

Penalties for Anti-Competitive Conduct: Sharpening the sting of South Africa's competition authorities

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I. Introduction

The recent series of administrative penalties imposed on respondent firms by the South African competition authorities is indicative of an active competition law regime committed to the development of sustainable and pro-competitive South African business practices. However, it remains to be seen whether these measures in fact effectively address the anti-competitive conduct at which they are specifically directed and serve as a meaningful deterrent to potential offenders.

The South African Competition Act (“the Act”)¹ seeks “to promote and maintain competition”² in South Africa so that, in turn:

- (i) the “*efficiency, adaptability and development*” of the South African economy is promoted;³
- (ii) consumers are provided with “*competitive prices and product choices*”;⁴
- (iii) employment is promoted and the “*social and economic welfare of South Africans*” is advanced;⁵
- (iv) “*opportunities for South African participation in world markets*” are expanded and “*the role of foreign competition*” is recognised;⁶ and
- (v) “*small and medium-sized enterprises have an equitable opportunity to participate in the economy*”.⁷

It follows then that any anti-competitive conduct on the part of a firm which threatens or undermines the realisation of these objectives may warrant the imposition of an administrative penalty in terms of the Act.

¹ Act No. 89 of 1998 (as amended).

² Section 2 of the Act.

³ Section 2(a) of the Act.

⁴ Section 2(b) of the Act.

⁵ Section 2(c) of the Act.

⁶ Section 2(d) of the Act.

⁷ Section 2(e) of the Act.

An administrative penalty is a punitive measure that the South African Competition Tribunal (the “Tribunal”) may impose on a respondent firm in terms of the Act for participating in an anti-competitive practice prohibited by the Act; contravening the terms of an order made by the Tribunal or the Competition Appeal Court; or, albeit to a lesser extent, acting in contravention of the merger control provisions of the Act.⁸ Such a penalty may be determined and enforced in one of two ways, namely:

- (i) determined and enforced unilaterally by the Tribunal in terms of section 59 of the Act; or
- (ii) determined in a consent agreement concluded between the respondent firm concerned and the South African Competition Commission (the “Commission”) and approved and enforced by the Tribunal in terms of section 58 of the Act.

A significant element of the determination of an effective administrative penalty is the turnover threshold that is provided for under section 59 of the Act, which caps the quantum of an administrative penalty at “10 per cent of the firm’s annual turnover in the Republic and its exports from the Republic during the firm’s preceding financial year”.⁹ Despite the significance of this threshold to the determination of an appropriate administrative penalty, both the South African legislature and the South African competition authorities have shown a reluctance to define or consider the meaning of the term “*preceding financial year*”.

Furthermore, the Act does not regulate or provide guidance to the Tribunal in its determination of whether a consent agreement provides for an “*appropriate*” penalty for anti-competitive conduct in any given case (as is required of it in terms of section 58 of the Act). As such, the majority of consent agreements approved by the Tribunal to date have not necessarily been scrutinised in a manner which is consistent with and which promotes the objects of the Act.

On the one hand, the absence of a definition for the term “*preceding financial year*” in section 59 of the Act and the absence of any regulations or directives which set out how a consent agreement is to be scrutinised under section 58 of the Act may be considered to provide the Tribunal with the flexibility needed to determine an appropriate administrative penalty in any given case. On the other hand, a lack of a definition for the term “*preceding financial year*” in the Act has exposed the arbitrariness of this term and a lack of consistency in the Tribunal’s decisions. A lack of clarity as to what constitutes an “*appropriate*” penalty in the context of a consent agreement approved under section 58 of the Act has further contributed to a lack of consistency in the Tribunal’s decisions.

⁸ Section 59(1) of the Act. See Brassey et al *Competition Law* (Juta Law, Lansdowne: 2002) at 324-325.

⁹ Section 59(2) of the Act.

Collectively, these shortcomings of the Act have the potential to prevent respondent firms from appreciating in advance the extent to which they may be liable should they be found guilty of anti-competitive conduct by the Tribunal. In turn, this consequence may:

- (i) reduce the degree of deterrence which an administrative penalty may otherwise yield; and
- (ii) discourage foreign investors from investing and doing business in South Africa to the extent that they do not consider themselves protected by an effective competition law regime.

This result would surely frustrate the realisation of the objects of the Act.

