Administrative penalties as they relate to consumer redress

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Abstract

Although consumer welfare is one of the main objectives of the South African Competition Act, the current administrative penalties for which it provides do not deal with consumer redress. Consumers who are disadvantaged by the anti-competitive conduct of firms receive no compensation or other assistance. The administrative penalties paid by firms that contravene the Act do not aid consumers; in fact, firms often increase the price of their goods or services to finance these penalties. So the Act does not meet its objective as it does not provide adequately for consumer redress. I suggest that the Act be revised to clarify the powers of the competition authorities and to enable them to impose penalties that will directly benefit affected consumers. I also suggest that the Act provide for private means of redress through the implementation of class actions specifically relating to anti-competitive conduct.

INTRODUCTION

'It is a common assumption that competition law by maintaining competitive markets, automatically maximises consumer welfare and consumer satisfaction.'[1] This statement is generally accepted at face value, and consumer benefit considerations have been accepted as a driving force behind competition policy in both the European Union and the United States.[2]

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[1] Buttigieg *Competition law: safeguarding the consumer interest* (2009) xi.

[2] 'Competition policy endeavours to maintain or create effective conditions for competition by means of rules applying to enterprises in both private and public sectors. Such a policy encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the consumer.' European Commission *Report on Competition Policy* (1971) 11.

This is even more valid in South Africa, where the Competition Act[3] (the Act) is founded on the premise of correcting the disadvantages suffered by many consumers under the pre-1994 political and economic regimes. In this article, I will critically analyse whether the South African Act realises the objective of consumer benefit, in particular through the orders it provides for in the Act and the administrative penalties imposed on firms found to be in contravention of the Act.

I will argue that pure administrative penalties, as imposed by the competition authorities, do not benefit the consumer. I will scrutinise the application of the monies collected as administrative penalties and examine the powers of the competition authorities to utilise these monies. I will argue that the current system of penalisation not only holds little benefit for consumers, but in certain circumstances may even be to their detriment.

Finally, I will examine attempts to rectify this ineffective means of redress and make recommendations as to ways in which penalties should be imposed – penalties that will result in actual redress for the disadvantaged consumer, rather than merely benefit the government's purse.

COMPETITION LAW IN SOUTH AFRICA

The objectives of competition policy in South Africa

When discussing the South African Competition Act, Davies stated that the Act and the institutions established under it in 1999 were important parts of the first democratic government's agenda for economic reform. He argued that the Reconstruction and Development Programme had clearly identified a more effective competition policy regime to deal with the excessive control of the South African economy and its negative consequences for development.'[4] This aligns with the stated purpose of the Competition Act – to promote and maintain competition in South Africa to achieve a range of objectives.[5]

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3 Act 89 of 1998.

4 Davies quoted in Competition Commission and Competition Tribunal *Unleashing rivalry: ten years of enforcement by the South African competition authorities* (2009) iii.

5 The Preamble to the Act states the objectives of the Act are to: (1) provide all South Africans equal opportunity to participate fairly in the national economy; (2) achieve a more effective and efficient economy in South Africa; (3) provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; (4) create greater capability and an environment for South Africans to compete effectively in international markets; (5) restrain particular trade practices which undermine a competitive economy; (6) regulate the transfer of economic ownership in keeping with the public interest; (7) establish independent institutions to monitor economic competition; and (8) give effect to the international law obligations

These objectives include the promotion of the efficiency, adaptability and development of the economy,[6] including competitive prices and product choices.[7] The Act not only promotes economic efficiency, but also addresses apartheid-related economic disparities.

The Act thus not only represents the objectives of the international counterparts from which it drew inspiration,[8] but was designed to meet the needs of a young, emerging democracy. Although not specifically stated, it is generally accepted that one of the key aims of the Act is to benefit public interest. It is widely recognised that consumer benefit is a primary objective of South African competition policy.[9] Firstly, the Act seeks to maximise consumer welfare by efficiently allocating resources, whilst furthermore incorporating amongst its goals the furthering of certain socio-economic objectives.

The Act stipulates[10] that it should be interpreted in a manner that gives effect to the letter and spirit of the Constitution[11] – an open and democratic society based on human dignity, freedom and equality.[12] In line with these fundamental rights, the main objective of the Act can only be consumer welfare.[13]

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of the Republic.

6 Section 2(a).

7 Section 2(b).

8 'The South African Competition Act draws heavily from developed countries' experience and practice in the area. As a consequence, precedent in jurisdictions such as Canada, Australia and Europe have influenced its content, application and interpretation.' Neuhoff *et al A practical guide to the South African Competition Act* (2006) 12.

9 Kampel *The role of South African Competition Law in supporting SMEs – can David really take on Goliath?* available at: http://www.comptrib.co.za/assets/Uploads/Speeches/kim.pdf (last accessed 20 May 2011). See also The Competition Tribunal in prohibiting the proposed merger of the JD Group and Ellerine Holding: 'An anti-trust merger evaluation is always primarily concerned with an assessment of the impact of the transaction in question on consumers.' *JD Group and Ellerine Holdings* (CT78/LM Jul00) 2.

10 Section 1(2)(a): This Act must be interpreted – (a) in a manner that is consistent with the Constitution and gives effect to the purposes set out in s 2.

11 Constitution of the Republic of South Africa, 1996.

12 'The promotion of the spirit, objects and purport of the Bill of Rights should take place through the interpretation of the Competition Act … .' see: Van Heerden-Neethling *Unlawful competition* (2ed 2008) 13.

13 'Our law differs (from American jurisprudence) in ways that are important; indeed one, already mentioned, is fundamental – it is that our competition law has a plurality of objectives of which consumer welfare is just one. Whether it is right to suggest, as this chapter does, that this is the primary object is a matter of debate. The Act seems to suggest as much, as we shall see; so do the early decisions of the tribunal … .' Brassey *et al Competition law* (4ed 2007) 20. This view is not accepted by all commentators on the Act – for contradicting views see the discussion in Brassey *et al* at 1, which states

The competition authorities

Previous competition legislation was of little value or relevance to consumers as it merely regulated the manner in which the government engaged with private businesses. The current competition authorities are independent, impartial institutions subject to the South African Constitution[14] and the law. This is in stark contrast to the previous Competition Board, which did not possess independent powers but rather acted in an advisory capacity to the government.

When considered broadly, the competition authorities regulate two main areas of competition – mergers and acquisitions on the one hand, and prohibited practices on the other. Although penalties may be imposed on firms for failure to notify the competition authorities of a merger or acquisition,[15] I will only discuss penalties imposed in relation to prohibited practices.

In practice the Competition Commission investigates prohibited practices and, refers these to the Competition Tribunal for prosecution. The parties, however, often reach a settlement agreement, whereafter the Competition Tribunal – as an independent and impartial institution – has the power to confirm, amend or refuse the agreement and make an appropriate order.[16] For the settlement to be enforced by law, the Tribunal must confirm the terms.

ADMINISTRATIVE PENALTIES IN SOUTH AFRICA

Administrative penalties imposed by the competition authorities

> Finally, whereas fines will normally have disgorgement of the unjust enrichment as one of their effects, the proceeds of fines normally go into the public coffers and budgets rather than to the consumers which (*sic*) are the real victims of the antitrust violations. (This is the case of the recent imposition of high fines against the fuel cartel in Cyprus by the Committee of the Protection of Competition.) After a period of almost five years, during which the consumers paid exaggerated high prices to the oil companies, the

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that the main goal is to promote competition in the market.

