

In the matter of *Competition Commission v Aveng (Africa) Ltd*[162], the Tribunal held that when considering the factors such as the "nature", "gravity" and "extent" of a contravention, for the purposes of imposing administrative penalties, the following is pertinent:

> Cartel conduct is considered a more egregious form of contravention than resale price maintenance. When considering the extent and gravity, if it was a cartel, the extent of the cartel – was it national or regional – how much market share did it account for, was it consistent or sporadic in nature, are some factors to be taken into account.

The Competition Tribunal in the *Pioneer* case held that the election of the competition authorities to impose an administrative penalty on the contravening firm is purely at their discretion and that such discretion must at all times be rational and justifiable.[163] In practice, the Competition Tribunal has calculated the administrative penalty by looking at the "affected turnover", which is that percentage of the turnover which originates from the product market in which the firm was found to have acted anti-competitively.[164] The Tribunal, however, pointed out that this differs from what section 59(2) of the Competition Act directs that the penalty should be calculated.[165] Sutherland and Kemp concur with the Tribunal's approach in *Pioneer* and propose

[160] *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd* 08/CR/Mar01 para 166.
[161] Wils "Optimal Antitrust Fines: Theory and Practice" 2006 *World Competition* 18 – 22.
[162] *The Competition Commission v Aveng (Africa) Ltd* 84/CR/Dec09.
[163] *Pioneer* paras 139 – 142.
[164] *Ibid.*
[165] Section 59(2) of the Competition Act stipulates that the penalty may be imposed on the firm's annual turnover in the Republic, including its exports from the Republic during the firm's preceding financial year.

that the 'affected turnover' should be utilised as a baseline in the initial calculation of the appropriate penalty.[166]

Notably the Tribunal in *Pioneer*[167] referred to the *Federal Mogul* case, where the Tribunal decided to exercise its discretion by calculating the threshold centred on the turnover in the infringing line of business only.[168] The rationale behind this approach, as articulated in the *South African Airways* case, is that companies often conduct their business in several product markets and so it is suitable to assess the penalty in parallel with the company's efforts to expand their market power through anti-competitive arrangements in that particular product market.[169]

The Tribunal did, however, warn that although it has adopted the aforementioned approach in several cases, the Competition Act in no way bars the imposition of a penalty calculated on the firm's total turnover.[170] The circumstances in which the Tribunal can exercise its discretion in favour of a fine calculated on a firm's total annual turnover is not *numerus clausus* and can, thus be expanded.[171] The Tribunal pointed out that there needs to be some indication that the firm's anti-competitive monopolisation efforts in one market conferred, or had the inclination of conferring upon such firm(s), some form of leverage in another product market which it would not have had, had it not been for such anti-competitive behaviour.[172]

In *Federal Mogul*, the Tribunal isolated deterrence as the primary objective for the imposition of administrative penalties on contravening firms.[173] The Tribunal stated that "deterrence elements must have some relationship to the harm inflicted by the prohibited practice."[174]

[166] Sutherland and Kemp 12 – 13.
[167] *Pioneer* para 141.
[168] *Federal Mogul* para 172.
[169] *Competition Commission v South African Airways* 18/CR/Mar01 para 273.
[170] *Federal Mogul* para 171.
[171] *Pioneer* para 142.
[172] *Pioneer* para 142.
[173] *Federal Mogul* para 166.
[174] *Ibid.*

In *Pioneer* it was stated that the discretion which is exercised by the Tribunal should always be done *in lieu* of what is stipulated in section 59(3) of the Competition Act.[175] The factors listed in section 59(3) should be utilised to determine the aggravating and mitigating circumstances and in turn strike a balance between deterrence and over-enforcement.[176] The Tribunal held that these factors must be weighed in "relation to each other and must be assessed in the specific circumstances of each case and in the context of the nature of the contravention".[177]

In order to avoid any further discrepancies and uncertainties, regarding the manner in which administrative penalties have been imposed on contravening firms, the CAC in the matter of *Southern Pipeline Contractors v Competition Commission*[178], developed specific methodology for calculating administrative penalties formulated in the following six steps:[179]

- **Step one:** The Tribunal will determine the affected turnover in the most recent year in which the firm participated in the contravention;
- **Step two:** The Tribunal will determine the basic amount on which to calculate the administrative penalty, being that proportion of the affected turnover relied on;
- **Step three:** where the contravention exceeds one year, the amount obtained in step two is multiplied by the duration of the contravention;
- **Step four:** If the figure from step three exceeds the cap provided for by Section 59(2) of the Competition Act, then the Tribunal rounds off the figure to the amount of the cap;
- **Step five:** the Tribunal will consider the factors that might mitigate and/or aggravate the amount reached in step 4. This may be done by way of a discount or premium expressed as a percentage of that amount that is either subtracted or added to it; and

[175] *Pioneer* para 147.
[176] *Ibid.*
[177] *Ibid.*
[178] *Southern Pipeline Contractors v Competition Commission* (2011) 2 CPLR 239 (CAC).
[179] Sutherland and Kemp 12 – 13.

- **Step six:** if the figure at step five exceeds the cap provided for in section 59(2), the Tribunal adjusts the figure downwards so that it does not exceed the cap.[180]

Sutherland and Kemp endorse of the aforementioned method in determining an appropriate administrative penalty. As was stated in the *Pioneer* case, the purpose of the imposition of administrative penalties is deterrence which ought to be correlated to the harm caused by the prohibited practice concerned.[181] Sutherland and Kemp emphasise that, imposing an administrative penalty on a business should not destroy such business.[182]

Consent agreements in terms of section 58 of the Competition Act are dealt with in a different manner to that of administrative penalties in terms of section 59. Prior to approving a consent agreement, concluded between the Competition Commission and the contravening firm, the Competition Tribunal must determine whether the terms set out therein (inclusive of the agreed penalty) are "appropriate" when looking at the facts of the case.[183] It must be noted that the Competition Act does not require consent agreements to be scrutinised in the same light as administrative penalties. It, thus, follows that the Competition Tribunal is in no way obligated to apply the aggravating and mitigating factors, set out in section 59(3) of the Competition Act, to consent agreements. The Tribunal may, however, reject the consent agreement where there are public grounds for doing so.[184]

It is submitted that a contravening firm would be much better off concluding a consent agreement with the Competition Commission in light of section 58 of the Competition Act affording such firm the opportunity to negotiate the penalty with the commission, as opposed the administrative penalty being determined unilaterally by the Competition Tribunal.

[180] Sutherland and Kemp 12 – 14.
[181] *Pioneer* para 143.
[182] Sutherland and Kemp 12.
[183] The Competition Act s49D.
[184] *The Competition Commission of South Africa v Netcare Hospital Group (Pty) Ltd* 27/CR/Mar07 paras 32 – 33.

2.5 Issues with Administrative Penalties in South Africa

Administrative penalties were implemented into South Africa's competition law to, *inter alia*, deter both present and future cartels from taking place within the relevant markets. To date, administrative penalties have been at the centre of such efforts to deter cartels. It is, however, submitted that the effectiveness of administrative penalties in curbing cartel behaviour, needs to be re-evaluated. The question which many authors, including myself, keep asking is whether administrative penalties have achieved their objective as postulated within the Competition Act.

2.5.1 Criminal Nature of Administrative Penalties

The nature and complexity of administrative penalties in South African competition law has been dealt with in numerous matters. One of the most contentious issues was the apparent resemblance that administrative penalties have to criminal penalties. In the *Federal Mogul* case, the CAC had to determine whether the administrative penalties, as postulated in the Competition Act, were a form of criminal punishment or not.[185] The matter before the Tribunal initially dealt with the prohibited practice of minimum resale price maintenance. The appeal before the CAC dealt with a constitutional challenge on the validity of section 59 of the Competition Act. The argument that was put before the CAC was that administrative penalties constituted a type of punishment which afforded the responding party the same constitutional guarantees, which an accused person would have, in terms of section 35(3) of the Constitution.[186]

[185] *Federal Mogul* para 50.
[186] The Constitution s35(3).

David JP and Jali JA held that the provisions of the Competition Act clearly distinguish between provisions which contain a criminal sanction and those provisions which contain an administrative penalty.[187] The Court further stated section 59 proceedings fall within the confines of civil law "as the purpose is not to punish criminals by imprisonment… and the context is corrective and non-criminal in nature."[188]

The Commission, Tribunal and the CAC have, subsequent to the *Federal Mogul* case, consistently dealt with section 59 proceedings within the confines of civil procedure.[189] However, the *dictum* of Harms DP in the SCA judgement of *Woodlands Dairy (Pty) Ltd and another v Competition Commission*[190] has caused some uncertainty due to the learned judge remarking that "administrative penalties bear a close resemblance to criminal penalties."[191]

The issue that arises with the blurring of the lines between a section 59 procedure and criminal offences is that the latter requires a higher burden of proof, namely beyond a reasonable doubt.[192] Whereas the process postulated in section 59 of the Competition Act entails an onus on a preponderance of probabilities, which is a lighter onus than that which is required in a criminal offence.