The South African model of determining administrative penalties therefore needs to be refined to ensure that it is one which will facilitate the development and enforcement of punitive measures which are appropriate and effective in addressing anti-competitive conduct in South African markets and which ultimately will provide for the promotion and maintenance of competition in South Africa.

II. What constitutes an appropriate administrative penalty?

Unlike the compensatory nature of civil damages or the restorative nature of interdicts and positive obligations that may be imposed following a contravention of the Act, administrative penalties are primarily aimed at penalising a respondent firm in a manner that will effectively deter that firm from committing further contraventions of the Act without threatening the financial sustainability of that firm.¹⁰ Administrative penalties also seek to deter potential offenders from participating in anti-competitive business practices prohibited by the Act.¹¹

The most optimal of fines has been described by commentators as one that fulfils the aim of deterrence.¹² The efficacy or appropriateness of an administrative penalty should therefore be measured with reference to the degree of deterrence that that penalty will ultimately yield.¹³ This

¹⁰ Brasseley et al (n 8) at 317.

¹¹ Joshua 'The European Commission's New Fining Guidelines and How They May Affect Cartel Enforcement' *George Mason Law Review* (13 September 2006) at 5 and 7.

¹² Wehmhörner 'Optimal Fining Policies' Paper presented at the *Remedies and Sanctions in Competition Policy* Conference, Amsterdam Centre for Law and Economics, February 2005 at 8.

¹³ Joshua (n 11) at 5 and 7. See also *The Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and others* – Case Number: 08/CR/Mar01 (“the *Federal Mogul* case”) at para 166.

notion has been accepted by the Tribunal.¹⁴ Deterrence is best achieved by setting the quantum of a fine as high as possible, provided that:

- (i) the fine does not exceed a firm's ability to pay;
- (ii) the burden of the fine is proportional to the actual harm caused to society; and
- (iii) the gravity of the fine does not discourage firms from engaging in conduct which would otherwise represent an efficiency gain.¹⁵

Furthermore, the degree of deterrence that an administrative penalty yields will presumably be higher where the criteria against which the penalty is assessed and ultimately formulated is clear and known to all, particularly potential offenders who will thereby be better placed to anticipate and appreciate the likely consequences of any anti-competitive conduct.

Most fine setting models around the world, including the South African model,¹⁶ tend to provide for the calculation of a base fine, which serves as an indicator of what should be considered the maximum possible penalty in each case. Once calculated, this base fine is adjusted to appropriately reflect any mitigating and aggravating circumstances that may exist in each case. Where an inappropriately low fine is imposed on a respondent firm, a low degree of deterrence is likely to be achieved, as the respondent firm may very well consider a low fine to be a reasonable fee to continue engaging in anti-competitive conduct, i.e. merely a cost factored into the costs of conducting business. Conversely, where a high fine is levied on a respondent firm, a high degree of deterrence is likely to be achieved, provided that the social and economic well-being of that firm and all interested and affected stakeholders is not undermined. This proviso is critical to the determination of an appropriate administrative penalty since a respondent firm may become insolvent where the penalty imposed exceeds the ability of that firm to pay. The insolvency of the respondent firm may give rise to adverse social and economic costs for all stakeholders concerned (including managers, shareholders, employees, suppliers, customers, creditors and tax authorities).¹⁷ Some of these social and economic costs include:

- (i) the depreciation of the value of securities held by creditors;
- (ii) the reduction of employee benefits and the retrenchment of staff as part of efforts to pay the penalty through cost-cutting measures;
- (iii) the reduction of tax receipts; and

¹⁴ The *Federal Mogul* case (n 13) at para 166.

¹⁵ *Ibid.* Wehmhörner (n 12) at 7-8. Wehmhörner suggests that market allocation and horizontal price-fixing may, in certain circumstances, represent an efficiency gain where cost savings are generated and profit is maximised for the market as a whole. See also WPJ Wils 'Optimal Antitrust Fines: Theory and Practice' *World Competition* Vol 29, No 2, June 2006 at 18-22.

¹⁶ The *Federal Mogul* case (n 13) at para 165.

¹⁷ Wils (n 15) at 18-22.

- (iv) price increases that will ultimately hit the pocket of the end consumer.¹⁸

III. The determination of administrative penalties in South Africa

The Tribunal has a wide discretion to determine what will be considered an appropriate administrative penalty in a given case. How this discretion is exercised and limited, if at all, will depend on whether the penalty in question is determined unilaterally by the Tribunal under section 59 of the Act or in a consent agreement entered into between the Commission and a respondent firm and approved by the Tribunal under section 58 of the Act.