14 Constitution of the Republic of South Africa, 1996.

15 Section 59(1)(d).

16 Section 49D(2): After hearing a motion for a consent order, the Competition Tribunal must: (a) make the order as agreed to and proposed by the Competition Commission and the respondent; (b) indicate any changes that must be made in the draft order before it will make the order; or (c) refuse to make the order.

> imposed fines went into the state coffers, leaving the consumers with the damage.[17]

The Competition Act regulates competition law within South Africa, and in terms of section 59, the Competition Tribunal as the adjudicatory body imposes administrative fines on firms that engage in prohibited practices. A prohibited practice includes a restrictive horizontal practice, a restrictive vertical practice, as well as the abuse of a dominant position – all of which are prohibited in terms of Chapter 2 of the Act. Horizontal practices refer to practices between a firm and its competitors,[18] while vertical practices refer to practices between a firm and either its suppliers or its customers.[19] In the first ten years of the current competition authorities' existence, the majority of administrative penalties imposed have resulted from a contravention of one of these prohibited practices.[20]

Since its inception in 1999, the Competition Tribunal has imposed numerous administrative fines. In a joint publication reviewing the first ten years of the existence of the competition authorities,[21] the following table, which sets out prohibited practice contraventions and the penalties accordingly imposed (for the period starting in the financial period of 2002–3 until 2009–10) was published:

Table 1. Prohibited Practice contraventions 2002–2009

Reporting year end 31 March	Respondent	Penalty	Concentration
2002/3	Federal Mogul	R3 million	5(2)
	Hibuscus Coast Municipality	No penalty	5(1)
	Patensie Sitrus Beherend Beperk	No penalty	8(d)(I)
2003/4	The Association of Pretoria Attorneys	R223 000	4(1)(b)(I)

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17 Aristodemou 'Consequences for the violation of EU Competition Rules delivered at training for judges on EC Competition Law' Latvia 4–6 March 2010 available at: http://www.consumersunion.org.cy/conunion/page.php?pageID=3&instance_ID=12&newsid=537 (last accessed 19 March 2011).

18 Restrictive horizontal practices are 'archetypal anti-competitive acts' which encompass 'the acquisition and abuse of market power through the co-operative acts of competitors.' Van Heerden-Neethling n 12 above at 29.

19 *Id* at 31: 'Whereas a horizontal relationship is a relationship between competitors, a vertical relationship exists between firms at different levels of production or distribution.'

20 See Table 3.1 below.

21 Competition Commission and Competition Tribunal n 4 above at 42.

2004/5	SA Medical Association	R900 000	4(1)(b)(I)
	Hospitals Association of South Africa	R4.5 million	4(1)(b)(I)
	United SA Pharmacies	R250 000	4(1)(b)
	Institute of Estate Agencies of South Africa	R522 400	4(1)(b)
	Toyota South Africa	R12 million	5(2)
	J Melnick & Co	R200 000	5(2)
2005/6	USA Citrus Alliance	R400 000	4(1)(b)(I)
	Subaru SA	R500 000	4(1)(b)(I)
	Nissan SA	R6 million	5(2)
	South African Airways	R45 million	8(d)(I)
	Daimler Chrysler SA	R8 million	5(2)
	Volkswagen SA	R5 million	5(2) & 4(1)(b)(I)
	Citroen SA	R150 000	5(2)
	BMW SA	R8 million	5(2)
	General Motors SA	R12 million	5(2)
	Glaxo Smith and BI	No penalty	8(a) & (b)
	Italtile Franchising	R2 million	5(2)
2006/7	Oakley	R212 100	5(2)
	South African Airways	R15 million	8(d)(I) & (c)

Source: Competition Tribunal and Competition Commission *Unleashing rivalry* 45 (2009).

The aggregate annual amount of administrative penalties[22] imposed has shown, with the exception of the 2003–4 and 2006–7 financial years, a definite increase. In relation to this the competition authorities state that 'the size of administrative penalties imposed by the Tribunal has increased substantially over time … .This has largely been associated with the uncovering of hardcore cartel conduct by the commission.'[23]

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22 Relating specifically to contraventions of prohibited practices.
23 Competition Commission and Competition Tribunal n 4 above at 40.

The number of administrative penalties imposed annually is on the rise, and according to the commission this is as a result of the uncovering of 'hardcore cartels'. It is also evident that the number of cases investigated and referred to the Tribunal is increasing.[24] Admittedly there are other factors that influence the annual amount of the fines imposed, such as inflation and the value of the annual turnover of the firm penalised (see for example the large penalty imposed on Sasol during 2009, which alone was more than the total annual penalties of any preceding year). While a penalty of R3 million to Federal Mogul Aftermarket SA was the only one imposed during the 2002–3 financial year,[25] total penalties imposed during the 2008–09 financial year increased dramatically to more than R300 million.

The Minister of Economic Development confirmed the public perception that the success of competition authorities is directly linked to the total annual monetary value of the penalties imposed. He reiterated this when he made the following statement: 'The Competition Tribunal levied fines totalling R788 million over this past year, a 61 per cent increase over the previous year.'[26]

However, the perception that a large fine equals a success for the competition authorities is not accurate, as any penalty imposed is evidence of anti-competitive conduct that has been detrimental to the South African economy. The aim of the Act should always be remembered – to eradicate anti-competitive conduct, not to impose penalties.

For the purposes of this article it is, however, critical to obtain a realistic idea of the amounts collected by competition authorities, regardless of their perceived successes or otherwise. The annual monetary values of the fines imposed for the relevant financial years can be illustrated as follows:

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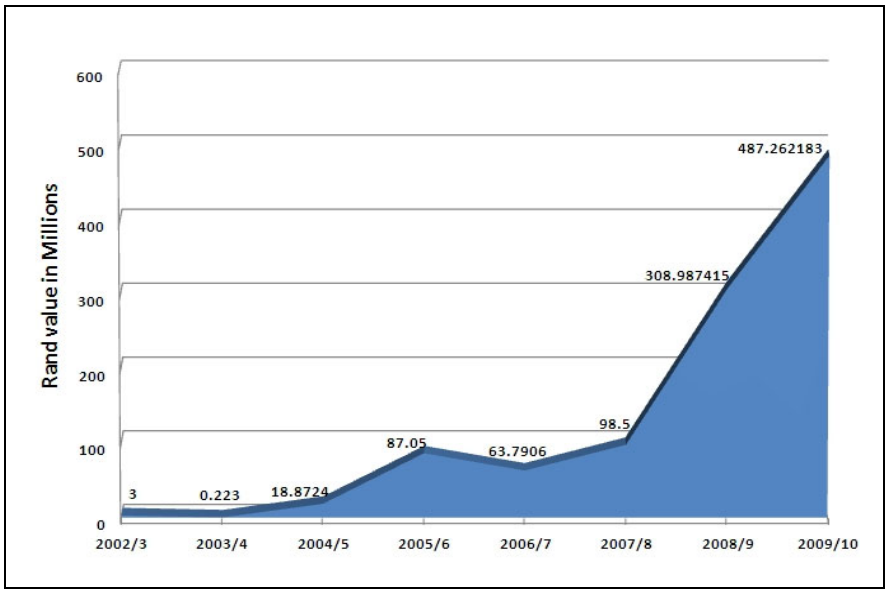
24 One wonders if this reflects the investigative skills of the competition authorities, or their lack of success in preventing anti-competitive activities.

