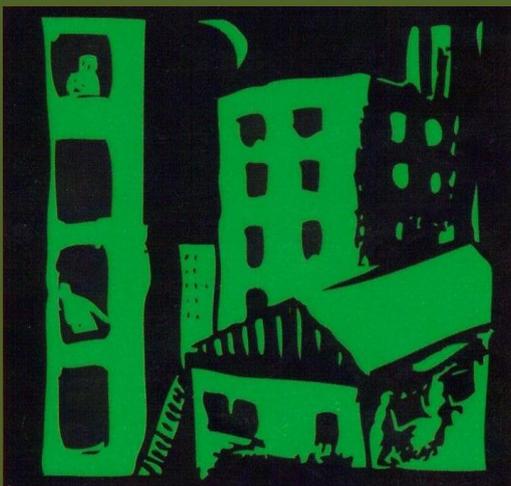


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Assessing the nature of competition law enforcement in South Africa*

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1 INTRODUCTION

There has been speculation in South African law in recent years regarding the nature and scope of the powers and duties conferred on the local competition authorities. This is due in part to divergent opinions in case law surrounding the nature and scope of the powers of the competition authorities, the interpretation of provisions relating to administrative penalties¹ as well as the introduction of new criminalising provisions by the Competition

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¹ Section 59 of the Competition Act 89 of 1998, as amended ("the Competition Act").

Amendment Act 1 of 2009.² Given that Chapter 5, Part B of the Competition Act already provides the Competition Tribunal with powers comparable to those of a prosecuting authority when dealing with complaints referred to it, procedural fairness in competition law enforcement proceedings, as well as the nature of remedies demanded and imposed in these proceedings, have become pertinent issues for analysis. Whereas some maintain that the powers and duties of the competition authorities are necessary to abide by the stated objectives of the Act, and that the administrative penalties commonly imposed on contravening firms are purely administrative and a form of equitable relief, others argue that the system is frighteningly similar to criminal procedural systems, and as such should be held to a higher standard and burden of proof at all times. This article attempts to identify and elaborate on the core issues related to the above and seeks to determine what position, if any, should be adopted by our courts and legislature to address them. First, a brief analysis of the historical development of South African competition law will be undertaken, with special emphasis on identifying the intention of the legislature. Thereafter a review of how the relevant provisions (and the legislature's intent) have been interpreted by South African courts is conducted, whereafter the traditional approach to the difference between criminal and civil procedure is examined. In this regard, a comparative analysis will illustrate how the situation has unfolded in foreign jurisdictions, specifically those of Canada, the European Union and the United States. These jurisdictions have been chosen, in particular due to their similarities with South African competition law, as well as the fact that South African courts often refer to them for guidance when developing its competition jurisprudence. Finally, a brief concluding overview shall be provided.

2 THE HISTORICAL DEVELOPMENT OF SOUTH AFRICAN COMPETITION LAW

In a way, competition law in South Africa has an ancient pedigree, dating back to Roman law in the form of the *lex iulia de annona*, as promulgated during the reign of Augustus to impose heavy fines on traders manipulating the price of grain,³ which was then later expanded through the introduction of Zeno's Constitution.⁴ Emperor Charles V⁵ promulgated the Perpetual Edict in Brussels, which, amongst other things, imposed criminal sanctions as a means of preventing monopoly.⁶ Relating to this period, Sutherland illustrates the prevailing sentiments with reference to the following remarks by Cowen:

² Hereinafter referred to as "the Amendment Act." See, for example, the introduction of s 73A as well as the amendments to s 74. It is important to note that these amendments have yet to enter into force.

³ Lord Wilberforce *et al*, *The law of restrictive trade practices and monopolies* (London: Sweet & Maxwell 1966) at para 106.

⁴ Sutherland P & Kemp K, *Competition law of South Africa* (Durban: LexisNexis Looseleaf Service Issue 17 – December 2013) at 2-5.

⁵ The Netherlands was part of the Holy Roman Empire at the time.

⁶ Section 7 of the Perpetual Edict of 4 October 1540.

The dominant feature of this branch of the Roman-Dutch law is that it clung to the Roman faith in the efficacy of criminal sanctions as a means of preventing monopoly. Indeed, broadly speaking, it might fairly be said that the Roman-Dutch law against monopolies shows basically the same characteristics as does the Roman law which inspired it.⁷

Sutherland reiterates that forestalling or cornering of the market were considered criminal acts in Roman-Dutch law (*crimen fraudatae annonae*), but that in spite of this the provisions proved to have more bark than bite and the legislation in question failed to achieve its intended outcomes:

The offences often went unpunished, they were not enforced at the end of the 17th century and became a dead letter by the end of the 18th century. Throughout this period the Dutch economy, like all others in Europe, was dominated by officially recognised monopolies in the form of guilds, and later the chartered corporation or trading monopolists such as the Dutch East India Company.⁸

2.1 Early legislative attempts

During the early 20th century there was no broad legislative framework for South African competition law, with fragmented regulation through various Acts⁹ and a subsequent attempt to broaden the scope of the Board of Trade and Industry, notably through the introduction of the Undue Restraint of Trade Act.¹⁰ The tenure of this Act was brief, and subject to severe criticism by the Board itself, which led to the drafting of a report suggesting its repeal and the introduction of proper legislation formulated on the basis of identified principles and objectives.¹¹

As a result of the Board of Trade and Industry's report, South Africa's first true general competition law came in the form of the Regulation of Monopolistic Conditions Act.¹² However, this legislation itself was also later criticised as being overly cautious and permissive. Enforcement under this law was seen to be ineffective: over a period of twenty years, only 18 investigations were ordered into alleged monopolies.¹³ The first time an anti-competitive practice was formally criminalised in South Africa was in 1969, when resale price maintenance was declared unlawful.¹⁴ Lewis notes that only a few companies were ever fined for persisting in this conduct; however, in one particular case suspended prison sentences were imposed on some of the guilty parties.¹⁵

⁷ Sutherland & Kemp (2013) at 2-6.

⁸ Sutherland & Kemp (2013) at 2-6.

⁹ Sutherland & Kemp (2013) at 3-26.

¹⁰ Act 59 of 1949.

¹¹ Sutherland & Kemp (2013) at 3-27.

¹² Act 25 of 1955, as amended.

¹³ *Competition law and policy in South Africa: An OECD peer review* (May 2003) at 12.

¹⁴ GN R. 1038, published in GG 2442 of 25 June 1969.

¹⁵ Lewis D, *Thieves at the dinner table: Enforcing the Competition Act: A Personal Account*, (Johannesburg: Jacana Media 2012) at 18. The case Lewis refers to is *S v South African Philips (Pty) Ltd And Others* 1977 (1) SA 446 (C). It should be noted that the judgment is brief, and makes no mention of the sentences ultimately imposed.

Subsequently, a commission of inquiry (Mouton Commission) was appointed to draft a report on the possibility of new legislation.

The *Mouton Commission Report*¹⁶ proposed a new South African competition law regime, which came about in the form of the Maintenance and Promotion of Competition Act.¹⁷ This Act set up a Competition Board, the first truly specialised body to investigate and deal with a variety of restrictive practices.¹⁸ Later, the specific restrictive practices of minimum resale price maintenance, horizontal collusion about price, terms, or market share, and bid rigging were declared per se unlawful in 1986.¹⁹ The Act specifically provided that such violations were to be treated as criminal offences which had to be proven beyond a reasonable doubt, with penalties upon conviction including a fine, imprisonment, or both. However, this mechanism was unsuccessful in addressing anti-competitive conduct due to high rates of more serious crime dominating investigative resources, and a lack of expertise in competition matters on the part of investigating and prosecuting officers.²⁰ As Lewis notes, there was not a single successful prosecution in terms of the 1979 Act, apart from one negotiated guilty plea by three companies in a furniture removal cartel which resulted in a miniscule fine of only R100.²¹

In proposing new legislation, one of the shortcomings identified by the Department of Trade and Industry in 1997 was that the penalties associated with contravention of prohibited anti-competitive practices remained contentious and problematic. In this regard, the Proposed Guidelines state:

The government's view is that monopolies law should be effected by a competent, professional agency with powers to investigate and respond rapidly and robustly to anti-competitive conduct. The decisions of the tribunal envisaged will be subject to judicial review, **but it is Government's intention to take enforcement of competition law out of the hands of the criminal courts and to avoid the prospect of lengthy, complex and costly litigation.**²²

Parliament sought to address this by expressly indicating that infringement of competition legislation would not be subject to criminal sanction (except for breaches of confidence, hindering the administration of the proposed Act or failures to attend when summoned and to answer truthfully to the Competition Commission).²³ In this regard, the Competition Bill of 1998 made reference to administrative fines.²⁴ There was

¹⁶ *Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act* (1978)

¹⁷ Act 96 of 1979, as amended.