Prins and Koornhof point out that since section 59 proceedings have been equated with criminal fines; a more hard-line approach has been adopted in interpreting and applying this provision.[193] In the matter of *Southern Pipeline Contractors & Another v Competition Commission*[194] the CAC relied on the SCA's approach in *Woodlands* by concluding that administrative penalties should be "proportional in severity to the

[187] *Federal Mogul* para 85.
[188] *Federal Mogul* para 87.
[189] Prins and Koornhof 2014 *Law Democracy and Development* 144.
[190] *Woodlands Dairy (Pty) Ltd & Another v Competition Commission* 2010 (6) SA 108 (SCA).
[191] *Woodlands Dairy* para 10.
[192] Prins and Koornhof 2014 *Law Democracy and Development* 144.
[193] *Ibid.*
[194] *Southern Pipeline Contractors & another v Competition Commission* (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6.

degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in general and consumers in particular."[195]

Prins and Koornhof, further point out, that should our courts adopt the view that section 59 is criminal in nature, then it only follows that the investigative powers of the Competition Commission will also be of a criminal nature.[196] These criminal investigative powers of the Commission are suitable, especially in light of the Competition Act making provision for the imposition of criminal penalties, inclusive of imprisonment, upon individuals found to have caused or permitted firms to engage in prohibited practices.[197]

There are two views on administrative penalties. On the one side, it is submitted that administrative penalties are purely criminal in nature and on the other, that such penalties should be considered *sui generis*.[198]

In order to classify administrative penalties as criminal in nature, the following factors, which are normally applicable in matters of a criminal nature, must be taken into account, namely; the proportionality of the fine to the severity of the prohibited practice, the general blameworthiness of the offending firm and the deterrent effect thereof, both specific and general.[199]

In refutation of the argument that administrative penalties are purely criminal in nature, it has been suggested that administrative penalties are *sui generis* and incorporate aspects which are not only both quasi-criminal and administrative, but also quasi-delictual in nature.[200] Prins and Koornhof refer to the Preamble and section 2 of the Competition Act coupled with the Explanatory Memorandum to the

[195] *Southern Pipeline* para 9
[196] Prins and Koornhof 2014 *Law Democracy and Development* 160.
[197] The Competition Act s73A. (Inserted by s12 of Act 1 of 2009).
[198] Prins and Koornhof 2014 *Law Democracy and Development* 161.
[199] Prins and Koornhof 2014 *Law Democracy and Development* 162.
[200] *Ibid.*

Competition Bill[201], which they believe supports the idea that administrative penalties are *sui generis*.[202]

The Competition Act makes a distinction between the imposition of administrative penalties and the various other criminal sanctions in the Act, each with their own respective method of enforcement and burden of proof.[203] Furthermore, it was the express intention of the Executive, when formulating the Competition Act of 1998 to enforce most competition law infringements outside the confines criminal procedure, in light of previous experience with competition enforcement in South Africa.[204]

Both views have their pros and cons. Our courts and the Legislature have not expressly adopted either one of the aforementioned views. Prins and Koornhof argue that our legislature or our courts need to reach a definitive stance on this aspect so that a consistent body of jurisprudence may be developed in this regard.[205]

2.5.2 Effect on Administrative Penalties on the Consumer

Buttigieg remarks that "It is a common assumption that competition law, by maintaining competitive markets, automatically maximises consumer welfare and consumer satisfaction."[206] This sentiment is echoed in the Competition Act, which is founded on the premise of correcting the disadvantages suffered by many consumers under the pre-1994 political and economic regimes.[207] Van Jaarsveld argues that a pure administrative penalty, as imposed by the competition authorities, fails to realise the objective of consumer benefit set out in the Competition Act.[208]

[201] Department of Trade and Industry, Explanatory Memorandum to Competition Bill, 1998, GG 18913 of 22 May 1998 at 63.
[202] Prins and Koornhof 2014 *Law Democracy and Development* 162.
[203] Prins and Koornhof 2014 *Law Democracy and Development* 162.
[204] *Ibid.* Also see discussion of the history of South African competition law in Chapter 1 above.
[205] *Ibid* 163.
[206] Buttigieg *Competition law: safeguarding the consumer interest* 2009 xi.
[207] Van Jaarsveld 2012 *CILSA* 276.
[208] *Ibid.*

All administrative penalties which are collected, are paid into the National Revenue Fund.[209] In addition to the Competition Act, the Constitution also provides that all monies received by the national government must be paid into the National Revenue Fund.[210] Section 13(1) of the Public Finance Management Act[211] (hereinafter "the PFMA") also dictates that all monies received from the national government must be paid into the National Revenue Fund. Section 13(1)(b)[212], however, excludes a national public entity, which the Competition Commission is declared as, in terms of the Schedule 3 of the PFMA.[213] This, thus, implies that the Competition Commission is exempt from automatically paying all collected monies into the National Revenue Fund. Van Jaarsveld questions why then section 59 of the Competition Act prescribed that monies must be paid into the National Revenue Fund.[214] As section 59 of the Competition Act refers only to administrative penalties, it is assumed that exemption from the PFMA is only applicable to filing fees which are used to finance the operations of the competition authorities[215], but that administrative penalties still have to be paid into the National Revenue Fund.[216]

One of the largest administrative penalties imposed on a contravening firm was in the *Pioneer Foods* case, wherein a settlement agreement was reached in a manner which was termed as "unprecedented and innovative".[217] The matter dealt with numerous complaints relating to contraventions of section 4(1)(b), 5(1) and (2) and 8(c) of the Competition Act, specifically in the maize and wheat milling industries.

[209] See footnote 87 above.
[210] The Constitution s213(1).
[211] Public Finance Management Act 1 of 1999 s13(1) (hereinafter "the PFMA").
[212] PFMA s13(1)(b).
[213] PFMA Schedule 3.
[214] Van Jaarsveld 2012 *CILSA* 283.
[215] The Competition Act s40(1)(b): which states that the Competition Commission is financed from fees payable to the Commission in terms of this Act.
[216] Van Jaarsveld 2012 *CILSA* 283.
[217] The Competition Commission Media Release 'Joint Statement of the Competition Commission (CC), National Treasury (NT) and Economic Development Department (EDD)' 30 November 2010 available at: http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Jointstatement.pdf (accessed 4 May 2020).

This was the first case in which the Competition Commission divided the penalty to ensure that the entire amount was not paid into the National Revenue Fund. It was decided that R250 million would be paid into the National Revenue Fund and the remaining R250 million would be utilised for the establishment of an agro-processing competitiveness fund.[218] The fund would be administered by the Industrial Development Corporation of South Africa (hereinafter "the IDC") in accordance with the criteria and corporate governance protocols, as agreed upon between the parties.

The aim of the fund was to promote competitiveness, growth and employment all of which would be achieved by providing finance to small and medium enterprises.[219] This agreement was reached between Pioneer and the Competition Commission in accordance with section 49D[220] of the Competition Act and was, thus, subject to confirmation by the Competition Tribunal.

It is, however, unfortunate that Treasury intervened and insisted that the entire penalty should be paid into the National Revenue Fund. Treasury was of the view that diverting the R250 million into another fund would constitute a contravention of section 213 of the Constitution as well as section 59(4) of the Competition Act. On the 30th of November 2010 the Competition Tribunal confirmed that an amended settlement agreement had been approved, which now stipulated that the full R500 million would be paid into the National Revenue Fund, as directed by relevant legislation.

In February 2011 Pravin Gordhan, who was the Finance Minister at the time, allocated R34 million of the R250 million to the IDC during the 2011-12 financial year. Minister Gordhan stated that this was part of 'additional allocations in support

[218] *Ibid.*
[219] Centre for Law and Social Justice "Profiteering from bread – landmark competition commission case – nearly R1 billion in penalties imposed on Pioneer Foods" 3 November 2011 available at: http://writingrights.org/2010/11/03/profiteering-from-food-landmarkcompetition-commission-case-r1bn-in-penalties-on-pioneer (last accessed 4 May 20200.
[220] Section 49D(1) of the Competition Act: 'If, during, on or after completion of the investigation of a complaint, the Competition Commission and the respondent agree on the terms of an appropriate order, the Competition Tribunal, without hearing any evidence, may confirm that agreement as a consent order in terms of section 58(1)(b).'

of industrial and economic development'.[221] It was announced, further, that the balance (R216 million) would be paid in two equal payments of R108 million during the 2012-13 and 2013-14 financial years. It is, however, still questionable why Treasury elected to pay the monies over in three payments over four years and not immediately, as initially anticipated by the Competition Commission. During the four years, in which the monies were in the National Revenue Fund, it accumulated substantial interest, which interest forms part and parcel of the National Revenue Fund.[222] The National Revenue Fund, thus, not only benefited from the R250 million penalty which it would retain, but it also benefited from the interest on the receding balance of the R500 million.