25 *Competition Commission v Federal Mogul Aftermarket SA* (2001) 08/CR/B/May01 [2001] ZACT 15 (23 April 2001).

26 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 23 April 2011).

Table 2. Administrative penalties imposed from 2002/3 to 2009/10



As illustrated more than R1.6 billion has been collected by the competition authorities during the first eight years of their existence.

What happens to monies collected by the competition authorities?

All the monies collected are paid into the National Revenue Fund.[27] In South Africa the collection and utilisation of monies collected by government departments are regulated by legislation, and the Constitution[28] provides that all monies received by the national government must be paid into the National Revenue Fund.[29]

In addition, section 13(1) of the Public Finance Management Act[30] (PFMA) states: 'All money received by the national government must be paid into the National Revenue Fund … .' The only monies collected that do not fall within the ambit of this latter Act are those collected by exempted institutions as set out in section 13(1) of the PFMA. Interestingly enough, the competition authorities were listed as a National Public Entity in terms of the

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27 With the exception of monies paid in lieu of filing fees, see n 30 below.

28 Constitution of the Republic of South Africa, 1996.

29 Section 213(1): There is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament.

30 Act 1 of 1999.

PFMA with effect from 1 April 2001, which implies that, theoretically, they are exempt from automatically paying all collected monies into the National Revenue Fund.

If the competition authorities are exempt from the prescriptions of the PFMA, one wonders why section 59 of the Act prescribes that monies must be paid into the National Revenue Fund. As section 59 refers only to administrative penalties, it is assumed that exemption from the PFMA is the vehicle through which filing fees are used to finance the operations of the competition authorities,[31] but that administrative penalties still have to be paid into the National Revenue Fund.

Analysis of contributions paid into the National Revenue Fund

Towards the end of the 2010–11 financial year the value of the administrative fines imposed was in excess of R794 million,[32] showing an increase of more than R300 million when compared to the previous financial year. The total contribution paid to the National Revenue Fund for the financial years 2007–08 to 2010–11 was:

Table 3. Contributions paid into the National Revenue Fund

Financial Year	Contribution in Rand value
2007/8	R99 384 870
2008/9	R302 519 545
2009/10	R487 262 183
2010/11	R794 190 704

The total contributions paid to the National Revenue Fund in the four years represented above amount to more than R1 683 million.

STATUTORY REMEDIES AND PIONEER FOODS

Background

The Competition Tribunal is, through the powers bestowed upon it by section 49D of the Act,[33] authorised to confirm settlement agreements

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31 Section 40(1): 'The Competition Commission is financed from – … (b) fees payable to the Commission in terms of this Act.'

32 E-mail from the Competition Tribunal on 1 April 2011.

33 Section 49D(1): '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

referred to it by the commission. Section 49D, read together with section 58(1)(a)(iii),[34] gives the Tribunal the power to impose administrative penalties on the Tribunal – and until the *Pioneer* decision the only orders the Tribunal in essence issued were purely administrative penalties.

Competition Commission v Pioneer Foods (Pty) Ltd[35]

A settlement agreement was reached between the commission and *Pioneer* and subsequently referred to the Tribunal for confirmation – this was the culmination of an investigation launched by the commission against *Pioneer* and sixteen other respondents and involving alleged prohibited practices during the period 1999 – 2007.

It consisted of various complaints relating to contraventions of sections 4(1)(b), 5(1) & (2), and 8(c) in relating primarily to the maize and wheat milling industries. On 2 November 2010 the commission released a media statement announcing it had settled all matters with Pioneer Foods.[36] This came after much criticism of Pioneer, and public outrage at the exploitation of the disadvantaged Western Cape communities.[37] Human rights groups demanded that severe action be taken against Pioneer,[38] and the media regularly featured articles and satirical portrayals of the matter.

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agreement as a consent order in terms of section 58(1)(b).'

34 Section 58(1): 'In addition to its other powers in terms of this Act, the Competition Tribunal may: (a) make an appropriate order in relation to a prohibited practice, including: (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section.'

35 15/CR/Mar10.

36 Competition Commission Media Release 'Competition Commission Settles with Pioneer Foods' 2 November 2010 available at: http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-settles-with-Pioneer-Foods2.pdf (last accessed 2 November 2010).

37 Although there were two separate complaints, known as the Western Cape Complaint and the Inland Complaint, the Western Cape Complaint consisted of fourteen complaints while the Inland Complaint had seven on 3 February 2010 available at: http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/TRIBUNAL-IMPOSES-PENALTY-OF-R195-MILLION-ON-PIONEER.pdf *(*last accessed 21 September 2010).

38 See criticism expressed by the Human Rights Group *Black Sash* who advocated that the maximum penalty of R3.2 billion (being 10 per cent of the annual turnover) be imposed available at: http://www.blacksash.org.za/index.php?option=com_content&view=article&id=2538:black-sash-unhappy-about-pioneer-foods-fine-03-nov-2010-busrepcoza-business-report-&catid=3:black-sash-in-the-media&Itemid=39 (accessed 4 November 2010).

The settlement constituted the largest single penalty imposed to date, and was devised in an 'unprecedented and innovative'[39] way. It contained the following conditions:

- Pioneer would pay R250 million as an administrative penalty to the National Revenue Fund;[40]
- Pioneer would pay R250 million which would be utilised to form an agro-processing competitiveness fund to be administered by the Industrial Development Corporation (IDC);
- Pioneer would adjust its pricing of flour and bread to reduce its gross margin by R160 million when compared to the similar period in 2009/10;
- Pioneer would increase its capital expenditure by R150 million;
- Pioneer would give its full cooperation to the Competition Commission in the ongoing investigations; and
- Pioneer would implement a competition compliance programme and cease all anti-competitive practices.

The penalty specifically excluded the R195.7 million penalty imposed on Pioneer Foods by the Competition Tribunal during February 2010 as a result of its involvement in another matter referred to as the 'bread cartel'.[41] The commissioner, Shan Ramburuth, said of the innovative settlement:

> This agreement has gone beyond just a penalty and includes price adjustment for the benefit of consumers and a fund to promote competition in the agro-processing industry. The commission welcomes Pioneer's approach, as evidenced in this agreement, to resolving the matters and agreeing to undertakings aimed at a more competitive and dynamic economy in these crucial sectors.[42]

The Competition Commission had, for the first time, divided the penalty to ensure that the whole amount was not paid into the National Revenue Fund. Rather it declared that only R250 million should be paid to the National Revenue Fund, and the remaining R250 million should be applied to the establishment of an agro-processing competitiveness fund. This fund would be administered by the (IDC) in accordance with criteria and corporate

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39 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/Joint-statement.pdf (accessed 2 December 2010).

40 In terms section 40 of the Act the money was to be paid into the bank account of the Competition Commission.

41 *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb07.

42 See n 36 above.

governance protocols that would be agreed on between the parties.[43] The aim of this fund, it was said, would be to promote competitiveness, growth and employment, and these would be achieved by providing finance to small and medium enterprises on favourable terms.[44]

The fourth condition regarding the capital expenditure was presumably included to ensure that the firm did not attempt to recover the cost of the penalty by reducing its capital expenditure. The commission was thus ensuring that employment was not only maintained, but also created, and that Pioneer would not decrease its output as a result of the monetary burden the penalties caused.