¹⁸ The restrictive practices were mainly set out in s 1 of the Act, and referred to vertical and horizontal restrictive practices, and some general exclusionary conduct by firms.

¹⁹ GN 801, GG 10211 of 2 May 1986.

²⁰ Department of Trade and Industry, *Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development* (27 November 1997) (hereinafter referred to as "the Proposed Guidelines") at 3.4.6.

²¹ Lewis (2012) at 18.

²² At para 8.3.1. Emphasis added.

²³ Department of Trade and Industry, Explanatory Memorandum to Competition Bill, 1998, GG 18913 of 22 May 1998 at 63.

²⁴ Section 62 of the Competition Bill of 1998, GG 18913 of 22 May 1998.

therefore a deliberate policy choice to decriminalise anti-competitive practices, since criminal enforcement was deemed to have been ineffective. This conclusion was also drawn in the Competition Tribunal judgment in the case of *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & others*²⁵ where it was noted:

There were few if any criminal prosecutions under the repealed 1979 Act. It is not hard to understand why. Competition cases are difficult to conduct not only because they are fact intensive, but also because they involve the application of both law and economics. Neither the Department of Justice nor the SA Police Service have people with any special skills in this area - nor would it have been worth their while securing them, since under the old Act the number of cases requiring prosecutions was too insignificant to warrant the investment. ...The administrative penalty became a feature of the new Act. What the Act sought to achieve was to improve enforcement by making a specialist agency and adjudicative tribunal solely responsible.²⁶

2.2 The Competition Act 89 of 1998

The Competition Act of 1998 came into effect on 1 September 1999 and prohibited a number of practices, such as, restrictive horizontal practices, restrictive vertical practices, and abuses of a dominant position. In terms of the Act, these prohibited practices were to be investigated by the newly formed Competition Commission,²⁷ an independent and impartial²⁸ body which has the responsibility, amongst other things, to investigate and evaluate alleged prohibited practices²⁹ and refer matters to and appear before the Competition Tribunal,³⁰ a tribunal of record with jurisdiction throughout the Republic of South Africa.

Currently, section 59 of the Act provides that an administrative penalty may be imposed by the Tribunal, subject to certain conditions, if a firm is found to have been engaged in prohibited practices. Such penalty may be determined and enforced in one of two ways, either unilaterally by the Competition Tribunal or in terms of a consent agreement concluded between the respondent firm in question and the Competition Commission and approved and enforced by the Tribunal in terms of section 58 of the Act. Furthermore, in determining the extent of the penalty, the Tribunal must take into account several factors, namely:

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the behaviour of the *respondent*;
- (d) the market circumstances in which the contravention took place;
- (e) the level of profit derived from the contravention;

²⁵ *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd & others* (08/CR/Mar01).

²⁶ Para 13.

²⁷ Established in terms of s 19 of the Act.

²⁸ S 20(1).

²⁹ S 21.

³⁰ Established in terms of s 26.

- (f) the degree to which the *respondent* has co-operated with the Competition Commission and the Competition Tribunal; and
- (g) whether the *respondent* has previously been found in contravention of *this Act*.³¹

The use of such administrative penalties is in keeping with the practice in a number of other, more established jurisdictions for the purposes of competition law enforcement. Australia provides for “pecuniary penalties,”³² Canada for “administrative monetary penalties,”³³ the United Kingdom refers to “penalties”³⁴ and both the European Union³⁵ and the United States³⁶ use the term “fines.” It should be noted that the Competition Act also has other remedies of which the Competition Tribunal may avail itself if a firm is determined to have engaged in prohibited practices, such as, prohibitory and mandatory interdicts³⁷ and compulsory divestiture.³⁸

Interpretation of the Act should be in a manner that is consistent with the Constitution³⁹ and that gives effect to the Competition Act’s stated purposes while also complying with South Africa’s international law obligations.⁴⁰ Appropriate foreign and international law may also be considered when interpreting or applying the Act.⁴¹ The stated purposes of the Act can be found in section 2, and are as follows:

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

³¹ S 59(3). Note that the term “respondent” is used, and is italicised as such in the wording of the Act itself.

³² S 76, Part IV, Competition and Consumer Act 2010.

³³ Ss 74.1 and 79 of the Competition Act, RSC, 1985, C-34.

³⁴ S 36 of the Competition Act 1998.

³⁵ Article 103 of the Treaty on the Functioning of the European Union (hereinafter referred to as “the TFEU”).

³⁶ The Sherman Act, 15 USC §§ 1 and 2.

³⁷ Ss 58(1)(a)(i), (ii) and (v).

³⁸ S 60.

³⁹ The Constitution of the Republic of South Africa, 1996.

⁴⁰ S 1(2).

⁴¹ S 1(3).

It is submitted that the nature of the legislation is distinctly socio-economic. As such, the remedies at the disposal of the competition authorities should be viewed in the same light, and accordingly be seen to be used to provide equitable relief rather than to punish transgressors of the Act.

In terms of procedure, the Act provides that the Competition Tribunal must conduct its hearings in public in a speedy manner and in accordance with the principles of natural justice, and may conduct its hearings informally or in an inquisitorial manner.⁴² The Tribunal may, subject to its own rules of procedure, determine any matter of procedure at a hearing with due regard to the circumstances of that case and the principles of natural justice, and may condone any technical irregularities arising in any of its proceedings.⁴³ The standard of proof for proceedings under the Act, other than proceedings in terms of section 49C⁴⁴ or criminal proceedings, is on a balance of probabilities,⁴⁵ and written reasons for its decisions must be publicly issued.⁴⁶ To ensure further procedural fairness, the Act provides for judicial review of the Tribunal's decisions by the Competition Appeal Court⁴⁷ which has the power to review any decision of the Tribunal or consider appeals arising from the Tribunal.⁴⁸

Chapter 7 of the Act specifically provides for separate criminal offences.⁴⁹ Conviction is punishable by a fine, imprisonment, or both,⁵⁰ which a Magistrate's Court has the jurisdiction to impose.⁵¹ In this regard, explicit reference to *criminal proceedings* is made,⁵² and provisions containing statutory presumptions or so-called "reverse onus" clauses, which are not uncommon in South African criminal procedure law, can also be found.⁵³ Seemingly, the Competition Tribunal does not therefore have jurisdiction over criminal offences under the Act.

⁴² S 52(2).

⁴³ S 55.

⁴⁴ Applications for interim relief, where the standard of proof is the same as that of proof in a High Court on a common law application for an interim interdict in terms of s 49C(3).

⁴⁵ S 68.

⁴⁶ Ss 52(4) and (5).

⁴⁷ Established in terms of s 36.

⁴⁸ S 37(1).

⁴⁹ These reflect the offences mentioned in the Explanatory Memorandum, including breach of confidence (s 69), hindering the administration of the Act (s 70), failure to attend when summoned (s 71), failure to answer fully or truthfully (s 72), and failure to comply with the Act (s 73).

⁵⁰ S 74.

⁵¹ S 75. The Competition Tribunal therefore does not have jurisdiction over criminal offences under the Act.

⁵² S 77.

⁵³ Ss 77(1)(a) and (b), and s 77(2). Examples of "reverse onus" provisions in the Criminal Procedure Act 51 of 1977 include s 237(2) (presumption of a prior lawful and binding marriage upon production of a certified copy of an extract from a marriage register on a charge of bigamy) and s 245 (presumption that if it is proved that an accused has made a false representation, such accused shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false).

It would appear that the legislator's intent behind the framing of the Act was apparent. Experience had shown that criminal enforcement of competition law had been ineffective. It was therefore decided to overhaul competition law enforcement entirely. The Commission, an independent and impartial body with specialist knowledge in the field of competition, would play the role of investigator and prosecutor (for lack of a better term). The Tribunal, independent of the Commission, would be a specialist adjudicative body with the power to impose certain remedies and penalties if prohibited practices were established. It was hoped that more informal proceedings of an inquisitorial nature would aid the efficient administration of the Act. The proceedings of both the Commission and the Tribunal would be *sui generis*, with aspects related to both civil proceedings and criminal proceedings although seemingly weighted towards the former. Notably, criminal proceedings under the Act are dealt with in a separate chapter, and attempts are made to separate such proceedings from the jurisdiction of both the Competition Commission and Tribunal, notwithstanding the fact that certified orders made by the Tribunal or Competition Appeal Court may still have an indirect effect on criminal proceeding in a Magistrate's Court.⁵⁴

3 THE NATURE AND POWERS OF THE COMPETITION AUTHORITIES TESTED IN THE COURTS

In the wake of the Act coming into operation in the latter part of 1999 and with the Commission starting its first complaint referrals to the Tribunal, there were immediate legal challenges to the Commission and Tribunal's powers and the nature of competition law enforcement in general. The debate can be split into two broad points of contention, namely, the nature of the penalties imposed by competition authorities in terms of section 59 of the Act, and the scope and nature of the Commission's powers when it comes to investigation and engaging in proceedings itself. Accordingly, we will deal with these broad categories separately.