When determining an administrative penalty unilaterally, the Tribunal is required to exercise its discretion after considering the factors prescribed by section 59(3) of the Act. These factors include:

- (i) the nature, duration, gravity and extent of the contravention;
- (ii) any loss or damage suffered as a result of the contravention;
- (iii) the behaviour of the respondent firm;
- (iv) the market circumstances in which the contravention took place;
- (v) the level of profit derived from the contravention;
- (vi) the degree to which the respondent firm has co-operated with the competition authorities; and
- (vii) whether the respondent firm has previously been found to have acted in contravention of the Act.¹⁹

It was argued in the *Federal Mogul* case that there is no requirement in the Act that the turnover threshold provided for in section 59(2) of the Act should influence the size of the actual penalty, and that the turnover threshold should only come into play if the amount arrived at after taking into consideration the factors listed in section 59(3) exceeds the specified threshold.²⁰ The Tribunal dismissed this argument on the basis that “[i]t would be extremely difficult to specify the appropriate level of an administrative penalty without recourse to any point of reference”.²¹ The Tribunal will therefore determine an administrative penalty within the parameters set by the specified turnover threshold with the most serious of contraventions warranting the imposition of the maximum penalty. As such, the interpretation of the term “preceding financial year” could have a direct impact on the gravity of an administrative penalty and, in turn, the degree of

¹⁸ Wils (n 15) at 20.

¹⁹ Section 59(3) of the Act.

²⁰ The *Federal Mogul* case (n 13) at 164.

²¹ The *Federal Mogul* case (n 13) at 165.

deterrence which an administrative penalty is able to achieve. Possible interpretations of this term are discussed in section IV below.

When deciding whether to approve a consent agreement concluded between the Commission and a respondent firm, the Tribunal must determine whether the terms of the agreement (including the agreed penalty) are “*appropriate*” in the circumstances. The Act does not specifically require consent agreements to be assessed by the Tribunal with the same level of scrutiny as is required of the Tribunal in respect of administrative penalties determined in terms of section 59(3) of the Act. A review of the consent agreements which have been approved by the Tribunal to date will show that these agreements do not typically provide for administrative penalties determined with reference to the factors set out in section 59(3) of the Act.

A respondent firm is therefore better off concluding a consent agreement with the Commission where this is possible, as section 58 affords a respondent firm the opportunity to negotiate a penalty with the Commission that in turn may be approved by the Tribunal without necessarily being scrutinised against the factors prescribed by section 59(3) of the Act or having to be supported by relevant evidence.²² The Tribunal has not formally undertaken to assess penalties negotiated between respondent firms and the Commission with reference to the factors set out in section 59(3) of the Act, but has indicated that it will decline to approve a consent agreement where there are public interest grounds for doing so.²³

It is therefore not surprising that, to date, significantly more consent agreements have been approved than administrative penalties have been imposed unilaterally by the Tribunal for contraventions of the Act. This trend is likely to continue as long as the South African legislature and competition authorities remain silent as to what constitutes an “*appropriate*” administrative penalty and how such penalty is to be determined in each case. Until the legislature takes steps to formalise the way in which administrative penalties are imposed and consent agreements are negotiated and approved, it is hoped that the Tribunal will draw on the factors listed under section 59(3) in assessing and ensuring the appropriateness of a consent agreement. In this way,

²² An administrative penalty determined by a respondent firm and the Commission and approved by the Tribunal appears to be a more favourable alternative to an administrative penalty determined unilaterally by the Tribunal when one considers that the majority of penalties imposed on respondent firms in terms of consent agreements approved by the Tribunal to date have not met or exceeded the threshold prescribed by section 59 of the Act. In fact, most of these consent agreements include a recordal to the effect that the agreed penalty does not exceed the threshold prescribed by section 59 of the Act.