This settlement agreement was reached between the Competition Commission and Pioneer Foods, and, in accordance with Section 49D[45] of the Act, was subject to confirmation by the Competition Tribunal.

National Treasury intervention

During November 2010 the Minister of Economic Development, Ebrahim Patel, announced in parliament that Pioneer would pay R250 million into a new agro-business start-up fund.[46] This announcement was made prematurely as the Tribunal had not confirmed the order,[47] but this did not stop the Treasury from immediately responding and pointing out that any money paid by Pioneer, as part of the settlement of charges brought by the Competition Commission, constituted a penalty and should accordingly be paid into the National Revenue Fund. According to the Treasury, diverting this money into another fund would constitute a contravention of section 213 of the Constitution[48] as well as section 59(4) of the Competition Act.

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43 The Minister of Economic Development and the IDC were to have announced details on the agro-processing competitiveness fund following the confirmation of the settlement order by the Tribunal.

44 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-landmark-competition-commission-case-r1bn-in-penalties-on-pioneer/ (last accessed 21 December 2010).

45 See n 33 above.

46 'Treasury tussle for Pioneer Food fine' *Business Day* 25 November 2010 available at: http://www.businessday.co.za/articles/Content.aspx?id=127724 (last accessed 21 January 2011).

47 As the Tribunal had not yet confirmed the settlement agreement entered into between the commission and Pioneer.

48 Constitution of the Republic of South Africa, 1996.

The Treasury then proceeded to brief counsel to represent it at the public hearing scheduled by the Tribunal as part of the proceedings prescribed by the Act.[49] The hearing was eventually adjourned on 24 November 2010 to enable counsel for the Treasury and the commission to attempt to negotiate a settlement regarding the final order and the payment of the penalty into the National Revenue Fund.

The consent order

On 30 November 2010 the Competition Tribunal announced that an amended settlement agreement between the commission and Pioneer had been approved. Most of the material terms of the initial settlement remained unchanged, including the obligation on Pioneer to adjust its pricing of flour and bread and to reduce its gross margin by R160 million. The main point of contention, the R250 million earmarked for the agro-processing competitiveness fund, was, however, amended. It was stipulated that this amount, together with the original R250 million, would be paid into the National Revenue Fund as directed by relevant legislation.

A COMPARISON TO OTHER JURISDICTIONS

Background

In trying to compensate for damages caused by anti-competitive conduct, other jurisdictions are initiating innovative ways in which to implement penalties.[50] As I will illustrate below, the monies collected by the international competition authorities are perhaps not utilised as a tool of redress,[51] but the penalties themselves are crafted in such a manner as to facilitate compensation, much as was attempted in the *Pioneer* matter. There are certainly many ways in which South African authorities can learn from the penalties imposed by their counterparts. In the words of Addy and Banicevic:

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49 Section 52: The Competition Tribunal must conduct a hearing, subject to its rules, into every matter referred to it in terms of this Act.

50 The European Union's (EU) competition authorities are increasingly employing new and novel remedies to redress the effects of anti-competitive conduct in cartel cases. These remedies go beyond the sorts of remedies historically utilised in such matters, namely those which are enumerated in sections 58 to 60 of the South African Competition Act.' Trengove SC & Le Roux *Heads of Argument filed in the matter between the Competition Commission and Pioneer Foods (Pty) Ltd* 30 November 2010 16.

51 For example, money collected in the European Union is paid into the Community Budget, which, according to the European Commission, will help finance the European Union and reduce the eventual tax burden on individuals http://ec.europa.eu/competition/cartels/overview/faqs_en.html (last accessed 29 November 2010).

> The need for a precise scalpel rather than a blunt sledgehammer to craft the appropriate remedy is arguably amplified in unilateral conduct cases where there is a need to maintain a fine balance between discouraging 'anti-competitive' conduct and encouraging aggressive but competitive behaviour.[52]

The United States of America

The United States of America (US) does not have a government programme that compensates victims of anti-competitive actions. However, the US Department of Justice's Corporate Leniency Policy[53] (the Policy) stipulates that if certain conditions are met, leniency will be granted to any firm that reports its anti-trust activities to the US Antitrust Division. In addition, firms are encouraged to compensate their victims through the incentive of a reduction of the penalty imposed. The conditions thus stipulate that a firm should, where possible, make restitution to the parties who were injured by the illegal activity.

One would argue that it is not always possible to identify the victims of anti-competitive behaviour, and the legislature has recognised this. For instance, the first victim may be the downstream distributor, which is also a company or corporation. Should such a distributor be the victim of price fixing, it will only be the distributor's eventual customers who will be victims from a consumer point of view – and it follows that they will be difficult to identify. This, however, does not preclude the offending firm from offering compensation by decreasing their prices. An example can be found in the matter between the Federal Trade Commission and Mylan Laboratories.[54]

The commission investigated complaints that the defendants conspired to raise the price of generic pharmaceutical products by depriving its competitors of the active pharmaceutical ingredient necessary to manufacture each product. The exclusive licence agreements entered into barred its competitors from the market, and enabled Mylan to raise prices dramatically by between 2 000 and 3 000 per cent.[55] The US Commission ordered Mylan

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52 Addy & Banicevic 'Remedies – how far and how much?' available at: http://www.luc.edu/law/academics/special/center/antitrust/pdfs/remedies.pdf (last accessed 3 May 2011).

53 US Department of Justice *Corporate Leniency Policy* (2003) available at: http://www.usdoj.gov/atr/public (last accessed 2 April 2011).

54 *Federal Trade Commission v Mylan Laboratories Inc, Cambrex Corporation, Profarmaco SRL and Gyma Laboratories of America Inc* 1:98CV03114 (TFH) (USDC).

55 For example the price of clorazepate, an anti-anxiety medication also used as an adjunct therapy for nicotine and opiate withdrawal, was increased from $11.36 to $377 for 500 tablets.

to pay $100 million in disgorged profits into a fund intended to compensate consumers who had suffered damage.[56] Of this an amount of $71 782 017 was paid into an escrow fund that would be used to pay consumer claims, while the remaining $28 217 983 was paid into an escrow fund to pay state agency claims. Mylan was also barred from entering into similar exclusive licensee agreements. The commission issued a statement that read:

> … the Commission should cautiously exercise its prosecutorial discretion to seek disgorgement in antitrust cases. Such relief is best reserved for cases, like this one, in which the defendants have engaged in particularly egregious conduct.[57]

Taking into account that US consumers have the advantage of private damages suits and class actions at their disposal, it is evident from the above that the legislature and the courts regard their responsibility to compensate consumers in anti-competitive actions in a serious light.

The European Union

The first case in which the European Commission took consideration of compensation paid by a firm to a disadvantaged competitor was in the 1998 *Pre-insulated Pipe Cartel* case involving international engineering company ABB.[58] The commission used its wide discretionary powers to determine the value of the penalty to be imposed, and stated:

> The only extenuating circumstance of which the Commission can take account…is the payment of substantial compensation to Powerpipe[59] and its previous owner. In recognition of this element, the Commission will apply a reduction of ECU 5 million to the basic amount.