3.1 The nature of penalties under section 59 of the Act

In *Federal Mogul Aftermarket Southern Africa (Pty) Limited v The Competition Commission & another*,⁵⁵ the Competition Appeal Court had to decide whether the administrative penalties provided for in section 59 of the Act were a form of criminal punishment or not. The case itself dealt with the prohibited practice of minimum resale price maintenance,⁵⁶ and the appeal is pertinent to the discussion at hand due to a constitutional challenge to the validity of section 59 on the grounds that administrative

⁵⁴ Section 77(1)(c) provides that "an order certified by the Chairperson of the Competition Tribunal or the Judge President of the Competition Appeal Court, is conclusive proof of the contents of the order of the Competition Tribunal or the Competition Appeal Court, as the case may be."

⁵⁵ [2005] 1 CPLR 50.

⁵⁶ Minimum resale price maintenance refers to instances where a supplier of products compels or coerces his distributors to ensure that they do not re-sell products below a set price or particular price level. This is, in essence, tantamount to an indirect form of price fixing between the various distributors of the same brand of products.

penalties constituted a type of punishment that requires the responding party to be afforded the constitutional guarantees afforded to an accused by section 35(3) of the Constitution. Davis JP and Jali JA held that the provisions of the Act clearly draw a distinction “between those provisions, which are followed by a criminal sanction, and those, which are followed by an administrative penalty.”⁵⁷ The Court further held that the purpose and context of section 59 proceedings clearly point to them being proceedings of a civil nature “as the purpose is not to punish criminals by imprisonment... and the context is corrective and non-criminal in nature.”⁵⁸ Furthermore, the decision confirmed that the Tribunal is not “an ordinary court” within the meaning of section 35(3) of the Constitution, but “an independent and impartial tribunal” for the purposes of section 33 (Just administrative action) and section 34 (Access to the courts) of the Constitution.⁵⁹ It is also worth noting that the administrative penalty that was imposed on the respondent in this case amounted to R3 million, six times greater than the maximum criminal fine that may be imposed upon conviction of contempt of the Tribunal or the Competition Appeal Court, but far lower than the maximum potential administrative fine that could have been levied. It is submitted that this indicates that the authorities are not attempting to use the fines in a punitive manner, but rather as a form of equitable relief, in accordance with the provisions of section 59(3).

Subsequent to the *Federal Mogul* decision, it would appear that the legislature’s intentions and the interpretations of the Act by the Commission, Tribunal and the Competition Appeal Court were consistent. Some uncertainty has, however, been caused by a *dictum* of Harms DP in a recent Supreme Court of Appeal judgment in *Woodlands Dairy (Pty) Ltd & another v Competition Commission*⁶⁰ in which he states “[t]he so-called ‘administrative penalties’ (more appropriately referred to as ‘fines’ in s 59(2)) bear a close resemblance to criminal penalties.”⁶¹

It is of vital importance to clarify this situation since criminal offences require a higher burden of proof. Indeed, criminal procedure differs significantly from civil procedure in that it entails significant procedural barriers to imposing sanctions.

The equating of the penalties in section 59 to criminal fines led to more hard-line approaches and interpretation relating to competition law enforcement being adopted at times. In *Southern Pipeline Contractors & another v Competition Commission*⁶² it was subsequently pointed out by the Competition Appeal Court that the approach adopted by the Supreme Court in *Woodlands* compels the conclusion that the administrative penalties should be “proportional in severity to the degree of blameworthiness of the offending party, the nature of the offence and its effect on the South African economy in

⁵⁷ At 85.

⁵⁸ At 87.

⁵⁹ At 90.

⁶⁰ 2010 (6) SA 108 (SCA)

⁶¹ 2010 (6) SA 108 (SCA) at para 10.

⁶² *Southern Pipeline Contractors & another v Competition Commission* (105/CAC/Dec10, 106/CAC/Dec10) [2011] ZACAC 6.

general and consumers in particular.”⁶³ Whether this interpretation and application are correct and desirable shall be analysed below in light of foreign jurisprudence below.

3. 2 The nature and scope of the powers of the Commission

In the *Norvatis*⁶⁴ case, a complaint against a number of pharmaceutical manufacturers referred to the Tribunal was contested, among other things, on the ground that the referral by the Commission violated those firms’ right to natural justice (and more specifically the principle of *audi alteram partem*) and constituted procedurally unfair administrative action. The Tribunal confirmed that the Commission’s powers are of a preliminary and investigative nature whereas the Tribunal is specifically empowered by the Act to adjudicate on prohibited practices and determine whether a prohibited practice has actually occurred. Only once a complaint has been referred to the Tribunal are the respondents afforded full administrative justice rights, such as, requesting information prior to the hearing as well as having their case heard.⁶⁵ The decision indicated that at the investigation stage respondents are only entitled to the “gist” or substance of the case against them, with reference to the Supreme Court of Appeal judgment in *Chairman: Board on Tariffs and Trade & others v Brenco Incorporated & others*⁶⁶ which held that the Board on Tariffs and Trade performed both an investigative and determinative function at various times. This view was confirmed by the Supreme Court of Appeal in *Simelane NNO & others v Seven Eleven Corporation (SA) (Pty) Limited & Another*.⁶⁷ Shortly thereafter in *Sappi Fine Paper (Pty) Ltd v Competition Commissioner & another*⁶⁸ the Competition Appeal Court found that the Commission is only empowered to investigate a complaint alleging contraventions of specific provisions of the Act, and does not have a power to investigate conduct generally considered to be anti-competitive.⁶⁹

The SCA in *Woodlands* likened the initiation of a complaint of anti-competitive behaviour to a summons in that it must survive the tests of legality and intelligibility.⁷⁰ As such, the Commission must at the very least be in possession of information concerning a specific alleged practice which, objectively viewed, gives rise to a reasonable suspicion of the existence of a specific prohibited practice.⁷¹ In the *Netstar*⁷² case this was later held not to mean that the initial complaint requires the level of precision demanded in pleadings, but that it must be “expressed with sufficient clarity

⁶³ At para 9.

⁶⁴ *Norvatis SA (Pty) Ltd & others v The Competition Commission and Others* (22/CRB/Jun01).

⁶⁵ At paras 42-47.

⁶⁶ 2001 (4) SA 511 (SCA).

⁶⁷ 2003 (3) SA 64 (SCA) at para 14.

⁶⁸ [2003] 2 CPLR 272 (CAC).

⁶⁹ At para 35.

⁷⁰ 2010 (6) SA 108 (SCA) at para 95.

⁷¹ At para 36.

⁷² *Netstar (Pty) Ltd & others v Competition Commission & another* (97/CAC/May10, 98/CAC/May10, 99/CAC/May10) [2011] ZACAC 1.

for the party against whom that allegation is made to know what the charge is and be able to prepare to meet and rebut it.”⁷³

In *Loungefoam (Pty) Ltd & others v Competition Commission & others*⁷⁴ the criminal law analogy went even further when the Competition Appeal Court explicitly compared an investigation by the Commission to a police, or criminal, investigation.⁷⁵ In this regard, Part B of the Act provides the Commission with a number of powers that are couched in the language of criminal procedure, such as the authority to enter and search under warrant⁷⁶ or without warrant⁷⁷. The only procedure under South African civil law that comes anywhere close to the consequences of these entry and search powers is the Anton Piller order, the purpose of which is to secure the preservation of evidence in proceedings already instituted, or to be instituted, by the applicant. The Appellate Division set out the essential requirements for such an order to be granted in a decision in 1995,⁷⁸ and it has been described as having “draconian and extremely invasive consequences” and as being “an example of the outer-extreme of judicial power” in a recent authoritative decision on the procedure.⁷⁹

It is submitted that the Commission’s powers of search and entry under the Act differ in two material respects from Anton Piller orders. Firstly, Anton Piller orders are always subject to judicial oversight being exercised prior to the entry and search taking place, which is not the case with searches without warrant under section 47 of the Act, which require belief on reasonable grounds that a warrant would be issued under section 46 if applied for, and that the delay ensuing from first obtaining a warrant would defeat the object or purpose of the entry and search. Secondly, Anton Piller orders require the applicant to have knowledge of specific documents in the possession of the respondent, whereas sections 46 and 47 searches do not require such knowledge, but rather a belief on reasonable grounds that a prohibited practice has taken place, is taking place or is likely to take place, or that anything connected with an investigation in terms of the Act is in the possession, or under the control, of a person who is on or in those premises. In fact, the wording of section 47(2) of the Act is almost identical to the

⁷³ At para 27.

⁷⁴ *Loungefoam (Pty) Ltd & others v Competition Commission & others* (102/CAC/Jun10) [2011] ZACAC 4.