²³ *The Competition Commission of South Africa v Netcare Hospital Group (Pty) Ltd and another* – Case Number: 27/CR/Mar07 (the “*Netcare Hospital case*”) at paras 32-33. In determining whether a consent agreement was appropriate, the Tribunal asked whether the terms of the agreement adequately protected the public interest.

consent agreements would be more effective in addressing anti-competitive conduct and less likely to be used by respondent firms as a means to avoid the imposition of a heavy administrative penalty.²⁴

Unlike that of the United States (“US”) and European Union (“EU”) competition authorities, the exercise of the Tribunal’s discretion to determine an appropriate administrative penalty is – save for the factors to be considered under section 59(3) of the Act – currently not regulated by any guidelines or the like.²⁵ However, the Tribunal may draw on appropriate foreign and international jurisprudence to enhance its interpretation of the Act and, more specifically, its understanding of the term “*preceding financial year*”.²⁶ The Tribunal should therefore be encouraged to develop its approach to the determination of an appropriate administrative penalty by drawing on the experience of its foreign and international counterparts so that there is not only consistency in the law, but also greater efficacy of any administrative penalties that are imposed on delinquent firms.

IV. Possible interpretations of the term “preceding financial year”

There are a number of possible interpretations which could be ascribed to the term “*preceding financial year*” in section 59(2) of the Act – each interpretation having the potential ability to either enhance or undermine the efficacy of an administrative penalty to be imposed by the Tribunal in a given case. For example, 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

²⁴ In the *Netcare Hospital* case, for example, the Competition Appeal Court (the “CAC”) upheld the terms of a consent agreement negotiated and concluded by the Commission and the respondent firms, notwithstanding the fact that the Tribunal had found that the proposed penalty did not take account of certain aggravating factors which existed (see paras 23 and 28) and, as such, was “*inappropriately low*” (see para 29). The CAC held, at para 28, that the Commission – having conducted the investigation into the respondent firms’ misconduct – was well-placed to calculate the extent of the respondent firms’ infringements of the Act and the Tribunal should therefore defer to the Commission’s determination of the penalty. See also *The Competition Commission of South Africa v Pioneer Foods (Pty) Ltd* – Case Number: 15/CR/Feb07 (the “*Pioneer Foods* case”) where Pioneer Foods, unlike the other members of the bread cartel in which it participated, was subjected to “*the highest penalty the Tribunal was entitled to levy*”. The other members of the cartel, like Foodcorp and Tiger Brands, entered into consent agreements with the Commission which were approved on more favourable terms by the Tribunal than the administrative penalty imposed on Pioneer Foods.

²⁵ Brassey et al (n 8) at 326. Under US law, the competition authorities are required to determine the quantum of administrative penalties in accordance with the *US Federal Sentencing Guidelines, as amended (2004)*. Under EC law, the competition authorities adhere to the *EC Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 1/2003 (2006/C 210/02)* (“the *EC Commission Guidelines*”), <http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html> (as accessed on 31 August 2010).

²⁶ Section 1(3) of the Act provides that “[a]ny person interpreting or applying this Act may consider appropriate foreign and international law”.

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;
- (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.²⁷

It may be the case that the turnover generated in one particular financial year is significantly lower than other financial years and, as such, would be the respondent firm’s preferred “*preceding financial year*” when determining the turnover threshold of an administrative penalty for which it is to be held liable.

To date, the Tribunal has not defined the term “*preceding financial year*” and instead has typically determined the turnover threshold of administrative penalties on the basis of the financial year proposed by the Commission and accepted by the respondent firm(s) concerned.²⁸ The turnover threshold of each administrative penalty imposed by the Tribunal to date has therefore been determined without reference to any standard financial period. For example, the Tribunal has used what appears to be the financial year preceding the cessation of the contravention in both *The Commission v South African Airways*²⁹ and *The Commission v Tiger Consumer Brands*;³⁰ the financial year preceding the referral of the complaint to the Tribunal in *The Commission v Pioneer Foods*;³¹ the financial year preceding the commencement of the contravention in the

²⁷ Sutherland and Kemp *Competition Law of South Africa* (LexisNexis, Durban: 2000) at 12-10.

²⁸ *Ibid.* See the *Federal Mogul* case (n 13) at para 169 where the Tribunal indicated that it did not need to consider the meaning of the term “*preceding financial year*” where the financial year to be used was “*common cause*” between the Commission and the respondent firm.

²⁹ *The Competition Commission of South Africa v South African Airways (Pty) Ltd* – Case Number: 18/CR/Mar01 at para 71.

³⁰ *The Competition Commission of South Africa v Tiger Consumer Brands (Pty) Ltd* – Case Number: 15/CR/Nov07 at para 6.2.