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56 'In the competition context, the Commission has used Section 13(b) primarily for the purpose of obtaining preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding. The commission may also obtain permanent injunctive relief against an anti-trust violation in an appropriate case, as well as disgorgement of unjust enrichment, restitution for injury suffered by consumers (*eg* the refund of overcharges attributable to price-fixing) or other appropriate equitable remedies.' Federal Trade Commission 'A brief overview of the Federal Trade Commission's investigative and law enforcement authority' (2008) available at: http://www.ftc.gov/ogc/brfovrvw.shtm (last accessed 23 March 2011).

57 Federal Trade Commission 'FTC reaches record financial settlement to settle charges of price-fixing in generic drug market' 29 November 2000 available at: http://www.ftc.gov/opa/2000/11/mylanfin.shtm (last accessed 25 May 2011).

58 European Commission of Competition 'Commission Decision of 21 October 1998' 1999/60/EC.

59 Powerpipe was a competitor that operated outside of the cartel, and was paid compensation in a private agreement between ABB and itself.

The firm was found guilty of a contravention of the then article 85 of the European Community Treaty (EC treaty). Much like the position in the US where compensation paid to victims is acknowledged,[60] the court granted a reduction in its fine as a result of the compensation paid to the competitor.

In the 2002 case against computer gaming company Nintendo,[61] it was found guilty of a contravention of article 81 of the EC treaty.[62] Following the precedent of ABB, the commission took cognisance of the fact that Nintendo had offered 'substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of [Nintendo's violation]'.[63] In recognition of Nintendo's attempts at restitution the commission granted a €300 000 reduction of its fine to Nintendo, stating:

> Subsequent to its decision to collaborate and at the instigation of the commission, Nintendo Corporation Ltd/Nintendo of Europe GmbH offered substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of the Nintendo Corporation Ltd/Nintendo of Europe GmbH's activities.

Although the amount by which the fine was reduced was lower than the actual restitution amount paid by Nintendo, it was larger in percentage terms than the reduction granted to ABB in the Pre-Insulated Pipes cartel case.[64] It is thus evidence of the inclination by the European courts to take

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60 The Commission Notice on the non-imposition or reduction of fines in cartel cases (96/C 207/04) contains no provision that lists compensation paid to victims as a mitigating factor. It stipulates that a firm may apply for an exemption or reduction of a fine if it (a) informs the commission about a secret cartel before the commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel; (b) is the first to adduce decisive evidence of the cartel's existence; (c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel; (d) provides the commission with all the relevant information and all the documents and evidence available to it regarding the cartel and maintains continuous and complete co-operation throughout the investigation; (e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity. See also the Notice on immunity from fines and reduction of fines in cartel cases OJ C 45, 19.2.2002 3–5.

61 *European Commission v Nintendo Corporation Ltd/Nintendo of Europe GmbH* COMP/35.587 PO and COMP/35.706 PO notified under document C 2002 4072.

62 European Commission of Competition *Commission Decision of 30 October 2002* 2003/675/EC.

63 Van Haasteren & Castellot 'Commission fines Nintento and seven of its European distributors for colluding to prevent parallel trade in Nintento products' *Competititon Policy Newsletter* 2003 50–53.

64 Id at 53.

compensation paid to victims into consideration, and to reward firms accordingly.

The courts have also shown their commitment to imposing structural and behavioural remedies. In the 2005 decision against the Coca Cola Company[65] the commission ordered it to refrain from concluding exclusive agreements, and instructed the firm to offer customers reasonable options for compensation. In another instance the commission, after concluding an investigation into banking charges for small and medium enterprises in 2002, ordered the relevant banks to reduce the charges and/or provide certain services free of charge to such concerns.

Although there is no formal government programme through which the monies collected from administrative fines is made available to injured consumers, the courts are taking cognisance of the damages caused by anti-competitive actions and demonstrating the importance of remedial actions.[66]

Canada

Restitution as remedial order has existed in Canadian legislation for some years,[67] and in following suit the Canadian legislature amended their Competition Act[68] in 2009 to provide specifically for the payment of restitution to victims of anti-competitive conduct. The Competition Bureau, during the consultation process, explained the proposed inclusion of such provision by stating:

> The courts could be given the power to order respondents (businesses and individuals who contravene the Act) in certain circumstances…to provide restitution to consumers. The courts could order respondents to set up a restitution fund and distribute monies directly to entitled purchasers, or appoint a fund administrator to execute the task.[69]

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65 2005/670/EC: Commission Decision of 22 June 2005 relating to a proceeding pursuant to art 82 of the EC Treaty and art 54 of the EEA Agreement (Case COMP/A .39.116/B2 – Coca-Cola) (notified under document no C(2005) 1829).

66 See the commission's annual report on Competition Policy, vol XXVI and XXVII which describes remedial actions taken such as the order of improvement to Athens Airport terminal and the cessation of a ground-handling monopoly.

67 Section 737 of the Canadian Criminal Code RSC 1985, c. C–46, as amended, provides for the payment of restitution to victims of criminal offences, including false or misleading representations.

68 RSC 1985 c. C–34.

69 Canada Competition Bureau http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01711.html#restitution (last accessed 1 April 2011). For a summary of the section also see http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03045.html (last accessed 2 April 2011).

The Canadian Competition Act was subsequently amended to include a restitution clause, which stipulates:

> 74.01 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person:
> (d) in the case of conduct that is reviewable under paragraph 74.01(1)(a),[70] to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold – except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products – in any manner that the court considers appropriate.

The Competition Bureau subsequently implemented and effectively applied this remedy; the first time in the consent agreement entered into with Bioenergy Wellness Inc.[71] The agreement resulted from accusations against the company for unsubstantiated claims that were made indicating their products and treatments could cure cancer. In terms of the agreement the company would cease making false statements regarding products to cure or treat cancer, would pay full refunds to its customers, and would post a corrective notice on their website. The bureau went even further by notifying all consumers of the order and providing advice regarding procedures to claim refunds.

The second example was found in the bureau's consent agreement entered into with Northern Response International Ltd in terms of which it ordered restitution to all consumers who had purchased products from the firm, to be paid to the consumers directly.[72] It also ordered a $50 000 penalty to be paid to cover any expenses the bureau might have incurred.

The rights of consumers (who would, in the light of the typically small damages generally suffered, not institute claims for civil damages) are

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70 74.01(1): A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (a) makes a representation to the public that is false or misleading in a material respect.

71 An initiative that targets cancer-related health fraud online, in terms of which action has been taken against more than 100 Canadian operated companies available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02988.html (last accessed 9 April 2011).

72 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03025.html (last accessed 7 June 2011).

protected by this legislation. More importantly the competition authorities are enforcing this remedy and assisting consumers in the process of obtaining restitution.

COMPENSATING THE VICTIMS – A FEW ATTEMPTS IN SOUTH AFRICA

> Consumer welfare is now well established as the standard the commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources.[73]

This statement by the European Union illustrates the approach to competition matters abroad. I will assess the South African approach to determine whether it corresponds to this.

Background

Although current competition legislation does not specifically provide for the compensation of victims of anti-competitive conduct,[74] this has not deterred the competition authorities from attempting to institute redress measures. To date the legality of these steps has not been determined by the courts, and the powers bestowed upon the Tribunal in terms of the Act have not been clarified. I will discuss the clarification that is needed in terms of the orders that the Tribunal can impose, in greater detail later in this article.