The imposition of administrative penalties on contravening firms alone does not always assist the consumer. In some instances it may even be to the consumer's detriment. Lopes *et al* believe that administrative penalties are not as effective on large cartelists as they simply include such penalties in their operational costs which are then siphoned to the consumer by increasing the price of their product or service.[223] The Commission was aware of this risk in the *Pioneer* case and had, thus, in addition to the R500 million administrative penalty, incorporated a clause in the settlement agreement that Pioneer would adjust its pricing of flour and bread to reduce its gross profit margin by R160 million when benchmarked against a similar period the previous year. It was revealed that Pioneer had implemented the price reductions in terms of the settlement agreement, by *inter alia*, reducing the price of a standard white or brown loaf of bread by 30c and reducing the price of flower by an average of R350,00 per ton.[224]

[221] National Treasury "National Budget Speech 2011" (23 February 2011) 21.
[222] Section 15(3)(b) of the PFMA states that when money in the National Revenue Fund is invested, the investment, including interest earned, is regarded as part of the National Revenue Fund.
[223] Van Heerden and Botha 2015 *TSAR* 329.
[224] Competition Commission Media Release "Pioneer implements agreement with Competition Commission to reduce the price of selected bread and four products" 14 December 2010 available at: http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Pioneer-media-release14Dec10.pdf (last accessed 9 May 2020).

Another case in which consumer redress was considered was in the matter of *Competition Commission v Foskor (Pty) Ltd*.[225] The parties entered into a consent agreement following complaints received in relation to excessive pricing and manufacturing agreements between Foskor and Sasol. The Competition Commission and Foskor agreed that the latter would not pay an administrative penalty, in light of Foskor agreeing to implement remedial action in the form of changing its pricing policy.[226] The settlement agreement stipulated that the concerns which the Commission had about Foskor's past pricing policy had been alleviated by the steps Foskor took to reduce its prices and alter its pricing policy'.[227] Foskor had, further, agreed that it would sell two of its products to consumers at wholesale prices, and not only to the retail market as it had previously done. The agreement was referred to the Competition Tribunal for confirmation, but the Tribunal refused to confirm the agreement in the absence of an administrative penalty therein.

The Tribunal contended two aspects in this matter. Firstly, why Foskor had not admitted guilt when its anti-competitive conduct resulted in a ten to fifteen percent price increase to its customers in the downstream market, and secondly why an administrative penalty had not been imposed in light of the significant financial gain the Foskor had acquired as a result of the anti-competitive conduct.[228] As a result of the Tribunal's contentions, the Competition Commission and Foskor amended their agreement and included an administrative penalty in in the amount of R6 481 889 in the settlement agreement.

The Tribunal unfortunately never heard arguments regarding the merits of the matter and, thus, never decided upon whether a reduction (alternatively a pardon) of an administrative penalty would be permissible in return for compensation paid to the victims of the anti-competitive conduct.[229]

[225] Competition Commission v Foskor (Pty) Ltd 43/CR/Aug10.
[226] *Foskor* para 6.1.
[227] *Ibid* para 4.5.
[228] Van Jaarsveld 2012 *CILSA* 296.
[229] Van Jaarsveld 2012 *CILSA* 296.

Van Jaarsveld proposes that firms should be rewarded for providing compensation to consumers, and that the victims should be compensated in accordance with the detriment suffered.[230] Van Jaarsveld, however, cautions against firms which may exploit this practice by increasing their prices excessively, only to reduce them once being investigated.[231]

2.5.3 Issues with interpreting the term "preceding financial year"

One of the fundamental factors in determining the quantum of an administrative penalty is the turnover threshold that is provided for in section 59 of the Competition Act.[232]This threshold has been significant in determining an appropriate administrative penalty, however, the absence of the definition of the term "preceding financial year" has led to some inconsistencies when quantifying administrative penalties by the competition authorities.

The following example given by Sutherland and Kemp amplifies the problem:

A firm is alleged to have engaged in minimum resale price maintenance in contravention of section 5(2) of the Act over the period February 2004 until January 2006. A complaint against the firm is subsequently lodged with the Commission in April 2007 by one of its competitors. The Commission then investigates the complaint until December 2008 when the complaint is referred to the Tribunal. The case is later heard by the Tribunal over the period June to October 2009. The Tribunal delivers its decision in June 2010, finding in favour of the Commission and the complainant and imposing an administrative penalty on the respondent firm for its anti-competitive conduct. In determining the maximum size of this penalty, the Tribunal could interpret the term "preceding financial year" to mean:

(i) the financial year preceding the commencement of the contravention;
(ii) the financial year preceding the cessation of the contravention;

[230] Van Jaarsveld 2012 *CILSA* 297.
[231] *Ibid.*
[232] See s59(2) and s59(2A) of the Competition Act.

(iii) the financial year preceding the lodgement of the complaint with the Commission;

(iv) the financial year preceding the Commission's referral of the complaint to the Tribunal; or

(v) the financial year preceding the imposition of the administrative penalty.[233]

The term "preceding financial year" has, to date hereof, not been defined by the Competition Tribunal. In determining the turnover threshold of administrative penalties, the Tribunal has been guided by the financial year proposed by the Competition Commission and accepted by the contravening firm(s).[234] In the *Federal Mogul* case the Competition Tribunal indicated that it was not necessary to consider the meaning of the term *"preceding financial year"* where the financial year applicable was *"common cause"* between the Commission and the respondent firm.[235] The following cases illustrate how the turnover thresholds applicable to the relevant administrative penalties have not been determined with reference to a universal financial period:

In *The Commission v South African Airways*[236] and *The Commission v Tiger Consumer Brands*[237] the Tribunal made reference to the financial year preceding the termination of the respective contraventions. In *The Commission v Pioneer Foods* the Tribunal looked at the financial year preceding the referral of the complaint to the Tribunal.[238] In the *Federal Mogul* case, the Tribunal looked at the financial year preceding the commencement of the contravention.[239] Lastly in the case of *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd* the Tribunal looked at the financial year preceding the filing of the complaint.[240]

[233] Sutherland and Kemp 10 – 12.
[234] *Ibid.*
[235] *Federal Mogul* para 169.
[236] *Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 para 71.
[237] *The Competition Commission of South Africa v Tiger Consumer Brands (Pty)* Ltd 15/CR/Nov07 para 6.2
[238] *Pioneer Foods* para 134.
[239] *Federal Mogul* para 166.
[240] *Harmony Gold Mining Limited v Mittal Steel South Africa Ltd* 13/CR/Feb04 para 52.

There are both pros and cons to the heterogeneous application of the term "preceding financial year" in section 59 of the Competition Act. The benefit is that it provides the Competition Tribunal with the flexibility needed to quantify an administrative penalty in any given case.[241] The down side is that the lack of such a definition in the Competition Act exposes the arbitrariness of these terms as well as the inconsistences in the Competition Tribunal's decisions.[242]

2.5.4 Economic and Social Effect of Administrative Penalties

On the economic forefront, administrative penalties could also have a detrimental effect on the finances of each firm concerned. Aproskie and Goga state that this can happen in two ways: Firstly, the imposition of the fine could result in the firm becoming insolvent which would result in that firm's exit from the market and the economy as a whole.[243] In such a case an otherwise effective competitor may be lost to the market and the market will also suffer from the job losses occasioned by the firm's exit. Secondly the fine may have a detrimental effect on the firm's investment decisions in that the firm may simply have insufficient capital to engage in any form of investment.[244]

The insolvency of the contravening firm may emanate in adverse social and economic costs for all stakeholders concerned (including managers, shareholders, employees, suppliers, customers, creditors and tax authorities).[245] These costs include, *inter alia*, the reduction in the value of securities held by the various creditors of the firm, the reduction in employee benefits, the retrenchment of staff, the reduction in VAT, PAYE and income tax and price increases of goods and/or

[241] Wilter "Penalties for Anti-Competitive Conduct: Sharpening the sting of South Africa's Competition Authorities" 2 available at https://www.bowmanslaw.com/article-documents/CompetitionSibergramme-MWilter.pdf (accessed 9 May 2020)
[242] *Ibid.*
[243] Aproskie and Goga "Administrative Penalties – Impact and Alternatives" 2011 *Journal of Economic and Financial Sciences* 136.
[244] Aproskie and Goga 2011 *Journal of Economic and Financial Sciences* 139.
[245] Wils 2006 *World Competition* 18 – 22.

services in order to absorb the penalty, which ultimately affects the consumer's wallet.[246]

2.4 Conclusion

As has been indicated above, the primary objective of the imposition of administrative penalties on cartelists is to both prevent and deter cartel behaviour. It is not a perfect system and has faced its challenges over time. The issues which the competition authorities have had with the imposition of administrative penalties relates to, *inter alia*, the quantification thereof, the enforcement thereof and the economic and social impact that such penalties have on the contravening firms, its employees and the consumers in general. It is submitted that deterrence and consumer redress should be treated as equally important when dealing with the imposition of administration penalties in South African competition law.