⁷⁵ At paras 44 and 45.

⁷⁶ S 46.

⁷⁷ S 47.

⁷⁸ In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, Maphanga v Officer Commanding, SA Police Murder & Robbery Unit, Pietermaritzburg* 1995 (4) SA 1 (A), Corbett CJ stated the requirements for the granting of an *Anton Piller* order (at 15): “...what an applicant for such an order, obtained in camera and without notice to the respondent, must *prima facie* establish, is the following: (1) That he, the applicant, has a cause of action against the respondent which he intends to pursue; (2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant’s cause of action (but in respect of which applicant cannot claim a real or personal right); and (3) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.”

⁷⁹ *Mathias International Limited & another v Baillache & others* [2010] ZAWCHC 68 at para 11.

wording of section 22(b) of the Criminal Procedure Act.⁸⁰ Accordingly, it is clear that the Commission's investigative powers, especially the power to enter and search premises without a warrant, bear the strongest resemblance to criminal procedures under South African law.

In the *Senwes*⁸¹ case, the question was raised as to whether the Competition Tribunal was correct in allowing the finding of a particular contravention of the Act⁸² which although related was never part of the original content and wording of the complaint referral against the respondent firm. The Competition Appeal Court held that the purpose of the Act is to ensure that the Tribunal "would not be constrained by the law relating to pleadings in the same way as would a civil court during a trial",⁸³ as well as not "inflexibly constrained by an adversarial model of adjudication."⁸⁴ On further appeal, the Supreme Court of Appeal continued the criminal analogy used in *Woodlands* by referring to the conduct complained of in the referral as "the charge" and to the conduct which the Tribunal found to be objectionable as "the conviction."⁸⁵ Brand JA held that there was a difference between the charge and the conviction in the Tribunal's decision, and that the Tribunal had gone beyond the terms of the referral and its own authority. The Tribunal, it was confirmed, is a creature of statute and has no inherent powers, and in accordance with the constitutional principle of legality, has to act within the powers conferred upon it by its enabling statute.⁸⁶ As such, the Tribunal must confine a hearing to matters set out in the referral to it by the Commission, and the referral "constitutes the boundaries beyond which the Tribunal may not legitimately travel."⁸⁷

On a final appeal, the Constitutional Court differed from the Supreme Court of Appeal's view. Jafta J in delivering the main judgment held the following:

[Section 52] gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal. Most importantly, it also authorises the Tribunal to adopt an inquisitorial approach to a hearing. Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry.⁸⁸

Of interest is the judgment of Froneman J (Cameron J concurring), who noted the following:

In my respectful view the Supreme Court of Appeal erred in its approach to determining the ambit of the referral, by failing to have regard to the relevant provisions of the Act. The Act does not use the language of "charge" and "conviction" at all. Even if they were used merely for the sake of brevity, the metaphor or analogy that they carry is inapposite to the Tribunal's powers in conducting a hearing. They are suggestive of an approach that the Tribunal's powers to determine

⁸⁰ Act 51 of 1977.

⁸¹ *Senwes Ltd v Competition Commission* (87/CAC/Feb09) [2010] ZACAC 6.

⁸² A so-called "margin squeeze" in terms of s 8(c).

⁸³ At para 39.

⁸⁴ At para 40.

⁸⁵ *Senwes Ltd v Competition Commission* [2011] 1 CPLR 1 (SCA) at para 38.

⁸⁶ At para 51.

⁸⁷ At para 52.

⁸⁸ *Competition Commission v Senwes Ltd* [2012] ZACC 6 at para 50.

the terms of a referral must be narrow and restricted. The provisions of the Act do not justify that kind of restrictive approach.⁸⁹

Froneman J suggested that a restrictive approach may be more appropriate to the investigative powers of the Commission, but not the adjudicative powers of the Tribunal.⁹⁰ Whereas the main judgment found that the Tribunal's failure to rule on Senwes's objections to the ambit of the referral had not resulted in prejudice or unfairness to Senwes, it opined that the failure by the Tribunal to make a ruling on the ambit at the start of the proceedings – or as soon as it became clear that there was a dispute about the ambit – was procedurally unfair and resulted in a failure of justice, and recommended that the matter be referred back to the Tribunal to make a ruling on the ambit.⁹¹

The Commission's success on Constitution Hill in the *Senwes* matter prompted it to seek direct access to the Constitutional Court in two matters appealing decisions taken by the Competition Appeal Court. In the *Yara* matter,⁹² the Competition Appeal Court held that the Commission is unable to amend an existing referral to the Tribunal in order to introduce a new complaint not previously submitted to, or initiated by, it.⁹³ In the *Loungefoam* matter,⁹⁴ it held that the Commission is not entitled to amend its founding affidavit in a complaint referral to include further implicated entities or additional allegations, and reaffirmed that the Act requires "that the sequence of complaint initiation, investigation and referral be followed."⁹⁵ Accordingly, the Competition Appeal Court's position appeared clear – if, in the course of investigating a complaint either initiated by it or submitted to it, the Commission uncovers evidence of alleged prohibited practices or that implicates parties not mentioned in the complaint, the Commission is unable to amend that complaint but must, instead, initiate a new complaint. The Constitutional Court decided to refuse leave to appeal directly to it in both cases,⁹⁶ preferring that the Supreme Court of Appeal to hear the matters first. Of interest is the fact that Justices Cameron and Yacoob dissented in both cases, feeling that leave to appeal was warranted due to, *inter alia*, the importance of the Commission's public role and the significance of the issues it sought to have determined.⁹⁷

⁸⁹ At para 65.

⁹⁰ At para 69.

⁹¹ At para 79.

⁹² *Yara South Africa (Pty) Ltd v Competition Commission & others, Competition Commission v Sasol Chemical Industries Ltd & others, Omnia Fertilizer Ltd v Competition Commission* (93/CAC/Mar10, 94/CAC/Mar10) [2011] ZACAC 2.

⁹³ At para 39.

⁹⁴ *Loungefoam (Pty) Ltd & others v Competition Commission & others* (102/CAC/Jun10) [2011] ZACAC 4.

⁹⁵ At para 52.

⁹⁶ *Competition Commission v Yara South Africa (Pty) Ltd & others* (CCT 81/11) [2012] ZACC 14; and *Competition Commission v Loungefoam (Pty) Ltd & others* (CCT 90/11) [2012] ZACC 15.

⁹⁷ [2012] ZACC 14 at paras 46-73 and [2012] ZACC 15 at paras 31-37.

In the recent *Paramount Mills* decision dealing with the content of a complaint referral,⁹⁸ the Competition Appeal Court confirmed that referral proceedings before the Tribunal are not equivalent to motion or application proceedings in the High Court despite affidavits in referral proceedings before the Tribunal having the same nature as affidavits in motion or application proceedings in the High Court.⁹⁹ The Tribunal's *sui generis* and inquisitorial model of adjudication was therefore reaffirmed. The Court also confirmed that witness statements can cure deficiencies in the affidavits in complaint referral proceedings, since witness statements have an important supplementary role to play and, in fact, can provide parties alleged to have carried out prohibited practices with more information about the hearing before the Tribunal than they would ordinarily enjoy in civil proceedings in the High Court.¹⁰⁰

4 IS COMPETITION LAW ENFORCEMENT CRIMINAL, CIVIL OR SOMETHING ELSE? A COMPARATIVE ANALYSIS

The rather strange apparent *status quo* in contemporary South African competition law when considering the opinions found in current case law is as follows:

- 1) Complaints of prohibited practices are submitted to or initiated by an investigative body, which conducts investigations of a seemingly *criminal* nature into these complaints;
- 2) That investigative body may decide to refer and prosecute complaints of prohibited practices before a separate, adjudicative body whose processes are neither *civil* nor *criminal* in nature, but rather *sui generis* and inquisitorial in approach; and
- 3) That adjudicative body may decide, upon determination of prohibited practices on the part of a respondent, to impose administrative penalties which are seemingly *criminal* in nature.

This does not seem to accord with either the Explanatory Memorandum to the Competition Act or earlier judgments discussing these aspects. Accordingly, it is important to ask whether judgments, such as, *Woodlands* were correct in equating the section 59 administrative penalties with criminal penalties, and subsequently in attempting to restrict the powers of the competition authorities in general.

The orthodox view of the distinction between criminal and civil law has been that criminal law puts in place rules, the contravention of which results in punishment by the State. In the Canadian constitutional judgment of *Proprietary Articles Trade Association v Attorney-General for Canada*¹⁰¹ Lord Atkin offered the following definition of criminal law:

Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act cannot be

⁹⁸ *Paramount Mills (Pty) Ltd v Competition Commission of South Africa* (112/CAC/Sep11) [2012] ZACAC 4.

⁹⁹ At para 60.

¹⁰⁰ At paras 64 & 65.