It is evident that imposing administrative penalties alone does not always assist the consumer. It may, in some instances, even be to the consumer's detriment. Take the example of companies that increase the prices of their goods or services to compensate for the money they have to pay in lieu of penalties imposed. A well-known South African example is the eight to ten per cent increase in the bread price announced by Pioneer on the same day as their initial settlement order was announced. The only rationale behind

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73 European Commissioner Neelie Kroes as quoted in Whish *Competition law* (2009) 19.

74 Section 65 of the Act specifically stipulates, in subsections (5) and (6), that the Competition Tribunal and Competition Appeal Court have no jurisdiction over the assessment of the amount or awarding of damages arising out of prohibited practices, and that a person may not institute proceedings in a civil court for the assessment of amount or awarding of damages if that person has been awarded damages in a consent agreement. This entails that section 65 will not be useful in the pursuit of damage awards, but rather that a person will have to rely on an award made in terms of a consent order (see more in the Conclusion and Recommendations below).

this was to ensure that consumers – who had already been hit by their anti-competitive behaviour – would now effectively pay for the penalty through the increased bread price.[75] Other parties in the 'bread cartel' affair were also involved in morally reprehensible behaviour: The Albany company increased its bread price by 40c per loaf soon after receiving a R99 million penalty for their role in this cartel in 2010.[76]

The Pioneer penalty

In the joint media statement regarding the settlement reached it was said the parties had settled on their treatment of the penalties and remedies agreed to in terms of the consent agreement between the CC and Pioneer Foods'.[77] They stated:

> The Pioneer Settlement was resolved in an unprecedented and innovative way. This approach is one that should be supported, and nothing should be done to dilute the sanctions on the firms that violate the rights of consumers in terms of the Competition Act.

The full penalty amount was subsequently paid into the National Revenue Fund, and it was agreed that the Department of Economic Development would submit a budgetary proposal and business case to the Treasury requesting the R250 million for the proposed agro-processing fund.

In February 2011 Finance Minister Pravin Gordhan announced that the Treasury had allocated R34 million to the IDC during the 2011–12 financial year. Minister Gordhan referred to the allocation in his annual budget speech as part of 'additional allocations in support of industrial and economic development'.[78] It was further announced that Treasury would still pay the

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75 'Fears were raised yesterday that consumers will in the end be coughing up to pay for the settlement … . A report in *The Times* says several parties, including the Black Sash and Imraahn Ismail-Mukaddam, the bread distributor who blew the lid on the bread price-fixing scandal, made submissions before the hearing was adjourned. Ismail-Mukaddam questioned who would pay the settlement. "It has been widely reported and in fact acknowledged by (Andre) Hanekom (MD of Pioneer Foods) that there had been substantial increases in the price of bread recently, the latest being an 8% to 10% increase that was announced the same day as this settlement agreement" he said.' Nortons Inc Attorneys at law available at: http://www.nortonsinc.com/index.php?option=com_content&view=article&id=407:decision-time-for-telkom-following-sca-judgment&catid=48:news-and-media&Itemid=86 (accessed 25 May 2011).

76 Motsoneng 'Competition Commission chokes on new bread price' *Mail & Guardian Online* 16 January 2008 available at http://mg.co.za/printformat/single/2008-01-16-competition-commission-chokes-on-new-bread-price/ (last accessed 26 May 2011).

77 See n 39 above.

78 National Treasury' National Budget Speech 2011' (23 February 2011) 21.

remainder of the R250 million, but only during the 2012–13 and 2013–14 financial years in two equal payments of R108 million each.

For all practical purposes Treasury had thus kept its promise of allocating the R250 million to the establishment of the agro-processing competitiveness fund, albeit in three payments over almost four years and not immediately as anticipated by the commission. Although it is commendable that the business proposal was approved, and the monies formally allocated in the 2011 budget, one must bear in mind that the bulk of the R250 million will only be paid in two and three years' time respectively, in the interim earning considerable interest. It is prudent to point out that in terms of the PFMA, all interest earned on funds is regarded as part of the National Revenue Fund.[79] It further goes without saying that when one deals with large sums of money, it is not only the owner of the capital that gains financially, but also the institution to which the interest accrues – in this instance Treasury. It would be interesting to see, at the date of the final payment, how much Treasury actually paid towards the fund, once the interest earned has been subtracted.

Interestingly, the joint media release applauds the efforts of the Competition Commission, and even recognises that the commission should be empowered with appropriate legal mechanisms to exercise its remedial options. This is in all probability the most significant occurrence in the history of the competition authorities in relation to victims' compensation, as for the first time some benefit will reach the consumer. This form of penalty appears more in line with the stated aims of the competition authorities, rather than merely increasing the gross revenue of the country.

On 14 December 2010[80] it was revealed that Pioneer had, in terms of the agreement, begun to implement price reductions on bread and flour. The price of a standard white and brown loaf was reduced by an average of 30c on 3 December 2010, while the price of flour was reduced by an average of R350 per ton on 10 December 2010. This price reduction formed part of the pricing commitment made by Pioneer that amounts to a reduction of R160 million in its gross profit when benchmarked against a similar period the previous year.

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79 Section 15(3)(b).

80 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-release-14Dec10.pdf (last accessed 16 December 2010).

Competition Commission v Foskor (Pty) Ltd[81]

Subsequent to the Pioneer decision there has been another case in which consumer redress was relevant, albeit only during the negotiation phase. The parties entered into a consent agreement following complaints received with regard to excessive pricing, and manufacturing agreements entered into with Sasol. The Competition Commission and Foskor agreed that Foskor would not pay an administrative penalty in light of 'its remedial action to change its pricing policy'.[82] The 'remedial action' refers to a pricing policy adopted by Foskor, in terms of which an excessive rate previously charged to local customers was amended, which in turn substantially decreased the price of its product.[83] Foskor also agreed to sell two of its products at wholesale prices to consumers, and not only to the retail market as had previously been done. The settlement agreement was then referred to the Competition Tribunal for confirmation, but the Tribunal expressed concern regarding the absence of an administrative penalty and referred the matter back to the parties.[84]

The Tribunal raised two points of concern: why had Foskor not formally admitted guilt when its conduct ultimately led to a ten to fifteen per cent price increase to its downstream customers; and why was an administrative penalty not deemed appropriate in light of the significant financial gain to Foskor as a result of the alleged excessive pricing conduct. The commission and Foskor entered into an amended agreement, in terms of which a R6 481 889. administrative penalty was imposed.

It is unfortunate that the Tribunal did not hear the matter, as it would have been interesting to see if a reduction (or in this instance, pardon) of an administrative penalty would be allowed in return for compensation paid to the victims of the anti-competitive conduct. The intention of the commission was clear in the original agreement – the penalty could be waived in light of the 'elimination of the detrimental effects of Foskor's past pricing policy for local customers'.[85] This begs the question of how the price reduction could

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81 *Competition Commission v Foskor (Pty) Ltd* (2011) 43/CR/Aug10.

82 See n 81 above at 6.1.

83 The settlement agreement further stipulated**:** 'The grave concerns the Commission had regarding Foskor's past pricing policy have been alleviated through the timely steps Foskor has taken to reduce its prices and alter its pricing policy.' n 115 at 4.5.