[246] Wils 2006 *World Competition* 20.

Chapter Three: The European Commission's Approach to Administrative Fines

3.1 Overview of Administrative Fines in the European Union

The European Union's *Guidelines on the Method of Setting Fines Imposed* ,which was originally issued in 2003 and subsequently amended in 2006, states that the purpose behind the imposition of fines for anti-competitive activities is deterrence, both specific and general.[247] In particular, the United Kingdom's Office of Fair Trading (hereinafter the "OFT") aligned itself with the aforementioned approach by setting out two objectives to its fining policy. Firstly, to impose penalties which reflect the seriousness of the infringement. [248] Secondly, to guarantee that the threat of such penalties will discourage both the infringing undertakings (specific deterrence) and other undertakings, which may be considered anti-competitive (general deterrence).[249] The penalties must not be excessive and should always be proportionate to the seriousness of the anti-competitive conduct, the impact that it has on the economy and the impact that it has on the consumer.[250]

The current EU sanctioning system has received considerable criticism for its failure to effectively deter competition law infringements and ensure compliance with the EU Competition Rules.[251] The question has, thus, arisen as to whether alternative sanctions should be added to the Commission's arsenal in order to assist in combating anti-competitive behaviour.[252]

Since 2006, in an attempt to maximise the effectiveness and uniformity of the sanctioning system in EU competition law, the Commission has structured their

[247] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) para 4 (hereinafter "the 2006 Guidelines").
[248] Office of Fair Trading "Guidance as to the appropriate amount of a penalty" 2012 *OFT423* 1.4 and 1.6.
[249] *Ibid.*
[250] *Ibid.*
[251] Kokkinaki "An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle?" 2013 *Institute for European Studies (IES)* 8.
[252] Kokkinaki 2013 *IES* 8.

enforcement strategy around high fines against anti-competitive undertakings.[253] The Commission has also promulgated certain laws which allow for victims of competition law infringements to claim civil damages parallel with the fines which may be imposed on such firms.[254] Notwithstanding the aforementioned efforts, Kokkinaki points out that the Commission has not been able to reduce the number of competition law infringements.[255] The Commission is still actively seeking the right concoction of enforcement tools to reduce the number of competition law infringements in the EU.[256]

Geradin remarks that, it is not disputed that administrative fines are necessary in attempting to combat competition law infringements.[257] Geradin, however, points out that there is very little evidence which suggests that increasingly stringent fines have an impact on the number of anti-competitive infringements. [258] Geradin also points out that the ability of firms to prevent or deter their employees from committing anti-competitive conduct is severely limited.[259]

It has, thus, been proposed that, in the EU, administrative fines should be complimented with additional measures to increase deterrence, in particular sanctions targeting the individuals in the firms who are responsible for leading the company to commit infringements.[260]

Kokkinaki observes that internationally there seems to be an increased inclination towards the imposition of criminal and/or administrative sanctions against

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[253] Blanco and de Pablo "EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity" Paper presented at the Fordham 38th Conference on International Antitrust Law and Policy 2011 7.
[254] Collins "Competition Law: Sanctions, Redress and Compliance" *Speech at King's College London: Office of Fair Trading* 2011. See also European Commission "Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union" available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF (accessed 19-04-2020)
[255] Kokkinaki 2013 *IES* 8.
[256] *Ibid.*
[257] Geradin "The EU Competition Law Fining System: A Reassessment" 2011 *TILEC Discussion Paper* 7.
[258] *Ibid.*
[259] *Ibid.*
[260] Marinello "Do European Union Fines Deter Price Fixing?" 2013 *Bruegel Policy Brief* 7 – 8.

individuals.[261] Polimeno relays that one of the main arguments deployed to justify the introduction of criminal sanctions in competition law, concerns its deterrence effect over individuals.[262]

Kokkinaki submits that, as opposed to criminal sanctions, it would be better to promulgate laws which require the disqualification of directors, who have been found to have led their undertaking(s) to partake in cartel behaviour.[263] Her view is that director disqualification is realistically both a more efficient and effective manner in which to, not only deter cartel behaviour, but other anti-competitive infringements as well.[264]

3.2 Current Sanctioning Policy in the EU

Article 101 of the TFEU postulates that agreements and concerted practices "between undertakings" as well as decisions "by associations and undertakings" that restrict or distort competition are prohibited.[265] Article 102 of the TFEU, further, states that any abuse "by one or more undertakings" of a dominant position is also prohibited.[266] Article 103(2)(a) of the TFEU refers to fines as the primary means to "ensure compliance with the prohibitions laid down in Articles 101(1) and 102 of the TFEU".[267] In the matter of *Inspecteur van de Belastingdienst/P/kantoor v X BV*, the European Court of Justice (hereinafter "The ECJ") took a robust view of Article 103(2)(a) by stating that competition rules and regulations "would be ineffective if they were not accompanied by enforcement measures provided for in Article

[261] Kokkinaki 2013 *IES* 9.
[262] Polimeno "Criminalizing EU Competition Law: the next step for a more effective enforcement?" 2016 *Master's Thesis Tilburg Law School* 5.
[263] *Ibid.*
[264] *Ibid.*
[265] TFEU Article 101.
[266] TFEU Article 102.
[267] TFEU Article 103(2)(a).

103(2)(a)… there is an intrinsic link between the fines and the application of Article 101 and 102 of the TFEU".[268]

The Commission considers the imposition of administrative penalties on undertakings as a central tool in the enforcement of EU competition rules.[269] The ECJ has found that where Articles 101 and 102 of the TFEU have been breached, then fines should be the default sanction.[270]

The Commission is afforded a broad discretion when determining an appropriate fine.[271] It was, thus, necessary to supplement such discretion with Guidelines, as alluded to in heading 3.1 above, which would outline the method which should be followed in determining the quantum of such fines.

In order to quantify the final amount of the fine a two-step procedure is followed. First, the basic amount of the fine is quantified, based on the value of the sales affected, plus the gravity and duration of the infringement.[272] Secondly, the basic amount may be adjusted upwards or downwards, taking into account both aggravating[273] and mitigating[274] factors.[275]

Article 23(2) of Regulation No1/2003[276], states that any undertaking which has breached the EU Competition law, risks the imposition of a pecuniary fine, which can

[268] Case C-429/07 *Inspecteur van de Belastingdienst/P?kantoor v X BV* EU:C:2009:359 para 33.
[269] Commission Staff Working Document "Enhancing competition enforcement by the Member States' Competition Authorities: institutional and procedural issues" Published 9 July 2014 para 62 available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014SC0231 (accessed 9 May 2020).
[270] Case C-681/11 *Schenker & Co. AG* EU:C:2013:404 paras 40 & 46.
[271] Case C-3/06 *P Group Danone v Commission* EU:C:2007:88 para 25.
[272] 2006 Guidelines para 12 – 26.
[273] These aggravating factors include recidivism, refusal to cooperate with the Commission's investigation or playing a leadership role within a cartel.
[274] These mitigating factors include substantial limited involvement by a firm, negligent commission of the breach, or influence of State regulation.
[275] 2006 Guidelines paras 28 – 29.
[276] Regulation (EC) 1/2003 of Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

amount to 10% of that undertaking's total turnover in the preceding business year. This was replicated in the 2006 Guidelines.[277] In terms of the 2006 Guidelines, the term "preceding financial year" has been defined as the year which precedes the cessation of the infringement.[278]

The 2006 Guidelines, further, state that exceptional reductions are permissible where, in view of the "specific social and economic context … imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned".[279] This provision has, however, in practice been interpreted and applied narrowly.[280]

Administrative fines form an important function in deterring cartel conduct with the undertaking being the current focus of deterrence. In theory there are two potential targets for competition law sanctions. On the one hand the infringing undertaking and on the other hand the infringing individual, who elicits the anti-competitive conduct on behalf of the undertaking, or adopts strategies which are capable of illegally abusing its dominant position.[281]

The use of the 2006 Guidelines by the Union Courts has resulted in increased legal certainty.[282] Consequently, the principles of equal treatment and legitimate expectations[283] are upheld by binding the Commission to comply with the provisions set out in the 2006 Guidelines. Divergence from the Guidelines is, however,

[277] 2006 Guidelines paras 32 – 33.
[278] 2006 Guidelines para 13. The Commission "will normally take the sales made by the undertaking during the last full business year of its participation in the infringement".
[279] 2006 Guidelines para 35.
[280] See Case T-236/01 *Tokai Carbon v Commission* EU:C:2004:118, para 375, wherein the Commission found that a reduction in the fine was in no way justified.
[281] Commission Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty.
[282] Case C-3/06 P *Group Danone v Commission* EU:C:2007:8 para 23.
[283] See *Dansk Rørindustri and Others v Commission* EU:C:2005:408 para 211and *Groupe Danone v Commission* EU:T:2005:367 para 523.

permitted in circumstances where the particularities of a case warrant such divergence in order to achieve deterrence.[284]