¹⁰¹ [1931] AC 310 PC.

discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?¹⁰²

It is clear from the Afrikaans, German and French terms for criminal law – “strafreg”, “Strafrecht” and “droit pénal”, respectively – that criminal law is traditionally about punishment, and more specifically, punishment by the State. Modern society has, however, seen the introduction of administrative procedures which carry the sanction of penalties. Examples from the United Kingdom include tax penalties,¹⁰³ decriminalised parking enforcement,¹⁰⁴ and anti-social behaviour orders (“ASBOs”).¹⁰⁵ This represents what has been called a paradigm shift in criminal enforcement necessitating further analysis due to confusion in terminology.¹⁰⁶

Few countries seem to have as clear-cut a distinction between so-called regulatory offences and criminal offences as Germany. The *Strafgesetzbuch* (“Penal Code”) distinguishes between “*Verbrechen*”, which are criminal acts punishable by more than a year’s imprisonment, and “*Vergehen*”, which are criminal acts punishable by less than a year’s imprisonment.¹⁰⁷ From 1968 onwards minor criminal offences (so-called “*Übertretungen*” or “violations”) were re-classified as regulatory offences (*Ordnungswidrigkeiten*, or “offences against order”) in the “*Ordnungswidrigkeitengesetz*”, which provides for administrative bodies to have the power to prosecute and penalise offences against order outside of court jurisdiction.¹⁰⁸ There is no specific procedure provided for the imposition of administrative fines for such offences against order; however, unless special provision is made elsewhere in the Act, the provisions of general criminal procedure apply.¹⁰⁹ It is of interest to note that competition law infringements in Germany are classified in the *Gesetz gegen Wettbewerbsbeschränkungen* (“Act Against Restraints On Competition”) as regulatory offences,¹¹⁰ albeit with exceptionally severe fine sanctions.

The difference between criminal offences and regulatory offences is often explained on the basis of the distinction between *mala in se* (“wrongs in themselves”) and *mala prohibita* (“wrongs because they are prohibited”). The argument that is put forward is that criminal offences are both morally and legally wrong, whereas

¹⁰² At 324.

¹⁰³ In *Her Majesty’s Revenue and Customs v Khawaja* Ch D [2008] STC 2800; [2008] EWHC 1687 (Ch) it was confirmed, with reference to the *Keith Report*, that a civil penalty system would require proof only to a civil standard, that is, on a balance of probabilities.

¹⁰⁴ Road Traffic Act 1991, in terms of which local authorities are empowered to issue Penalty Charge Notices which can either be paid or contested, either by appeal to a tribunal or opposing the claim for payment of the penalty charge at an arbitration hearing.

¹⁰⁵ As introduced by the Crime and Disorder Act 1998 (as extended) in England and Wales, and by the Antisocial Behaviour (Scotland) Act 2004 in Scotland.

¹⁰⁶ White R, “Civil Penalties: Oxymoron, chimera and stealth sanction?” (2010) 126 *Law Quarterly Review* 593at 596 and 597.

¹⁰⁷ § 12 *Strafgesetzbuch* (StGB).

¹⁰⁸ § 35 *Ordnungswidrigkeitengesetz* (OWiG).

¹⁰⁹ §46(1) OWiG.

¹¹⁰ §81 *Gesetz gegen Wettbewerbsbeschränkungen* (GWB).

administrative offences are not in themselves morally wrong and are therefore less blameworthy than criminal offences. Because administrative offences are less blameworthy than criminal offences, so the argument goes, it justifies prosecuting and penalising those offences outside of the traditional criminal justice system.¹¹¹

Wouter Wils identifies six distinguishing characteristics of criminal law, as opposed to public law enforcement of a civil or administrative nature:¹¹²

- Criminal law appears to have a monopoly on the use of imprisonment, and the possibility of a sanction of imprisonment is not necessary for a prohibited act or enforcement procedure to be criminal, but it is definitely a sufficient condition;
- The commission of a criminal offence usually requires that the prohibited act be committed with criminal intent, not by mere negligence;
- Criminal sanctions are designed to carry a stigma to reflect the moral condemnation of the infringement in question;
- There appears to be a less strict relationship in criminal law between the size of the penalty and the size of the harm caused than in the setting of civil sanctions. As Wils puts it, this “appears to reflect the idea that criminal law does not seek to *price* certain behaviour (by making the actor bear the external costs of his behaviour) but rather to *prohibit* it (unconditionally, i.e. irrespective of the actual size of the external costs)”¹¹³;
- Under criminal law enforcement authorities tend to have stronger investigative powers; and
- Criminal procedures tend to have stronger protections in place to avoid false convictions, and in particular in criminal enforcement systems the adjudicative or decision making function is always separated from the investigative and prosecutorial functions. A very important principle here is that of *ei incumbit probatio qui dicit, non qui negat*¹¹⁴ (the burden of proof lies upon him who affirms, not him who denies), which is enshrined in the presumption of innocence.

These characteristics all form part of what one might call traditional “hard core” criminal offences.

Notwithstanding the above, the traditional line between criminal and non-criminal sanctions has become extremely blurred at times. Mann identifies a growing trend of the U.S. Supreme Court to use legal fictions to prescribe “punitive civil sanctions” to avoid the procedural implications of punishment (that is, the stiff procedural barriers to imposing sanctions), a trend he claims is caused by, amongst others, the growing influence of utilitarianism and deterrence theory in the law, the general expansion of law and litigation, the increasing authority of administrative

¹¹¹ The *Keith Report* at para 18.4.2.

¹¹² Wils WPJ, “Is Criminalization of EU Competition Law the Answer?” (2005) 28 (2) *World Competition* 117 at paras 6-14.

¹¹³ Wils (2005) at para 11.

¹¹⁴ The Digest of Justinian, 22.3.2.

agencies, frustration with the procedural obstacles of the criminal law, and reforms in civil procedure.¹¹⁵ At this stage it is accordingly worthwhile to look at foreign legal systems' approaches to the problem of the distinction between criminal and non-criminal sanctions with reference to competition law.

4. 1 The Canadian position

The Canadian Competition Act expressly states that the purpose of administrative monetary penalties is not to punish, but rather to promote future compliance with that Act,¹¹⁶ which reflects the sentiments adopted by the Competition Tribunal and Competition Appeal Court in their respective judgments in *Federal-Mogul*. There are some anti-competitive practices which are criminalised and have to be proven beyond a reasonable doubt and which, upon conviction, can lead to fines, imprisonment or injunctions ordering the offender to cease its anti-competitive behaviour. Notably, these offences must be prosecuted separately in an ordinary court.¹¹⁷ A number of anti-competitive practices are reviewable by the Commissioner of Competition and are subject to civil sanctions.¹¹⁸ In this regard, the Commissioner can institute formal civil proceedings in the Competition Tribunal against individuals or companies that engage in reviewable anti-competitive practices.

The Canadian Charter of Rights and Freedoms (sections 1-34 of the Constitution Act 1982) is the Canadian equivalent of the South African Bill of Rights. Section 11 of the Canadian Charter protects a person's legal rights in criminal and penal matters and is broadly comparable to section 35 of the South African Constitution. The Supreme Court of Canada had to decide in *R v Wigglesworth*¹¹⁹ when a proceeding is, or should be, criminal in nature. Justice Wilson, for the majority, formulated a two-part test to be used:

In my view, **if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity**, then that matter is the kind of matter which falls within s. 11... This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity... This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve **the imposition of true penal consequences**. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to

¹¹⁵ Mann k, "Punitive Civil Sanctions: The Middleground Between Criminal And Civil Law" (1992) 101(8) *Yale Law Journal* 1795.

¹¹⁶ Ss 74.1(4) and 79(3.3) of the Competition Act, RSC 1985, C-34.

¹¹⁷ Parts VI and VII, Competition Act, RSC 1985, C-34.

¹¹⁸ These include: refusal to deal (s 75); consignment selling (s76); tied selling, exclusive dealing and market restriction (s 77); abuse of dominant position (ss 78 and 79); delivered pricing (ss 80 and 81) and merger review (ss 91 - 100).