³¹ *The Pioneer Foods Case* (n 24).

Federal Mogul case,³² and the financial year preceding the filing of the complaint in *Harmony Gold Mining Company Ltd v Mittal Steel South Africa Ltd*.³³

Without providing any clarity on the interpretation and application of the term “*previous financial year*” in determining the turnover threshold provided for in section 59(2) of the Act, the Tribunal recently confirmed in the *Pioneer Foods* case that it has an unfettered discretion to determine the quantum of an administrative penalty, which discretion must be exercised in a rational and justifiable manner after consideration of all relevant circumstances.³⁴ The Tribunal also noted that it has typically calculated administrative penalties ‘*on the basis of the “affected turnover”, i.e. that portion of the turnover of the [respondent] firm derived from the product market in which it was found to be act[ing] anti-competitively*’.³⁵ If one were to adopt this approach in determining the turnover threshold provided for in section 59(2) of the Act, the term “*previous financial year*” seems irrelevant, if not arbitrary and therefore unhelpful, to the Tribunal’s determination of an appropriate administrative penalty, as the “*affected turnover*” would presumably relate to the turnover of the respondent firm which can be shown to have been derived as a result of that firm acting anti-competitively and not the turnover of the respondent firm which was generated in any “*preceding financial year*”.

The *Pioneer Foods* case was taken on appeal by Pioneer and cross-appeal by the Commission, with the Commission apparently arguing that in cartel cases, penalties should be based on total turnover, not just the turnover of the affected line of business. Unfortunately this case has recently been settled, depriving the case law of an opportunity to further clarify this issue. It seems that the affected line of business measure first identified in the *Federal Mogul* case, and as refined in the *Pioneer Foods* case, will continue to be the benchmark for the foreseeable future.

In its limited interpretation of the term “*preceding financial year*”, the Tribunal appears to have given little consideration to interpretations adopted in foreign and international jurisdictions. In the *Federal Mogul* case,³⁶ for example, the Tribunal indicated that it is alive to the EU definition of the term “*preceding financial year*” when it stated, albeit without citing any authority for this statement,³⁷ that “*the [EU] ..., which also caps fines at 10 percent of the firm’s total sales in its*

³² The *Federal Mogul* case (n 13).

³³ *Harmony Gold Mining Limited and another v Mittal Steel South Africa Ltd and another* – Case Number: 13/CR/Feb04 at para 52.

³⁴ The *Pioneer Foods* case (n 24) at paras 142-147.

³⁵ The *Pioneer Foods* case (n 24) at para 140.

³⁶ The *Federal Mogul* case (n 13) at footnote 93.

³⁷ See Sutherland and Kemp (n 27) at 12-10 and 12-11.

previous financial year, interprets this as previous to the imposition of the fine, not to the cessation of the infringement'.

Contrary to this, however, the *EC Commission Guidelines*³⁸ specify that the financial year preceding the cessation of the infringement should be used by the EC Commission in determining the maximum administrative penalty to be imposed in each case.³⁹ Unlike the approach adopted by the South African competition authorities but similar to that which is adopted by the competition authorities in the United States of America ("US"), the EC Commission calculates an administrative penalty with reference to a percentage of a respondent firm's sales of goods or services to which the infringement pertains during the financial year preceding the cessation of the infringement (excluding all turnover from such year that is not affected by the anti-competitive conduct).⁴⁰ This percentage is determined by the gravity of the infringement and is multiplied by the number of years over which the infringement occurred.⁴¹ The product of this calculation is then adjusted depending on any relevant aggravating and/or mitigating circumstances.⁴² This approach is sensible to the extent that it ensures that the penalty will have some relevance to the circumstances which existed at the time that the infringement occurred.⁴³

In the United Kingdom ("UK"), the financial year preceding the imposition of the administrative penalty tends to be used as the base year for determining the financial ceiling of a fine.⁴⁴ This approach is logical insofar as it enables the competition authorities to determine an appropriate administrative penalty which takes into account a respondent firm's ability to pay a penalty at the time that such penalty is imposed.⁴⁵

Unlike their EU and UK counterparts, the US antitrust authorities determine administrative penalties with reference to a base fine calculated as a fixed percentage of 20% of the affected commerce (i.e. turnover generated) over the *full duration* of the infringement (as opposed to a

³⁸ *EC Commission Guidelines* (n 25). Point 13 of the *EC Commission Guidelines* states that the Commission "*will normally take the sales made by the undertaking during the last full business year of its participation in the infringement*".