The ECJ has unlimited jurisdiction with respect to the judicial scrutiny of fines, which includes the full power to cancel, reduce or increase the quantum of a fine.[285] The Union Courts may, thus, "substitute their own appraisal for the Commission's,"[286] which according to Tridimas and Gari, occurs quite frequently.[287] The wide discretion which is afforded to the Commission, in determining the quantum of a fine, will in many cases result in judicial appeals and/or reviews. Camesasca *et al* state that such judicial challenges to the calculation of fines are likely to succeed, which is attributable to the margin of discretion afforded to the Commission when imposing such fines.[288] Lianos *et al* point out that when reviewing competition fines, the Union Courts are tend to not stray too far from the Commission's Guidelines.[289]

Wils[290] submits that by imposing fines on firms which have contravened EU competition laws, the goal of prevention of other infringements may be achieved in three ways. In the first instance, fines have a deterrent effect by creating a credible threat to firms that they may be prosecuted and fined.[291] Secondly, the risk of being fined may reduce an individual's willingness to commit violations, by pleading to the

[284] 2006 Guidelines para 37. This was also confirmed, *inter alia*, in Case C-194/14 P *AC-Treuhand* EU:C:2015:717 paras 65 – 67.
[285] Artcile 31 of Regulation 1/2003.
[286] C-199/11 *Europese Gemeenschap v Otis NV* EU:C:2012:684 para 62.
[287] Tridimas & Gari "Winners and Losers in Luxembourg: A statistical analysis of judicial review before the European court of Justice and the Court of First Instance (2001-2005)" 2010 *European Law Review* 131.
[288] Camesasca *et al* "Cartel Appeals to the Court of Justice: The Song of the Sirens?" 2013 *Journal of European Competition Law & Practice* 215.
[289] Lianos *et al* "Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective" 2014 *CLES Research Paper Series 35* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2542993 (accessed 9 May 2020).
[290] Wils *World Competition* 2006 11.
[291] *Ibid.*

individual's moral character.[292] Thirdly, through the incorporation of leniency policies[293] and the utilisation of other adjustment factors to the fines imposed. The fines which have been imposed on undertakings are published, with the intention to warn cartels that the cost of the administrative fine would far outweigh the benefit which the undertaking would attain during the cartel conduct.

Kokkinaki proposes that the optimal sanction for competition law infringements should be based upon two pillars: firstly, the total fine must be large enough to remove the profit which was attained by the infringing undertaking.[294] Secondly the individual who orchestrated the anti-competitive behaviour, on behalf of the undertaking, should be given an appropriate disincentive to discourage them from participating in that activity. This could be formulated as either a fine, imprisonment, or a disqualification order.[295]

In addition to the risk of fines which may be imposed at the EU level, a company involved in cartel activity runs the risk of various additional penalties under their respective country's legislation.[296] Some National Competition Authorities (NCAs)[297] may take criminal or other enforcement action against individuals, depending on their

[292] *Ibid.*
[293] The EU has a leniency policy which offers companies involved in a cartel – which self-report and hand over evidence – either total immunity from fines or a reduction of fines which the Commission would have otherwise imposed on them available at: https://ec.europa.eu/competition/cartels/leniency/leniency.html (accessed 9 May 2020). See also Commission Notice on immunity from fines and reduction of fines in cartel cases (Oj 2006, C298 8.12.2006) which notice is essentially based on two principles: first, the earlier that undertakings contact the Commission, the higher the reward; second, the value of the reward will depend on the usefulness of the materials supplied.
[294] *Ibid.*
[295] Kokkinaki 2013 *IES* 10.
[296] "The EU Competition Rules on Cartels: A guide to the enforcement of the rules applicable to cartels in Europe" 2018 Slaughter and May available at https://prodstoragesam.blob.core.windows.net/highq/64584/eu-competition-rules-on-cartels.pdf (accessed 9 May 2020) 9.
[297] Council Regulation 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 EC developed the enforcement powers of the competition authorities of the EU Member States (also referred to as national competition authorities or NCA's).

respective national legislation. Certain Member States also provide for some kind of personal exposure for directors, which will be discussed hereunder.

In 2008 the Commission introduced a settlement procedure to supplement the existing Leniency Notice and Fining Guidelines.[298] The aim of the settlement procedure is to fast track the investigation process and to reduce European Court litigation in cartel cases, which in turn frees the Commission's resources, enabling it to pursue more cases.[299] The Commission retains its discretion to determine which cases may be suitable to explore settlement discussions.[300] The Commission may decide to discontinue settlement discussions, should it be found that the parties to the proceedings coordinated to distort or destroy evidence which would have been utilised to establish an infringement or to calculate the appropriate fine.[301]

In order to qualify for a settlement agreement, the parties are expected to acknowledge their participation in the cartel and accept liability for such conduct and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. Should the parties fully cooperate, they are rewarded with a 10% reduction in fines (cumulative to any leniency reduction).[302]

In addition to the imposition of administrative fines and/or other forms of criminal sanctions, third parties who have suffered loss as a result of cartel behaviour can also sue for damages before the national courts.[303] In December 2014, a new EU Directive (hereinafter "the Damages Directive")[304] came into effect, which aimed to

[298] Commission Notice on the conduct of settlement procedures in view of the adoption of decision pursuant to Article 7 and Article 23 of Council regulation (EC) No 1/2003 in cartel cases (OJ 2008 C167/1 2.7.2008) and Commission Regulation (EC) 622/2008 (OJ 2008 L171/3, 1.7.2008) amending Regulation 773/2004 with regards to the conduct of settlement procedures in cartel cases.
[299] *Ibid* at para 1.
[300] *Ibid* para 5.
[301] *Ibid.*
[302] *Ibid.*
[303] Slaughter and May 2018 9.
[304] Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L349, 5.12.2014) available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG (accessed 10 May 2020).

harmonise the rules governing actions for damages under national law for competition law infringements.[305]

3.3 Criticism Against the Current Sanctioning System in the EU

Many academics and practitioners in the EU have criticised the current fine sanctioning system as being one-dimensional and, thus, inadequate to successfully meet its purpose.[306] Kokkinaki submits that notwithstanding the increase in the quantum of fines imposed, these fines are still trivial compared to what is required to ensure deterrence.[307]

The EU seems to have accepted the idea that the quantum of the fine is directly proportionate to its deterrence effect[308] Neelie Kroes, a former Commissioner in charge of the EU competition policy, stated that by taking better account of the economic and social impact which cartels have, the Commission imposes large fines in order to deter such cartels, by linking the fines to the relevant sales by the infringing undertaking.[309]

It would, however, seem that the imposition of large fines has not had its desired effect. In addition to these fines not deterring major cartels, very high fines may also lead to higher prices for consumers.[310] Ginsburg and Wright highlight this issue by pointing out that corporate fines tend to be redirected onto consumers in the form of higher prices, as firms pass on increased monitoring and compliance expenditures.[311]

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[305] A discussion of this Directive is beyond the scope of this dissertation. For further detail on this Directive see Isidro "Claims for Damages and Arbitration: The 2014/104/EU Directive – Chapter 13 – The Impact of EU Law on International Commercial Arbitration" 2017 and Drexl "Consumer Actions After the Adoption of the EU Directive On Damages Claims for Competition Law Infringements" 2015 *Max Planck Institute for Innovation and Competition Research Paper*

[306] Kokkinaki 2013 *IES* 10. See also Solek "Administrative and Judicial Discretion in Setting Fines" 2015 *World Competition* 547.

[307] *Ibid.*

[308] Kokkinaki 2013 *IES* 11.

[309] Kroes "The Lessons Learned – 36th Annual Conference on International Antitrust Law and Policy" Speech presented at Fordham University New York (24 September 2009).

[310] Kokkinaki 2013 *IES* 12.

[311] Ginsburg & Wright 2012 *Competition Policy International* 57.

A further issue with such exorbitant fines is that in many cases it runs the risk of exceeding a companies' ability to pay such fines. Even if a fine does fall within the confines of a company's ability to afford the fine, Wils remarks that there are other "undesirable side-effects".[312] Various stakeholders in the infringing undertaking may be affected by the imposition of a fine. Inclusive of these effected stakeholders are bondholders and other creditors.[313] The imposition and payment a fine would also most likely result in a decrease of salaries and bonuses of the infringing company's employees.[314] Furthermore, revenue generated from income tax would be reduced.[315] In addition to all of the above, the infringing undertaking will most likely attempt to recover its losses, in part or in full, by implementing higher prices in its relevant market, which has a direct impact on the consumer.[316] The reality is that the consumer is affected on two occasions: firstly, at the time at which the anti-competitive behaviour took place and secondly, when paying higher prices for the product or service as a result of the fine.