¹¹⁹ [1987] 2 S.C.R. 541.

be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.¹²⁰

This test was confirmed in *R v Généreux* where it was held that even if a matter dealt with was not of a public nature (the case involved a trial before a General Court Martial), section 11 would apply “by virtue of the potential imposition of true penal consequences.”¹²¹ The potential magnitude of administrative monetary penalties for competition law infringements was identified as a concern by the Retail Council of Canada in its testimony to the Standing Senate Committee on Banking, Trade and Commerce on amendments to the Competition Act in 2009. A legal opinion by Peter Hogg, a constitutional law expert, stated that the administrative monetary penalties were more like penalties associated with criminal offences in other Acts, such as, administrative penalties in taxing statutes which are based on a mathematical formula related to the amount of tax evaded, or the value of goods on which customs duty was evaded. Hogg further opines that the administrative monetary penalty provisions also have a “true penal consequence” as per the *Wigglesworth* test and were therefore of a criminal nature and necessitated section 11 protections.¹²²

Hogg’s opinion would appear to be consistent with Canadian constitutional law if one is able to prove that the magnitude of the administrative monetary penalty that may potentially be imposed in a competition law matter indicates the intention to redress a wrong done to society at large. However, it is submitted that Hogg’s assessment may be somewhat of an over-simplification of the situation. It is important to note that penalties under Canadian competition law are limited to a maximum of CAD 10,000,000 for a first order and CAD 15,000,000 for each subsequent order.¹²³ While this is a seemingly large amount, one must bear in mind the nature of competition law contraventions, and the fact that the potential revenue to be obtained by firms engaging in anti-competitive conduct can often be immense. Furthermore, a set of factors, similar to those found in the South African Act, is to be applied in determining the extent of the fine.¹²⁴ Lastly, an alternative remedy to that of simply imposing a fine is for an order to be made that an amount be distributed among the persons to whom the products which were affected by anti-competitive conduct were sold, provided that the amount does not exceed the total of the amounts paid to the person for the products in respect of which the conduct was engaged in.¹²⁵ It is submitted that this approach could be construed as a specialised form of relief based on the notion of negative interesse, and is accordingly quasi-delictual and administrative rather than criminal in nature. Thus, it remains to be seen whether the courts or legislature will adopt a stance similar to the one proposed by Hogg.

¹²⁰ [1987] 2 SCR 541 at paras 23 and 24. Emphasis added.

¹²¹ [1992] 1 SCR 259, at para 1

¹²² *Recent Competition Act Changes: A Work in Progress, Report of the Standing Senate Committee on Banking, Trade and Commerce* (June 2009) at 11.

¹²³ Ss 74.1 & 79 of the Competition Act, RSC, 1985, C-34.

¹²⁴ S 74.1(5) of the Competition Act, RSC, 1985, C-34.

¹²⁵ S 74.1(1)(d) of the Competition Act, RSC, 1985, C-34.

4.2 The European Union position

In contrast to the Canadian position, the penalties that may be imposed for anti-competitive conduct in the European Union are not similarly limited. The European Union position is an interesting one that has seen considerable jurisprudence over the last few years. Article 23(5) of Council Regulation (EC) No 1/2003¹²⁶ provides that decisions taken pursuant to imposing fines for anti-competitive activities “shall not be of a criminal nature.” The European Union’s Guidelines¹²⁷ indicate that the purpose behind such fines is deterrence, both specific and general. In keeping with this, the United Kingdom’s Office of Fair Trading confirmed that the twin objectives of its policy on financial penalties are to impose penalties reflecting the seriousness of the infringement and to ensure that the threat of penalties will deter both the infringing undertakings (specific deterrence) and other undertakings that may be considering anti-competitive activities (general deterrence) from engaging in them, while ensuring that such penalties are proportionate and not excessive.¹²⁸

The European Convention on Human Rights (“ECHR”) protects the right to a fair trial in Article 6. Similar to the Constitution of South Africa, Article 6 guarantees a fair public hearing before an independent and impartial tribunal for any dispute, as well as additional guarantees in the case of criminal proceedings. A rich body of jurisprudence has developed regarding the general interpretation of “charged with a criminal offence” for purposes of the application of the Article. In *Adolf v Austria*¹²⁹ the European Court of Human Rights held that the concept bears an autonomous meaning independent of the classification utilised by individual Member States.¹³⁰ In this regard, an objective test was developed to determine whether proceedings involve the determination of a “criminal charge” in the sense of Article 6, the so-called *Engel* criteria:

- The classification of the offence under domestic (national) law;
- The nature of the offence; and
- The nature and severity of the penalty.¹³¹

It would seem that the first criterion is by no means a conclusive determining factor. In *Öztürk v Germany* it was held that even though a State may classify certain offences (and their related remedies) as regulatory or administrative in the interests of decriminalisation, this does not mean that they may not be viewed as criminal when it comes to applying the ECHR.¹³² Furthermore, in *Ravnsborg v Sweden* it was held that the

¹²⁶ Of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU.

¹²⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), at para 4.

¹²⁸ OFT’s guidance as to the appropriate amount of a penalty, OFT423, September 2012, at 1.4 and 1.6.

¹²⁹ (1982) 4 EHRR 313.

¹³⁰ (1982) 4 EHRR 313 at para 30.

¹³¹ *Engel & others v The Netherlands* (1976) 1 EHRR 647 at para 82.

¹³² *Öztürk v Germany* (1984) 6 EHRR 409 at para 49.

fact that an offence does not give rise to a criminal record may be relevant but is not decisive, since this is usually only a reflection of the domestic classification.¹³³

In evaluating the second criterion a number of factors have to be taken into consideration:

- Is the legal rule in question addressed to a specific group, or is it a law of general application?¹³⁴ This is to distinguish disciplinary offences, applicable to specific groups or professions, from criminal offences, which are generally binding.
- Are the proceedings instituted by a public body with statutory powers of enforcement?¹³⁵
- Does the legal rule in question have a punitive or deterrent purpose?¹³⁶
- Is the imposition of any penalty dependent upon a finding of guilt?¹³⁷
- How are comparable procedures classified in other Contracting States?¹³⁸

Accordingly, the nature and purpose of the particular form of enforcement is of relevance.

The third criterion is determined with reference to the possible maximum penalty which may be imposed. In this regard, the possibility of imprisonment (even when it only serves as an alternative to a fine payable) can be pertinent. In *Demicoli v Malta* it was noted:

[W]hilst the House imposed a fine of 250 Maltese liri on the applicant which has not yet been paid or enforced, the maximum penalty he risked was imprisonment for a period not exceeding sixty days or a fine not exceeding 500 Maltese liri or both. What was at stake was thus sufficiently important to warrant classifying the offence with which the applicant was charged as a criminal one under the Convention.¹³⁹

In *Lutz v Germany*, it was further held that the second and third *Engel* criteria are not necessarily cumulative but alternative.¹⁴⁰ Accordingly, if an offence is already classified as criminal, then an analysis of the nature and severity of the penalty is moot.

Given the limited judicial review that European courts exercise with regard to the European Commission's complex economic determinations in competition law matters, the question of whether this situation is compatible with the right to a fair trial has been raised.¹⁴¹ The *Menarini* decision¹⁴² was an appeal against both the judgment and penalty of the Italian Competition Authorities relating to cartel conduct in the

¹³³ *Ravnsborg v Sweden* (1994) 18 EHRR 38 at para 38.

¹³⁴ *Bendenoun v France* (1994) 18 EHRR 54 at para 47.

¹³⁵ *Benham v the United Kingdom* [1996] ECHR 22 at para 56.

¹³⁶ *Öztürk v Germany* (1984) 6 EHRR 409 at para 53.

¹³⁷ [1996] ECHR 22 at paragraph 56.

¹³⁸ *Öztürk v Germany* (1984) 6 EHRR 409 at para 53.

¹³⁹ (1991) 14 EHRR 47 at para 55.

¹⁴⁰ (1988) 10 EHRR 182 at para 55.

¹⁴¹ It must be noted that the European Commission combines its investigative and adjudicative functions in the same body, in contrast to the position in South Africa.

¹⁴² *A. Menarini Diagnostics S.R.L. v Italy*, Application No. 43509/08.

market for diagnostics equipment. In the judgment, the European Court of Human Rights expressly confirmed that competition law may qualify as criminal law within the meaning of Article 6 ECHR and accordingly that judicial review of competition law decisions of administrative bodies is possible. The reasons appear from the judgment:

As for the nature of the offence, it appears from the provisions of the violation that the applicant firm is accused of that it is aimed at protecting free competition in the market. The Court notes that the AGCM, an independent administrative authority, has the function of monitoring agreements that restrict competition as well as abuses of a dominant position. It therefore affects the general interests of society normally protected by criminal law...Besides, it is necessary to note that the fine imposed intends for the most part to punish in order to prevent a repetition of the prohibited acts. One can then conclude that the fine imposed is founded on norms pursuant to purposes that are deterrent and punitive...As for the nature and the severity of the sanction "capable of being imposed" on the applicant..., the Court notes that the fine in question cannot be replaced by a punishment depriving liberty in the case of non-payment...However, we note that the AGCM imposed a pecuniary penalty of six million euros, a sanction that has a character that is both punitive, in that it is aimed at punishing a wrongful act, and deterrent, in that it aims to dissuade the firm in question from repeating the offence...In light of the preceding and considering the considerable size of the fine imposed, the Court finds that the sanction, due to its severity, raises a criminal matter...¹⁴³

Subsequent to *Menarini*, the Court of Justice of the European Free Trade Association States¹⁴⁴ in *Posten Norge*¹⁴⁵ accepted that Article 6 does not apply in all cases with the same stringency. The firm in question had been fined EUR 12,89 million for abuse of a dominant position.¹⁴⁶ In this regard the Court held that the amount of the charge was substantial and that the stigma attached to being held accountable for an abuse of a dominant position is not negligible.¹⁴⁷ It further held that criminal penalties of this kind do not necessarily need to be imposed in the first instance by an independent and impartial tribunal established by law but may be imposed by administrative bodies, provided that the decision of that body is subject to subsequent control by a judicial body that has full jurisdiction and does in fact comply with the requirements of Article 6(1) ECHR.¹⁴⁸

With regards to whether subsequent judicial review applied to complex economic matters, the Court held that it is restricted to a review of legality which "precludes it from annulling the contested decision if there can be no legal objection to the assessment...even if it is not the one which the Court would consider to be preferable."¹⁴⁹ That being said, the Court must still not only "establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into

¹⁴³ At paras 41-42.