84 Details of the hearing provided to the author by the Competition Tribunal on 18 April 2011.

85 See n 81 above at 4.

have 'eliminated' the detrimental effects: to introduce a new pricing policy can prevent future detriment, but not eliminate past detriment. Consumers will in future be able to purchase the goods at the realistic market value, which they should have been entitled to do in the first instance. A further question that remains unanswered is: is it appropriate to waive a penalty in response to an adjusted pricing policy, rather than providing for a reduction in penalty, as is done internationally?[86]

The concept of rewarding a firm for providing compensation is certainly one that should be encouraged, but the victims should be compensated in accordance with the detriment suffered. Further, one must caution against firms exploiting this practice by increasing their prices excessively, only to reduce them once investigated. In the Foskor original agreement scenario, this means that they had the financial gain of excessive pricing for a fixed term, yet were able to escape a penalty as they reduced their price upon being caught out. The competition authorities will have to be vigilant when rewarding consumer redress and ensure that the companies are punished suitably.

Legislative ambiguity

In heads of argument filed in support on behalf of the Treasury in the Pioneer matter,[87] Advocates J Gauntlett SC and F Pelser argued that the penalty proposed by the commission exceeded the powers granted to the commission in terms of the Act, and as a result did not constitute a penalty as purported by section 49D. They argued that:

> Indeed, the only monetary sanction contemplated by the Act is an administrative penalty. On basic precepts of statutory interpretation this means that the commission is not at large to demand other monies from firms, and no such power is readily to be read in.[88]

They further set out that the Act does not confer wider powers on the commission than the powers set out in section 21,[89] that powers granted to

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86 For example the United States Corporate Leniency Policy discussed in 5.2 above.

87 See n 35 above above.

88 At par 16.

89 The Competition Commission is responsible for: (a) implementing measures to increase market transparency; (b) implementing measures to develop public awareness of the Act; (c) investigating and evaluating alleged contraventions; (d) granting or refusing applications for exemption; (e) authorising, prohibiting or referring mergers; (f) negotiating and concluding consent orders; (g) referring matters to the Competition Tribunal; (h) negotiating agreements with any regulatory authority; (i) participating in the proceedings of any regulatory authority; (j) advising, and receiving advice from, any

an organ of state cannot be exercised for another function[90] and that creating a fund for competitiveness constitutes an activity different to that which the Act intended and is thus *ultra vires*.[91] They concluded that the Tribunal is not authorised to confirm the order, as it does not constitute an 'appropriate' order.

Advocates W Trengrove SC and M le Roux responded that the order is appropriate as the Act does not stipulate a closed *clausa* of remedies to be imposed. They argued that the order was appropriate, as the Tribunal had the latitude to impose penalties in line with the objectives of the Act, in particular when the respondent had agreed to the conditions.[92]

The precise powers of the competition authorities have not been decided by the courts. It is proposed that powers conferred upon it should be clarified by the legislature. While an organ of state cannot be granted unlimited powers in a democratic society, authorities should also not be hampered by legislation while pursuing the objects of the Act. An amendment to the Act, which provides clear guidelines within which the Tribunal may exercise its powers, should be introduced as a matter of urgency.

RECOMMENDATIONS AND CONCLUSION

> The weapons in the enforcers' arsenal are conduct remedies, structural remedies, and fines and imprisonment. The power to order the modification of corporate conduct (*eg* to determine the price at which a product may be sold), which may go so far as the complete break-up of a company, may be the most powerful weapon.[93]

Summary

Historically the only penalties imposed by the South African competition authorities on firms that engaged in practices prohibited by the Act have been administrative penalties. All such penalties are, in accordance with the Act,

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regulatory authority; (k) reviewing legislation and public regulations; and (l) dealing with any other matter referred to it by the Tribunal.

90 The commission is thus not authorised to withdraw all pending matters against Pioneer should Pioneer agree to the conditions of the settlement order in another investigation.

91 At par 20.

92 At par 24.

93 Furse *Competition law of the EC and UK* (2008) 119.

paid into the bank account of the Competition Commission,[94] after which the commission pays them into the National Revenue Fund. Although the commission, as National Public Entity, is exempt from paying money received in lieu of merger filing fees into the National Revenue Fund, section 59 of the Act compels it to pay all administrative penalties to the Fund. The number of penalties imposed by the Tribunal has increased dramatically since its inception in 1999,[95] and the money paid into the Fund has accordingly also increased. As has been shown above, the total value of administrative penalties paid into the Fund during the past ten years amounts to more than R1,6 billion.

Until recently there has been no attempt by the competition authorities to introduce penalties other than pure administrative penalties. The Pioneer settlement agreement was the first effort to apportion parts of an administrative penalty to recipients other than the National Revenue Fund. The money originally earmarked for the creation of an agro-processing fund was eventually, after the Treasury's objection, paid to the National Revenue Fund. The commission may not have been successful in its attempt directly to establish the agro-processing fund, but the agreed reduction in the bread price was the first time that a penalty was devised in a way that would ensure it was not paid into the National Revenue Fund. The R160 million reduction was a financial burden on Pioneer, and represented a monetary amount that would benefit consumers directly, rather than being paid into the fund. It is the first time that consumers directly benefited from a penalty imposed by the competition authorities, and the first time the authorities ultimately realised the objectives of South African competition policy.

It remains unclear exactly what types of penalty the Tribunal is authorised to impose.[96] Although the Act recites appropriate orders that the Tribunal

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94 Section 40(4)(a) stipulates: 'The Competition Commission must open and maintain an account in the name of the Commission with a registered bank, or other registered financial institution, in the Republic, and (a) any money received by the Commission must be deposited to that account.'

95 During its first five years of existence the competition authorities imposed administrative penalties to the value of approximately R173 386 000, in comparison to R1 688 940 804 during the last four years – an increase of more than 950%.

96 Section 58(1)(a) of the Act stipulates: (1) In addition to its other powers in terms of this Act, the Competition Tribunal may (a) make an appropriate order in relation to a prohibited practice, including (i) interdicting any prohibited practice; (ii) ordering a party to supply or distribute goods or services to another party on terms reasonably required to end a prohibited practice; (iii) imposing an administrative penalty, in terms of section 59, with or without the addition of any other order in terms of this section; (iv) ordering divestiture, subject to section 60; (v) declaring conduct of a firm to be a prohibited practice in terms of this Act, for the purposes of section 65; (vi) declaring the whole or

may make, such as imposing an administrative penalty in section 58(1)(iii), it does not state that these are the *only* orders the Tribunal may impose. It merely states that the Tribunal may make an appropriate order, and then remains silent on what would be regarded as appropriate. The insertion of the word 'including' in section 58(1)(a) also clearly implies that the list of seven orders is not exhaustive.[97] It is within this wide ambit that the Tribunal acquires its authority to confirm orders regarding price reductions and capital expenditure.[98] The lack of guidance provided by the Act is frustrating the legal process as it not only confers undefined powers on the competition authorities but also does not address essential elements such as consumer redress.

Recommendations

No creature of statute should be allowed to exercise its discretion without definite parameters to limit its authority. Not only do defined powers create legal certainty, they also ensure fair process. Currently, section 58 does not clearly stipulate what an appropriate order is, nor does it give the competition authorities the legislative power to enforce consumer redress. The relevant section should be reviewed to provide certainty regarding what would constitute 'an appropriate order'.