Recidivism[317] of anti-competitive behaviour in the EU, illustrates that notwithstanding the imposition of high fines in nominal numbers, such fines do not have the desired effect of deterring such behaviour.[318] The fact that the recidivism numbers remain relatively unchanged, illustrates that the imposition of large fines, as the sole enforcement policy, is not as effective as initially envisaged.[319] The high rates of recidivism appear to indicate that businesses seem to regard infringing competition law solely as a matter of corporate risk.[320]

[312] Wils *World Competition* 2006 11.
[313] Kokkinaki 2013 *IES* 12.
[314] *Ibid.*
[315] *Ibid.*
[316] Calvino *European Competition Law Annual: Enforcement of Prohibition of Cartels* (2006).
[317] According to the EU General Court, "recidivism, as understood in a number of national legal systems, implies that a person has committed fresh infringements after having been penalised for similar infringements". See, *inter alia*, European Court of Justice (ECJ) *Thyssen Stahl v Commission* Case T-141/94 (1999) ECR II-347 par 617.
[318] Kokkinaki 2013 *IES* 13.
[319] *Ibid.*
[320] *Ibid.*

A further issue that has arisen in EU competition law, that may be relevant to the imposition of an administrative fine, concerns the definition of "undertaking". For the purposes of EU competition Law, the term "undertaking" refers to "an abstract term for entities engaged in economic activity, regardless of their legal status".[321] The definition of an "undertaking" may include both a parent company and its subsidiary where the former has exerted a "decisive influence" over the latter and actually does so.[322] It has become trite in EU competition law that where a subsidiary is wholly owned by its parent company, there is a rebuttable presumption that the latter exercises a decisive influence over the former.[323] The effect of this presumption is that the conduct of the subsidiary is imputed onto the parent company. The European Court of Justice in the *AEG* case specified that the fact that a subsidiary has a separate legal personality will not prevent such undertaking's conduct being imputed onto the parent company.[324] This is especially true where the subsidiary does not dictate its own operations, but gets its instructions from the parent company.[325]

The effect of the aforementioned judgement is that the administrative fine is calculated on the turnover of both the parent company and the subsidiary.[326] Kokkinaki submits that placing parent companies and its subsidiaries in the same basket does not abide by the principles of equal treatment and proportionality.[327] Hofstetter and Ludescher argue that only where the parent company played an

[321] European Court of Justice (ECJ) *Dansk Pelsdyravlerforening v Commission* Case T-61/89 (1992) ECR II-01931.
[322] Court of First Instance (CFI) *Tokai Carbon Co. Ltd and others v Commission*, Joined Cases Case T- 71, 74, 87 and 91/ 03 (2005) paras 59 - 60.
[323] European Court of Justice (ECJ), *Akzo Nobel NV and others v. Commission*, Joined Cases C- 97/08 (2009) ECRI-8237 para 60: "According to the settled case-law of the Court of Justice and the Court of First Instance (ECJ, *Stora Kopparbergs Bergslags v Commission* Case T-354/94, paragraph 80, confirmed by ECJ, *Stora Kopparbergs Bergslags v Commission* Case C-286/98, paragraphs 27 to 29), the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power."
[324] European Court of Justice (ECJ) *AEG-Telefunken AG v Commission* Case 107/82 (1983) ECR 3151 para 49.
[325] *Ibid.*
[326] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty read with the Commission's Guideline on the method of setting fines (2006).
[327] Kokkinaki 2013 *IES* 14.

active role in the anti-competitive conduct can it rightfully be accused of such.[328] In the absence of the parent company's involvement, such company should only be held liable where they failed and/or refused to implement a robust competition compliance programme.[329] It has also been held that holding the parent company liable in these circumstances is contrary to the principle of legality and presumption of innocence under Article 6(2) and 7 of the ECHR.[330]

By holding both the parent company and its fully owned subsidiary liable for anti-competitive behaviour the size of the fine is substantially increased.[331] Not just this, but the Commission also then places its focus on these parent companies, notwithstanding their innocence and/or best efforts to enforce pro-competitive behaviour in their business, and in turn neglects to place any responsibility on the individuals who master minded the transgressions.[332]

The last bit of criticism against fines is the apparent criminal nature thereof within the EU. It has been argued by critics that the high level of fines in the EU is a clear indication of their punitive and, thus criminal nature. This assertion is based on the so-called "Engel-criteria"[333] of the European Court of Human Rights (hereinafter "the ECtHR").

[328] Hofstetter and Ludescher "Fines Against Parent Companies in EU Antitrust Law: Setting Incentives for 'Best Practices Compliance'" 2010 *World Competition* 55.
[329] Hofstetter and Ludescher 2010 *World Competition* 66.
[330] Blanco *et al* "Fine Arts in Brussels: Punishment and Settlement of Cartel Cases Under EC Competition Law" 2011 11-12. See also Article 6(2) which states that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. Article 7 states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law as the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
[331] Kokkinaki 2013 *IES* 15.
[332] *Ibid.*
[333] European Court of Human Rights (ECtHR) *Engels and others v. Netherlands* no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

The Engel criteria is an objective test which is utilised to determine whether proceedings involve the determination of a criminal charge in the sense of Article 6 of the ECHR. The following factors are applied:

- The classification of the offence under domestic (national) law;
- The nature of the offence; and
- The nature and severity of the penalty.[334]

The EU Courts have declared to the aforementioned criticism as unfounded. The ECJ in the *Schindler* case stated "the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6 of the ECHR as interpreted by the European Courts of Human Rights".[335]

Wils concurs with the EU Courts in relation to the non-criminal status of fines. Wils is of the opinion that the increase in the level of competition law fines imposed by the Commission has no relevance whatsoever in this respect.[336] Wils states further that even if these fines were to be increased in the future, they would still not be criminal within the meaning of EU law.[337]

3.4 Imposition of Criminal and/or Civil Sanctions on Individuals

The imposition of corporate fines is indeed necessary, but has fallen short of effectively combatting anti-competitive behaviour in the EU. What has become clear in EU competition law is that despite the fact that individuals intently lead the undertaking to infringe competition laws; the Commission has limited options, in its arsenal, to impose sanctions on the individual.[338]

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[334] *Engel*s para 82.
[335] European Court of Justice (ECJ) *Schindler Holding Ltd and Others v Commission* Case C-501/11 P (2013) ECR I-0000 para 33.
[336] Wils "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights" 2010 *World Competition* 13.
[337] *Ibid.*
[338] Blanco and de Pablo "EU Competition Law Enforcement Elements for a Discussion on Effectiveness and Uniformity" 2011 Paper presented at the Fordham 38th Conference on International Antitrust Law and Policy 40.

In theory, under the current sanctioning system in the EU, corporate penalties aim at discouraging the individual persons within the firm from participating in anti-competitive conduct, whilst also encouraging firms to monitor, detect and prevent their employees from breaching competition law rules.[339] Kokkinaki is of the view that this goal, however, would only really be achieved by the following: where every stakeholder in the infringing firm, and not only the consumer, suffers damages and where the management team of the infringing firm could actually control its employees.[340] Kokkinaki states that this aim may be achieved with SME's, but where the guilty enterprise is a large multinational, it is not always possible for the management team to exercise total control of its employees.[341] Another aspect pointed out by Kokkinaki which may add to the rise in anti-competitive behaviour is that the corporate group's employees and lower executives intently infringe competition laws which may yield greater profits (for example through cartel activities aimed at price fixing or market division) as they aim for promotions and/or higher salaries.[342]

It, thus, seems as though the threat of fines on infringing undertakings is not sufficient to prevent competition law violations as the personal profit, which arises from these violations, far outweighs the threat of a fine.[343] Kokkinaki argues that the missing key to a truly effective sanctioning system is to impose sanctions on the individuals within the undertakings.[344] This could potentially fill in the gap of lack of personal liability and influence the individual's moral commitment to the law.[345]

A number of countries in the EU provide for criminal sanctions, including fines and imprisonment, for individuals who participate in cartels.[346] In the UK participation in a cartel is regarded as a criminal offence, in terms of section 188 of the Enterprise Act

[339] Geradin 2011 *TILEC Discussion Paper* 20.
[340] Kokkinaki 2013 *IES* 17.
[341] *Ibid.*
[342] *Ibid.*
[343] *Ibid.*
[344] *Ibid.*
[345] *Ibid.*
[346] Slaughter and May 2018 10.