¹⁴⁴ Hereinafter referred to as "the EFTA Court." The EFTA Court is responsible for the three EFTA members, namely Iceland, Liechtenstein and Norway, who have access to the internal market of the European Union and who are consequently subject to a number of European Union laws.

¹⁴⁵ *Posten Norge AS v EFTA Surveillance Authority*, Case E-15/10.

¹⁴⁶ At para 2.

¹⁴⁷ At para 90.

¹⁴⁸ At para 91.

¹⁴⁹ At para 98.

account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.”¹⁵⁰ Furthermore, when imposing fines for infringement of the competition rules, the administrative body of first instance cannot be regarded as having any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review. In addition, in a case covered by Article 6, the question whether the evidence is capable of substantiating the conclusions drawn by the competition authority must be answered having regard to the presumption of innocence and that the Court must nonetheless be convinced that the conclusions drawn are supported by the facts.¹⁵¹

The judgment in *Posten Norge* was lauded for effectively providing a single principle requiring in-depth judicial review of administrative procedures in competition cases in European Union law, in European Economic Area law and under the ECHR, at least in all cases involving fines or serious sanctions.¹⁵² An essentially similar stance was adopted by the European Court of Justice in *Schindler Holding & others v Commission*.¹⁵³ In *Schindler*, the Court dealt with the interrelationship between European Union competition law and Article 6 of the ECHR specifically with regard to the question of separation of powers. It found that the fact that the Commission imposes fines in competition matters is not in itself contrary to Article 6 of the ECHR.¹⁵⁴ The Court then goes on to discuss *Menarini* and states that entrusting the prosecution and punishment of anti-competitive conduct to administrative authorities is not inconsistent with the ECHR insofar as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR.¹⁵⁵ Furthermore, the obligation to comply with Article 6 of the ECHR does not necessarily preclude penalties from being imposed by administrative authorities, as long as such decisions are subject to subsequent review by a judicial body that has full jurisdiction.¹⁵⁶

It would therefore appear that the position in European law in the wake of *Posten Norge* and *Schindler* is as follows: penalties for anti-competitive practices are criminal penalties which may be imposed by an administrative authority in the first instance in quasi-criminal proceedings, as long as those decisions are subject to subsequent judicial review. The judicial review is on a sliding scale, with the weight of the matter in question determining the extent of the review; for example, a case of failing to notify a merger will hardly result in the same level of judicial review as would a case of abuse of dominance or “hard core” cartel conduct. However, whereas

¹⁵⁰ At para 99.

¹⁵¹ At paras 100 & 101.

¹⁵² Lang JT, “Judicial review of competition decisions under the European Convention on Human Rights and the importance of the EFTA court: the *Norway Post* judgment” (2012) 37(4) *European Law Review* 464 at 467.

¹⁵³ Case C-501/11 P.

¹⁵⁴ Case C-501/11 P at para 33.

¹⁵⁵ Case C-501/11 P at para 34.

¹⁵⁶ Case C-501/11 P at para 35.

similarities do exist between the European and South African law (especially on matters of substantive law), it is notable that there is quite some divergence when it comes to procedural aspects, and one should be mindful of this when applying such foreign judgments to South Africa's local system.

4 3 The Position in the United States of America

Modern United States antitrust legislation can be found in Title 15, Chapter 1 of the US Code, which effectively incorporates the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act ("FTCA") of 1914, among others, together with their subsequent amendments. On a read-through of the first couple of provisions of the Chapter, it would be easy to typify the American system of competition enforcement to be exclusively criminal in nature. Sections 1 and 2 of Title 15, Chapter 1, declare activities in restraint of trade to be "illegal" whereas people found engaging in prohibited conduct "shall be deemed guilty of a felony" for both of which heavy fines and/or a term of imprisonment may be imposed. However, when reading further, this becomes slightly less clear: sections 4 and 9 place duties on United States attorneys to bring proceedings "in equity," whereas section 15 introduces the well-known "treble damages" rule, which effectively paves the way for private enforcement of competition law chiefly by means of civil action (including civil action by the United States government on behalf of others).

From a state enforcement point of view, the two most important agencies are the Federal Trade Commission's Bureau of Competition and the Department of Justice's Antitrust Division. The Bureau of Competition operates exclusively in the civil arena, bringing cases of public interest relating to the protection and promotion of free and vigorous competition, whereas only the Department of Justice is able to prosecute criminal violations of competition law.¹⁵⁷ That being said, the Department of Justice's purposes are not exclusively related to criminal enforcement, and its Anti-trust Division Manual states that its primary goals and functions include:

General criminal and civil enforcement of the Federal antitrust laws and other laws relating to the protection of competition and the prohibition of restraints of trade and monopolization, including investigation of possible violations of antitrust laws, conduct of grand jury proceedings, issuance and enforcement of civil investigative demands, and prosecution of all litigation that arises out of such civil and criminal investigations.¹⁵⁸

The Manual sets out criteria to determine when a case will be proceeded with civilly or criminally. Interestingly, it notes that most cases will be civilly tried, as there are a number of situations where, although the conduct appears to be a violation of the law, criminal prosecution is not seen to be appropriate. These situations include cases in which: the case law is unsettled or uncertain; there are truly novel issues of law or fact presented; confusion reasonably may have been caused by past prosecutorial decisions;

¹⁵⁷ Federal Trade Commission guide to the antitrust laws: The enforcers. Available at <http://www.ftc.gov/bc/antitrust/enforcers.shtm> (accessed 14 July 2013).

¹⁵⁸ Department of Justice Antitrust Division Manual 5th ed (November 2012) at 1-2

or there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.¹⁵⁹

The Manual also goes into quite some detail in distinguishing the procedures and guidelines which govern investigations and prosecutions of a criminal nature from those of their civil counterpart. As Thide notes, criminal prosecution of antitrust violations are effectively currently restricted to “hard core” cartel conduct, such as, naked price fixing, bid rigging and market allocation.¹⁶⁰ Accordingly, the US system, notwithstanding its particular choice of wording, seems to opt for a system with much stronger civil enforcement than anything else. This is also a more historically accurate way of viewing the legislation, as it must be noted that the express purpose of the Sherman Act (and one of the strongest historical influences of United States antitrust policy) is the notion of attaining economic efficiency.¹⁶¹ In this regard, the suit in equity is one of the most commonly applied tools insofar as government enforcement is concerned.¹⁶² The reasoning behind this can be found in the judgment in *International Salt Co v United States* where it was noted:

In an equity suit, the end to be served **is not punishment of past transgression**, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they **effectively pry open to competition a market that has been closed by defendants’ illegal restraints**.¹⁶³

The notion of equitable relief, therefore, is to restore competitive conditions and deprive transgressors of competition law of their ill-gotten gains rather than to penalise conduct or compensate for loss (although both of these effects may also occur).¹⁶⁴

In *Timken Roller Bearing Co v United States*¹⁶⁵ the appellant firm was charged with several *per se* violations of antitrust law, including that of price fixing and market allocation of its anti-friction bearings. On the question of whether divestiture of the firm and its assets was warranted, Justice Reed held that a decree in equity is not, and should not be, punitive.¹⁶⁶ Furthermore, in *United States v Glaxo Group Ltd*, where pharmaceutical companies attempted to use the licensing of their patents to effectively create a division of markets, Justice White, in writing for the majority, confirmed that it is the role of the Court to determine a remedy that is only calculated to restore competitive conditions and nothing more.¹⁶⁷ In fashioning such relief, the Supreme

¹⁵⁹ Department of Justice Antitrust Division Manual 5th ed (November 2012) at 3-12.

¹⁶⁰ Thide F, “Judicial Policy Nullification of the Antitrust Sentencing Guideline” (2013) 54(2) *BCLR* 861 at 868.

¹⁶¹ Thide (2013) at 870.

¹⁶² Areeda PE & Hovenkamp H, *Antitrust law: An analysis of antitrust principles and their application* (Aspen 2013) at para 325a-3.