The competition authorities cannot be allowed to make orders that they, in their exclusive opinion, deem appropriate. Some may question the appropriateness of an order that prescribes the capital expenditure output of a business as was done in the Pioneer settlement agreement, and argue that the Tribunal overstepped its authority. However, as the parameters of authority are not defined by legislation, it would appear that the competition authorities acted within their powers. In a similar vein the competition authorities recently approved mergers subject to a wide variety of conditions[99] that are at best questionable in their appropriateness. The

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any part of an agreement to be void; (vii) ordering access to an essential facility on terms reasonably required.

97 AJ Southwood stated in *Minister of Safety and Security and Another v Xaba* 2003 2 SA 703 (D): 'The word "include" is often used in the definition sections of Acts of Parliament for the purpose of enlarging the meaning of a word or phrase by bringing under it something which is not comprehended under the ordinary meaning of the word or phrase.' It was further stated in *Sandton Town Council v Homeward Investments (Pty) Ltd* 1982 3 SA 67 (W) that the word 'including' should be read to mean 'as well.'

98 As was demonstrated in the Pioneer settlement agreement.

99 The commission approved the Kansai acquisition of Freeworld subject to certain conditions such as that Kansai will establish an automotive coating factory in the country within five years and enter into a B-BBEE transaction within two years, while the Tribunal approved the Wal-mart/Massmart merger subject to, among other things, the

rationale behind the conditions is apparent. However, it is doubtful whether the authorities should be allowed to prescribe business conditions such as erecting manufacturing facilities or entering into B-BBEE transactions. It could be argued that such prescriptions not only deprive a company of the power to exercise its business acumen, but could potentially scare away foreign investors and suppress local business ventures.

It is further imperative that guidelines be provided within which the authorities can draft their orders – orders to penalise the offending firm appropriately but also to allow the authorities to compensate consumers. As set out above, other jurisdictions either specifically empower their competition authorities to order compensation to victims or encourage compensation by reducing penalties when provided with proof thereof. As described by Whish,[100] enabling consumers privately to seek damages for harm suffered will be beneficial for various reasons, including the greater deterrence against infringement resulting in compliance with the law, as well as lightening the burden on public enforcement agencies. It would assist the competition authorities who may not have sufficient resources to investigate every single complaint they receive. It would also ensure that interim relief is obtained more quickly, and most importantly, that consumers are compensated for losses suffered.

From the history of the South African competition authorities it is clear that a mechanism of consumer redress was not originally viewed as a priority. The first matters dealt with did not directly involve consumers, but rather competitors in horizontal relationships. However, since the bread cartel was uncovered and regularly commented on in the media, the need for ways to compensate victims of anti-competitive conduct has been stressed. The Act does not grant the competition authorities the power to hear applications for damages, and through section 65 limits the civil remedies available to consumers. The Act should be reviewed to ensure it addresses current problems encountered in competition policy, including those of consumer redress.

The competition authorities should also be encouraged within these guidelines to craft the penalties carefully to ensure that the benefit offered to consumers is real. While the price reduction of bread in the Pioneer matter was laudable, the price was increased again within six months, thus only

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establishment of a development programme funded by a R100 million contribution from the firm.

100 Whish n 73 above at 319.

offering temporary respite to consumers.[101] The immediate increase after the six-month period appears to be in contravention of what the Tribunal tried to achieve, and perhaps the order to decrease the bread price should have been accompanied by an order preventing further increases for a specific period. The authorities should take cognisance of possible actions the firms may engage in, and, when feasible, pre-empt this in the drafting of their orders.

Similarly the Act should be updated to address current commercial realities. South African legislation has never, until the recent Consumer Protection Act,[102] made provision for class actions in relation to consumer-related actions. It has, however, become apparent that this is much needed in the current economic society where individuals will often not have the financial means to institute action against corporations. Individual consumer redress in the Pioneer matter would not have succeeded under the *de minimus* rule,[103] but collectively the consumer complaints will add up to a substantial amount. Section 38 of the Constitution[104] expressly provides for class actions,[105] but it has been argued that it applies only to an infringement of fundamental rights, and will in all probability not be extended to consumer rights.[106] Section 4 of the Consumer Protection Act is, however, almost identical to section 38 of the Constitution,[107] and expressly provides for class actions in realising consumer rights.[108]

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101 Enslin-Payne 'Pioneer walks a tight line' *Business Report* 24 May 2011 available at: http://www.iol.co.za/business/business-news/pioneer-walks-a-tight-line-1.1072916 (accessed 29 May 2011).

102 Act 68 of 2008.

103 The *de minimus* rule refers to something or a difference that is so little, small, minuscule, or tiny that the law does not refer to it and will not consider it. Available at: http://legal-dictionary.thefreedictionary.com/De+Minimis.

104 Constitution of the Republic of South Africa, 1996.

105 Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons;anyone acting in the public interest; and an association acting in the interest of its members.

106 Murphy 'The class action is coming – really!' *The Mercury* 27 May 2011 available at: http://www.ens.co.za/newsletter/briefs/ENS%20Business%20Update%20--%20May%20pg1.pdf (accessed 3 June 2011).

107 Constitution of the Republic of South Africa, 1996.

108 (1) Any of the following persons may, in the manner provided for in this Act, approach a court, the Tribunal or the commission alleging that a consumer's rights in terms of this Act have been infringed, impaired or threatened, or that prohibited conduct has occurred or is occurring:(a) a person acting on his or her own behalf; (b) an authorised person acting on behalf of another person who cannot act in his or her own name; (c) a person

The Black Sash is a human rights group that is currently appealing a decision that denied them permission to initiate a class action against the companies involved in the bread cartel.[109] It is suggested that the Competition Act should adopt provisions similar to those found in the Consumer Protection Act and pave the way for consumers injured by anti-competitive conduct directly or by downstream means. In light of the Pioneer matter it is evident that a need exists for these consumers to demand compensation, and as the competition authorities do not have specific methods through which they can do this on their behalf, consumers should be empowered to do so themselves by way of class actions.

Conclusion

The current competition policy in South Africa is effective in many ways – but in one instance it fails consumers completely. Not only does the Act not provide a means for the competition authorities to directly order consumer redress, it also does not provide the means for consumers, as opposed to competitors, to do so privately. It is the opinion of the author that the lack of redress available to consumers points to a flaw in the Act regarding one of its primary objectives – consumer welfare. It is essential that the Act be reviewed to protect the rights of consumers adequately, and afford them a means of redress when appropriate. The Act should not enable corporations to take advantage of consumers, and escape having to offer compensation when found guilty. Until a way is found to eradicate anti-competitive behaviour, the only way in which consumers can be assisted is by amending the Act. Until such time, the South African Competition Act will fail to meet its set objectives.

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acting as a member of, or in the interest of, a group or class of affected persons;(d) a person acting in the public interest, with leave of the Tribunal or court, as the case may be; and (e) an association acting in the interest of its members.

109 For the full media statement see: http://www.blacksash.org.za/index.php?option=com_content&view=article&id=2864:appeal-in-class-action-case-against-bread-cartel-to-be-heard-in-western-cape-high-court-black-sash-friday-27-may-2011&catid=2:press-releases&Itemid=40 (last accessed 7 June 2011).