2002,[347] and is punishable by imprisonment and/or fines.[348] In the UK a cartel criminal offence is defined as an agreement between at least two persons that, if implemented, would lead to at least two competitors agreeing to fix prices, limit supply or production, share markets or engage in bid-rigging.[349] What is important to note is that it is not the participation of an infringement, postulated in Article 101 of the TFEU[350] (or the UK Competition Act 1998),[351] that is criminalised. The Enterprise Act of 2002 separately defines and criminalises a cartel offence. Interestingly, it is not necessary to indicate the presence of an anti-competitive effect to prove a cartel offence.[352] Furthermore, whether an individual was acting with the company's authority, is irrelevant when determining whether a cartel offence has been committed.[353] Where the relevant agreement was reached outside of the UK, then a criminal prosecution can only be commenced where the agreement was also implemented in the UK.[354]

3.5 Directors Disqualification

The term "director disqualification" means that the infringing conduct of the individual director is imputed personally on that person, who can then be prohibited from participating in the management of any company for a specified period, if he/she knew or ought to have known that such conduct was taking place.[355] Once again the goal here is deterrence, although in this case Kokkinaki points out that the aim is to deter the individuals within the undertaking and not the firm (as a juristic person)

[347] Enterprise Act 2002 s188.
[348] Section 190(1)(a) of the Enterprise Act 2002 states that a person guilty of an offence under section 188 is liable on conviction on indictment to imprisonment for a term not exceeding five years or to a fine or to both.
[349] Enterprise Act 2002 s188(2)(a)-(f).
[350] TFEU Article 101.
[351] Competition Act 1998
[352] Slaughter and May 2018 11.
[353] *Ibid.*
[354] *Ibid.*
[355] Khan "Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?" 2012 *World Competition* 89.

from participating in cartel conduct and to, further, encourage those individuals in power to implement competition law-compliant regulations within the undertaking.[356]

This type of sanction is relatively novel within the EU member states. The United Kingdom (who admittedly is no longer a member of the EU as a result of Brexit, but which adopted this sanction while it still was a EU member) pioneered this type of sanction by promulgating the Company Directors Disqualification Act[357] (hereinafter the "CDDA").[358] The UK officially started applying the CDDA to competition law in June 2003 when the Enterprise Act[359] came into force. In June 2010 the OFT published a revised version of its first guidance document on the topic entitled *Director Disqualification Orders in Competition Cases*[360], which document sketched a road map which would hopefully increase the deterrent effect of Competition Disqualification Order's. The Office of Fair Trading and a competent industry regulator may seek a competition disqualification order from any competent court.

In light of the UK's vast experience with this type of sanction, the relevant laws and regulations adopted by the UK competition law authorities will be used as the benchmark for director disqualification as a sanction for anti-competitive behaviour. According to the CCDA, a director of a company is any person who acts as a director if it, whatever his or her title is.[361] The definition of a director includes individuals who act as directors even though they are not validly appointed, or even if there has been no formal appointment as a director at all.[362]The CCDA also states that unregistered companies will be bound by these provisions, which is inclusive of unregistered subsidiaries or branches of companies which are incorporated outside of the UK, on the condition that they carry on business within the UK.[363]

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[356] Kokkinaki 2013 *IES* 24.
[357] Company Directors Disqualification Act (CDDA) 1986.
[358] Hannigan *Company Law* (2010) 53.
[359] Enterprise Act 2002.
[360] Office of Fair Trading, Director Disqualification Orders in Competition Cases, Summary of responses to the OFT's consultation and OFT's conclusions and decision document (May 2010). https://webarchive.nationalarchives.gov.uk/20140402155253/http://www.oft.gov.uk/OFTwork/consultations/cdq (accessed 19-04-2020).
[361] CDDA s9E(5).
[362] Practical Law Company (PLC) Competition 2013.
[363] CDDA 1986 s22(2).

The rationale behind the disqualification is to ensure that the disobedient director is removed from his or her position of influence within the company and, further, barred from relying on the company's limited liability to escape the consequences of his or her actions.[364] There is a piercing of the corporate veil.

Competition law in the UK offers two separate versions of directors' disqualification, namely a Competition Disqualification Order (hereinafter "CDO") and a Competition Disqualification Undertaking (hereinafter "CDU"), both of which I will briefly discuss hereunder.

In order for the imposition of a CDO on a director, two conditions need to be met: firstly the undertaking of which the individual is a director must have breached competition law and secondly, the individuals conduct must render him or her unfit to manage a company.[365] Should both conditions be met then a court can impose a CDO, however, the CDO cannot exceed a period of 15 years.

The Office of Fair Trading or the Regulator will follow a five-step process when deciding whether to apply for a CDO. The first stage involves verifying whether there is sufficient proof of a breach of competition law. The second stage involves an assessment of the nature of the breach that takes place. During the third stage the authorities look at the appropriateness of a CDO in lieu of a leniency request. The fourth stage involves an analysis of the director's responsibility for the infringement and the justification of the application of a CDO. Lastly, at the fifth stage, the mitigating and aggravating factors are taken into cognisance.[366]

CDU's are an alternative to CDO's. A CDU occurs where the director accepts to not take part in the infringing undertaking in question for a certain period of time.[367] The duration of the CDU is directly dependent on the seriousness of the prohibited action

[364] Bradley "Enterprise and Entrepreneurship: The Impact of Director Disqualification" 2001 *Journal of Corporate Law Studies* 53.
[365] CDDA s9A (2) and (3).
[366] To help it consider these factors the Office for Fair Trading or the regulator may use any or all of the information-gathering powers in sections 26 – 28 of CA98, as authorised by sections 9C(1) and 9C(2) of the CDDA.
[367] CDDA s9(A)(9).

by the director.[368] Mitigating and aggravating circumstances will also be taken into account in determining the time period, which cannot exceed 15 years in any event.[369] Should the director breach the terms of the CDU, then he or she may either be fined or sentenced up to two years of imprisonment.[370] The director in question will also be personally liable for the debts incurred by the infringing undertaking for the period in which he or she was part of the latter's management.[371]

Kokkinaki remarks that directors' disqualification provides competition law authorities with alternative sanctions to the imposition of administrative fines and forms the foundation on which an effective individual liability system can be built. Due to the personal implications that a CDO or CDU may have on a director it aids in deterring anti-competitive behaviour.[372] Since the inclusion of CDO's and CDU's within the competition authorities sanctioning arsenal, there has been an increase in the amount of directors which seek legal advice in order to ensure that their companies avoid infringing competition laws and in turn avoid the risk of a CDO.[373]

Albeit the positive deterring effect, that directors' disqualifications have, it is not without criticism. Kokkinaki submits that it may dissuade valuable professionals from accepting executive director positions.[374] Another issue which may arise is where a director is prematurely removed from his/or her position as a result of the imposition of a CDO, then severance packages or "golden handshakes" tend to be applicable.[375] As to whether this is ethical and good business practice is another story. Kokkinaki also points out the negative stigmatisation which is carried by the directors who have faced a CDO and CDU.[376] They will most likely suffer substantial

[368] OFT Guidance 3.5.
[369] CDDA s9(B)(5).
[370] CDDA s13.
[371] CDDA s15.
[372] Kokkinaki 2013 *IES* 30.
[373] Khan 2012 *World Competition* 93.
[374] Kokkinaki 2013 *IES* 30.
[375] *Ibid.*
[376] *Ibid.*

reputational damage which would in turn result in difficulties finding a new job in the future.[377]

Notwithstanding the aforementioned criticism, it nevertheless appears that disqualification coupled with other pecuniary sanctions on undertakings which infringe competition law may result in the perfect mix to combat anti-competitive behaviour.

3.5 Conclusion

Administrative Fines, on its own, are no longer considered the best sanctioning system. Targeting the corporate executives coupled with the imposition of fines on the infringing undertakings will ensure a higher level of deterrence.[378] The Damages Directive published by the EU Commission in 2014 is most definitely a step in the right direction. Individuals who have suffered at the hands of cartelists can now sue for damages before a national court.

Higher fines not only fail to deter anti-competitive behaviour, they also have a massive impact on society and can be difficult to implement in times of economic crises. Excessive fines also run the risk of being in conflict with the legal principle of proportionality and would, therefore, not be sustainable as such fines would be subject to judicial review or appeal and be reduced in any event.[379]

Directors' Disqualification seems to be the most appropriate and effective policy response to anti-competitive behaviour in the EU. Directors Disqualification can be applied in most matters of competition law infringement, ranging from the least severe to the most severe. The risk of being disqualified acts as a strong disincentive to directors who fear having their reputation damaged and their income cut. Therefore, directors' disqualification could prove to be a valuable tool in the

[377] *Ibid.*
[378] *Ibid.*
[379] Kokkinaki 2013 *IES* 36.

Commission's arsenal in order to bring a fine balance to the current sanctioning system. Directors' Disqualification may just be the missing piece of the puzzle.

Chapter Four: Recommendations and Conclusion

As things currently stand, the following aspects encapsulate administrative penalties, as imposed on cartelists, in South African Competition Law:

- First time contraventions of section 4(1)(b) of the Competition Act will carry a penalty of up to 10% of that firm's turnover in the Republic and its exports from the Republic in the preceding financial year;
- Where the conduct of a firm is substantially a repeat of the conduct previously found by the Tribunal to be a prohibited practice, then such conduct will carry a penalty of up to 25% of that firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year;
- Controlling firms can be held jointly and severally liable for an administrative penalty;
- The turnover of a controlling firm or firms can be included into the penalty calculation, if that company knew or should reasonably have known about the conduct; and
- The quantification of the administrative penalties is guided by the factors set out in section 59(3) of the Competition Act, which list is not *numerous clausus*.