¹⁶³ 332 US 392 (1947) at 401. Emphasis added.

¹⁶⁴ Areeda & Hovenkamp (2013) at 325a-3.

¹⁶⁵ 341 U.S. 593 (1951).

¹⁶⁶ At 603.

¹⁶⁷ 410 US 52 (1973) at 64.

Court in *F Hoffman-La Roche Ltd v Empagran SA*¹⁶⁸ (quoting from earlier decisions) summarises the position as follows:

A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission... [I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor. Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief... [P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government.¹⁶⁹

Accordingly, a wide discretion is given to the courts, but is subject to alteration should the order be seen as too harsh or too lenient.¹⁷⁰

It is interesting to note that, despite its criminal wording, US antitrust law advocates for a system that is most decidedly more civil in nature. Admittedly, there are both administrative and quasi-criminal aspects insofar as the tools that the Federal Trade Commission and the Department of Justice are respectively entitled to use, but clear-cut policies and a plethora of case law ensure that these particular aspects do not create confusion. It is submitted that local competition authorities may find some value in referring to these when aiming for greater clarity in the South African landscape.

5 CONCLUSION

It would appear that the nature and scope of the powers conferred on the South African Competition Tribunal have been settled by recent case law. The highest court in the land has put it beyond doubt that the Tribunal is a specialist adjudicative creature of statute empowered to adopt an inquisitorial approach to hearings, which allows it to consider matters in a hearing that have not even been referred to it. What is, however, still unsettled is the position with regards to the investigative powers of the Competition Commission and the nature of the administrative penalties that may be imposed. It is desirable that these matters be clarified and settled as soon as possible.

With regard to the nature of the Competition Commission's powers, it is entirely foreseeable that, should our courts adopt the view that section 59 is criminal in nature, they will eventually confirm that the investigative powers of the Commission are of a criminal nature as well, and that they should be restrictively interpreted. As such, it is not unreasonable to expect the Commission to comply with the clear procedures set out in the Act and subsequently confirmed by the Competition Appeal Court in cases, such as, *Yara* and *Loungefoam* and the Supreme Court of Appeal in the *Woodlands* case. This is especially suitable in light of the legislature's recent move towards proposing criminal penalties – inclusive of imprisonment – to be imposed upon individuals found to have caused or permitted firms to engage in prohibited practices.¹⁷¹ Alternatively,

¹⁶⁸ 542 US 155.

¹⁶⁹ 542 US 155 at 170-171.

¹⁷⁰ Areeda & Hovenkamp (2013) at 325a-7.

¹⁷¹ As discussed above, see s 73A of the Competition Amendment Act.

should the penalties be seen as *sui generis* in nature, there is nothing wrong with viewing the powers of the Competition Commission in the same light. Here an analogy can be drawn with our labour enforcement system, which *inter alia* grants labour inspectors powers of investigation and adjudication in terms of the Basic Conditions of Employment Act¹⁷² and also proposes a quasi-criminal procedure when dealing with workplace discipline.¹⁷³ Both ways, procedural fairness is guaranteed by employing a competition law enforcement regime consisting of the following:

- 1) A specialist investigative body, subject to judicial review, that may only exercise its wide powers of investigation upon submission of a complaint by a third party or may initiate its own complaint if it has a reasonable suspicion of a prohibited practice, and may then refer and prosecute that complaint;
- 2) A specialist adjudicative tribunal that is independent (especially of the investigative body) and impartial, and acts as the tribunal of first instance for determining whether a prohibited practice has taken place when a complaint is referred to it;
- 3) The right of appeal to, or review by, a court that exercises judicial authority, and further appeal to even higher courts should it be deemed necessary.

Given that the above is already catered for under the *status quo*, especially in light of the application of both sections 33 and 34 of the Constitution, it is not considered a particularly contentious solution. Finally, with regards to the nature of the administrative penalties, there are two divergent points of view with different implications for South African competition law, namely, that administrative penalties are either of an outright criminal nature, or should be seen as *sui generis*. Accordingly, we shall summate and discuss these respective interpretations. If one were to strictly apply the *Wigglesworth* test under Canadian constitutional law (in that the fines constitute “true penal consequences”) or the *Engel* criteria under European Union human rights law (due to the nature and severity of the sanction), it would seem that the penalties in terms of section 59 could be construed as criminal in nature.

There are some arguments to bolster such an interpretation. First, the administrative penalties that may be imposed by the Tribunal if a respondent is found to have engaged in a prohibited practice is hundreds of times more than the greatest criminal fine that may be imposed in South African law. In absolute terms, the size of administrative penalties that can and have been imposed have extremely considerable economic significance, and may result in the company upon which it is imposed becoming financially distressed or even being liquidated, with serious consequences for the stakeholders of that company (including employees, directors and shareholders). Secondly, the Act also compels the Tribunal to consider the general blameworthiness of a respondent firm when determining the appropriate penalty to be imposed, by considering the respondent’s behaviour and the degree to which it has co-operated with

¹⁷² Chapter X of Act 75 of 1997, as amended.

¹⁷³ In this regard see cap VIII as well as sch 8 (Code of Good Practice: Dismissal) of the Labour Relations Act 66 of 1995, as amended.

the Commission and the Tribunal.¹⁷⁴ Lastly, recidivism is an important concept under section 59: for instance, administrative penalties in respect of contraventions of certain sections may only be imposed if the conduct in question is substantially a repeat by the same firm of conduct previously found to be a prohibited practice¹⁷⁵ and whether the respondent has previously been found to be in contravention of the Act is a factor that must also be considered by the Tribunal in determining the appropriate penalty to be imposed.¹⁷⁶

In determining the section 59 fines to be of a criminal nature, it becomes imperative to ensure that considerations normally present in criminal law proceedings are taken into account when imposing such fines. These considerations include proportionality of the fine to the severity of the prohibited practice, the general blameworthiness of the offending firm, and the deterrent effect thereof, both specific and general.

An alternative explanation of administrative penalties is to state that they are *sui generis* and incorporate aspects which are both quasi-criminal and administrative, but also overwhelmingly quasi-delictual in nature. This point of view is supported not only by the Preamble and section 2 of the Competition Act, but also the Explanatory Memorandum. Secondly, the Act makes an express distinction between section 59 and the various criminal sanctions, and imposes a completely different method of enforcement and burden of proof related thereto. Lastly, the decision to enforce competition law infringements outside of criminal procedure was a specific policy choice by the Executive in light of past experience with competition law enforcement in South Africa. The creation of an expert investigative body devoted to competition law enforcement has removed most of the problems encountered under the previous competition law regime. What must also be borne in mind is that criminal procedure puts in place safeguards to protect individuals from the power of the State. In the case of firms implicated in prohibited practices, it can hardly be claimed that they do not have the financial means to prepare comprehensive defences. As such, a policy choice was made to have referrals of complaints of anti-competitive conduct heard in the first instance by the Tribunal, which has been held to be an independent and impartial body that has the power to conduct its hearings in an inquisitorial manner, on a lower standard of proof and with emphasis on the proceedings being speedy and informal.

With regard to its quasi-delictual nature, it is important to note that damages payable in civil claims may naturally also be hundreds of times more than the greatest possible criminal fine. Detractors of this point of view note that these damages differ materially from administrative penalties for anti-competitive conduct in that they are compensatory in nature. However, it is submitted that administrative penalties are also intended to offset the harm to society at large. Naturally, this is a more liberal and general notion of compensation when compared to the specificity of delictual compensation, but it is close enough for it to at least still to be construed as quasi-

¹⁷⁴ Sections 59(3)(c) and (f), respectively.

¹⁷⁵ Section 59(1)(b).

¹⁷⁶ Section 59(3)(g).

delictual. Also, it might be argued that civil damages have the effect of deterring delicts, just as administrative penalties seek to deter anti-competitive conduct. Admittedly there is a stricter relationship in the law of delict between the harm caused and the damages awarded, which is not always the case with administrative penalties, although the loss or damage suffered as a result of the contravention and the level of profit derived from a contravention must be considered when determining an appropriate penalty;¹⁷⁷ and it has often been given a greater weighting than other factors. Given the current wording of the Canadian Competition Act, as well as the manner in which this issue is treated and viewed in the United States, it is submitted that this is also a reasonable interpretation of the nature of Section 59. The structure of the South African competition authorities has seemingly more in common with these two jurisdictions, which could necessitate a more in-depth review of the prevailing laws and jurisprudence before finally deciding upon this matter.

As can be seen from the above, there are valid arguments for adopting either of the two interpretations. What is more important is that either our legislature or our courts (and preferably both, to avoid what happened subsequent to the *Woodlands Dairy* judgment) create legal certainty so that a consistent body of jurisprudence may be developed in this regard.

¹⁷⁷ Sections 59(3)(b) and (e) of the Act, respectively.