³⁹ See Sutherland and Kemp (n 27) at 12-11. Sutherland and Kemp cite *Boel T-142/89* [1995] ECR II-867 as authority in this regard. See also Joshua (n 11) 3. Like the South African competition authorities, the EC Commission may not impose an administrative penalty which exceeds 10% of a respondent's total turnover in the relevant preceding financial year.

⁴⁰ Mackenzie 'Searching for certainty' *Without Prejudice* (February 2010) at pages 5-6.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See Sutherland and Kemp (n 27) at 12-11. The *OFT's Guideline as to the Appropriate Amount of Penalty* OFT 423, December 2004 is cited as authority in this regard.

⁴⁵ Sutherland and Kemp (n 27) at 12-11.

particular preceding financial year).⁴⁶ In turn, US law caps the quantum of an administrative penalty at either twice the gross financial gain achieved by the respondent firm from the infringing conduct or twice the gross financial loss sustained by consumers as a result of the infringing conduct in question, whichever is the greater, provided that each of these exceeds US\$100 million.⁴⁷ The question of which preceding financial year to use in determining the turnover threshold of an administrative penalty is accordingly irrelevant to the US competition authorities. The US model of fine setting advocates a high degree of deterrence in that the base fine is set as high as possible, being calculated:

- (i) with reference to the full period of a contravention; and
- (ii) with the intention of it being reflective of the actual benefit gained by the respondent firm or the actual harm caused to society as a result of the anti-competitive conduct, whichever is the greater.⁴⁸

By calculating the base fine with reference to the full duration of an infringement, the US model seeks to deter firms from manipulating their annual financial statements or from strategically selecting turnover generated in a particular financial year in an attempt to remove the financial sting of that fine.

V. The way forward

As the South African competition authorities continue in their efforts to expose and prosecute anti-competitive business practices, the South African legislature and competition authorities need to reconsider the way in which administrative penalties are determined in terms of the Act. In particular, it would be helpful for the South African legislature to amend the Act to extend the turnover threshold to include all affected turnover generated during the full duration of the contravention without reference to an arbitrary financial year (as per the US model discussed in section IV above). This approach would ensure that the resultant penalty is set as high as possible and is rationally connected to the circumstances relevant to the infringement in question (including the ability of the respondent firm to pay the penalty). Whilst refraining from fettering the discretion of the Tribunal in its determination of administrative penalties under the Act unnecessarily with restrictive legislative reforms, it would be useful for the Tribunal to issue a

⁴⁶ See section 1 of the Sherman Act 15 U.S., as amended by section 215 of the Antitrust Criminal Penalty and Enforcement Act (the “Sherman Act”). See Wehmhörner (n 12) at 11-13.

⁴⁷ *Ibid.* The Sherman Act also states that as an alternative to imposing a fine, an individual can be imprisoned for up to 10 years for acting in contravention of the Sherman Act. See also *Federal Trade Commission’s Guide to Antitrust Laws*, http://www.ftc.gov/bc/antitrust/antitrust_laws.shtm (as accessed on 31 August 2010).

⁴⁸ Wehmhörner (n 12) at 11-13.

practice directive setting out how it will determine, assess and impose administrative penalties on respondent firms.⁴⁹ This directive should provide guidelines that require:

- (i) administrative penalties to be determined in a manner that takes cognisance of the actual benefit gained by the respondent firm and the actual harm caused to society as a result of the anti-competitive conduct (as per the US model); and
- (ii) consent agreements to be scrutinised by the Tribunal after careful consideration of at least the factors prescribed by section 59(3) of the Act.⁵⁰

Above all, the legislature and competition authorities need to ensure that the determination of administrative penalties in South Africa is effective in deterring firms from engaging in business practices that undermine competition in South African markets.

Word count: approximately 3,815 words (including headings and excluding footnotes)

⁴⁹ Mackenzie (n 40).

⁵⁰ Mackenzie (n 40). Mackenzie notes that this approach '*...would be preferable to noting the guiding principles in a decision of the Tribunal ... [as] the respondent(s) before the Tribunal would [otherwise] not have been afforded the opportunity of assessing the guiding principles in preparing for the hearing and considering the merits of settlement prior to an adverse finding*'.