As has been indicated in the previous chapters, administrative penalties play two roles: punishment and deterrence, with the latter being more sought-after.[380] In order to achieve deterrence, there needs to be a balance between the likelihood of cartel detection and a sufficiently high penalty. It is, however, submitted that high penalty amounts, alone, have very little deterrent effect especially where there is no realistic possibility of detection. The size of the penalty should always be weighed against the harm suffered by the consumer, the impact that such fine would have on the firm and its employees as well as various other social and economic factors.

[380] Niels *et al* "Determination and Application of Administrative Fines for Environmental Offences: Guidance for Environmental Enforcement Authorities in EECCA Countries" 2011 *OECD.*

The probability of detection of cartels could be measured by looking at the number of cartels which are uncovered compared to the total universe of cartels which exists. This is, however, a difficult task due to the secretive nature of cartels which allow for their activities to remain hidden. Low detection rates are one of the main reasons why there was a significant increase in administrative penalties in the EU.[381] Detection is also hampered by the lack of investigative resources.

Wils suggests that optimal deterrence is best achieved if penalties directly reflect the benefits that accrue to firms engaging in cartel conduct.[382] The value of the affected sales and the duration of the infringement is utilised as a proxy to evaluate the economic effect of the infringement, which in turn aids the competition authorities in quantifying the appropriate penalty. This principle is mirrored in the European Commission's 2006 Guidelines, which state that fines are based on the value of sales in the relevant market and the duration of the infringement.[383] Similarly section 59(3)(a) of the Competition Act provides that when determining an appropriate penalty, the Competition Tribunal must consider the nature, duration, gravity and extent of the contravention.[384] Furthermore, section 59(3)(e) provides that the Tribunal must look at the level of profit derived from the contravention.[385]

One of the key determining factors in quantifying an appropriate administrative penalty is the turnover threshold provided for in section 59 of the Competition Act. The interpretation of the phrase "preceding financial year" has been inconsistent in South Africa through the years, as there is no conclusive definition thereof. The benefit of there being no definition is that the Competition Tribunal is given the flexibility, sometimes required, to quantify the administrative penalty in each case. The down side is that there are inconsistencies in interpreting the term which leads to the inconsistent quantification of administrative penalties. In the EU this issue has

[381] Ascione *et al European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* 83.
[382] Wils 2006 *World Competition* 208
[383] 2006 Guidelines
[384] The Competition Act s59(3)(a).
[385] The Competition Act s59(3)(e).

been dealt with, specifically in the 2006 Guidelines, which specify that the financial year preceding the cessation of the infringement should be used by the Commission when determining the maximum penalty to be imposed in each case. It is submitted that South Africa should adopt the policy adopted in the United States[386], which has extended the turnover threshold to include all affected turnover generated during the *full duration* of the contravention without any reference to a specific financial year. This would strengthen the deterrent effect which administrative penalties already aim to achieve.

It has been illustrated that large penalties could lead firms into becoming insolvent. This is one of the reasons South Africa placed a cap on penalties and made provisions which require a firm to make representations of objective evidence demonstrating that the penalty would irretrievably jeopardize a firm's economic viability and result in the de-valuation of the firm's assets. Should a contravening firm become insolvent due to a large administrative penalty, then one could argue that competition is lessened, because of the reduction in the number of firms in a particular market. This argument is, however, flawed as competition is not necessarily dependent on the number of firms, but rather on the behaviour of such firms.

Due to the detrimental effect that administrative penalties may have on contravening firms, firms may be more amenable to entering into settlement agreements with the competition authorities. Settlement agreements generally award benefits to a firm (in the form of a lower penalty or less burdensome remedy) in exchange for its admission of participating in anti-competitive behaviour, acceptance of penalties and cooperation with the competition authorities in prosecuting the remaining

[386] Section 1 of the Sherman Act as amended by section 215 of the Antitrust Criminal penalty and Enforcement Act which provides that antitrust authorities determine administrative penalties with reference to a base fine calculated as a fixed percentage of 20% of the affected commerce over the *full duration* of the infringement (as opposed to a particular preceding financial year) (authors emphasis).

contravening firms.[387] Firms have greater incentives to settle when they face a high probability of an adverse finding by the Tribunal or Court, resulting in a penalty which is substantially higher than the penalty agreed upon in the settlement agreement. Competition authorities also have incentives to settle in order to relieve the strain on limited resources, limit consumer harm and focus resources on prosecuting other cartel behaviour. It is, thus, encouraged for competition authorities to pursue entering into settlement agreements, as opposed to running a full hearing which consumes valuable time and resources.

Section 59(3) of the Competition Act provides no guidance as to how or whether the factors set out therein should be applied to consent agreements. Whether the Tribunal should apply the factors postulated in section 59(3) to settlement agreements in unison with the manner in which it is applied to the imposition of penalties in terms of section 59 in general, is debatable. Public interest deems to be the driving factor in the Tribunal approving or not approving consent agreements.

Furthermore, as has been illustrated above, some firms try and recoup their losses suffered as a result of the administrative penalties, by increasing the prices of the services and/or products. This, obviously, has a detrimental effect on the consumer and should be prohibited. Where contravening firms are ordered to pay an additional amount for consumer redress, I am of the opinion that such monies should not be paid into the National Revenue Fund, where interest would accrue to the benefit of the Revenue Fund, but should rather paid to a fund which can be administered by the IDC. The rationale behind this argument is that the interest that accrues on this amount should be utilised to benefit the consumer and not the State.

In order to avoid cartelists from increasing their prices, it is imperative that the competition authorities continue to monitor the firms by analysing the firm's finances to ensure that the fine is not being passed onto the consumer by increasing the prices of their goods and/or services. The Competition was fully aware of this risk in

[387] Wils "The use of settlements in public antitrust enforcement: Objectives and Principles" 2008 *World Competition* 352 (Hereinafter "Wils 2008").

the *Pioneer* case and, thus, in addition to the R500 million administrative penalty, incorporated a clause in the settlement agreement that Pioneer would adjust its pricing of flour and bread to reduce its gross profit by R160 million. This laid the way forward for the Competition Commission to implement such conditions, in addition to the imposition of the standard administrative penalty, which at the end of the day facilitates consumer redress. It is, therefore, submitted that the laws and regulations surrounding administrative penalties, especially in relation to cartels, needs to be amended to enable the consumer, who is most hard-hit by the cartel conduct, to be directly and/or indirectly compensated.

In addition to the imposition of administrative penalties in South African Competition Law, we can take a play out of the UK's book, by disqualifying directors from firms which have participated in cartel conduct. Directors who have been disqualified should be placed on a national "Disqualified Directors List" at the Companies Intellectual Property Commission (CIPC), which prohibits such individuals from being appointed as a director of any firm for the next 5 years. The risk of being disqualified could act as a strong disincentive to directors who fear having their reputation tarnished and their income substantially reduced. This would still fall within the confines of civil law and would, thus, not require a separate criminal court to impose the penalty.

In relation to the criminal nature of administrative penalties in South Africa, there seem to be two divergent views, namely, that administrative penalties are either outright criminal in nature, or *sui generis*. If one strictly applies the *Engel* criteria under European Union human rights law (looking at the nature and severity of the sanction), it would appear that administrative penalties, as they are currently formulated in section 59 of the Competition Act, could be construed as criminal in nature. There are several arguments in support of the criminal nature of administrative penalties, Firstly, the size of the administrative penalties imposed, to date, are considerably high compared to the maximum fines imposed in criminal matters. Secondly, the Tribunal is tasked with considering the general

blameworthiness of the contravening firm and the degree to which such firm has co-operated with the Competition Authorities in terms of sections 59(3)(c) and (f) respectively. Lastly recidivism is a factor which is taken into account when quantifying the administrative penalty.[388]

The Competition Act makes a clear distinction between section 59 proceedings and the various other criminal sanctions set out therein, each with their respective burden of proofs. It was the express intention of the Executive to enforce competition law infringements outside the confines of criminal procedure, due to the past experience with competition law enforcement. It would be preferable for our courts to deter this uncertainty, by clarifying the criminal or non-criminal status of administrative penalties in South African Competition Law.

The Competition Authorities are fighting a noble fight in trying to expose and prosecute anti-competitive business practices. However, the current penalty dispensation requires reform to aid in the aforementioned efforts. Administrative penalties should always be determined in a manner that takes into account the actual benefit received by the contravening firm and the actual harm caused to society as a result of the anti-competitive behaviour. This is why it is suggested that the calculation of the fine should only be based on the infringing line of business and not the firm's entire turnover. Above all else, the policies which regulate administrative penalties must always be formulated in a manner which is effective in deterring firms from engaging in business practices that undermine competition in South African markets.

[388] Section 59(1)(b) looks at whether the conduct is substantially a repeat by the same firm of conduct previously found by the Competition Tribunal, or previously acknowledged by the firm in a consent order, to be a prohibited practice. Section 59(3)(g) further looks at whether the respondent has previously been found in contravention of the Competition Act.

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