

## **It's a Fine Mess: The Approach to Administrative Penalties under the Competition Act**

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To date, there has been an inconsistent approach towards penalties for cartel conduct in South Africa. Section 59 of the Competition Act, 89 of 1998 ("Act") provides that the Competition Tribunal ("Tribunal") may impose an administrative penalty not exceeding 10% of a firm's annual turnover in, and its exports from, South Africa during the firm's preceding financial year. Section 59 also provides that the Tribunal must consider certain specified factors when determining an appropriate penalty.

Past decisions<sup>1</sup> have differed both in terms of the appropriate turnover to be used as the basis for the penalty<sup>2</sup> as well as the way in which 'preceding financial year' has been regarded as, *inter alia*, the year preceding the initiation of the complaint<sup>3</sup> or the referral of the complaint,<sup>4</sup> or the year preceding the contravention.<sup>5</sup>

In 2010 in *Southern Pipeline Contractors and Conrite Walls (Proprietary) Limited vs The Competition Commission* ("Southern Pipelines case"), the Tribunal applied penalties of R16,882,597 and R6,192,457 on Southern Pipeline Contractors ("SPC") and Conrite Walls (Proprietary) Limited ("Conrite"), respectively, for their participation in cartel conduct in the pre-cast concrete industry. However, in August this year, the Competition Appeal Court ("CAC") overruled the Tribunal's decision, criticising the Tribunal for disregarding the legislative framework when determining the penalties. The CAC's decision provides greater guidance in relation to the approach to be followed but offers little predictability in relation to penalties likely to be imposed, leaving scope for vastly different penalties in future cases.

The CAC emphasised that the wording of section 59 indicates a structure to be followed, albeit that some confusion is caused by the fact that the determination provided for in section 59(3) should precede the application of section 59(2). Section 59(3) lists the relevant factors to be considered when determining an appropriate penalty, including the duration, gravity and extent of the contravention. Section 59(2) imposes a cap of 10% of the offending firm's

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<sup>1</sup> *Commission v Federal Mogul Aftermarket Southern Africa (Proprietary) Limited*, Case No.: 08/CR/Mar01; *Harmony Gold Mining Company Limited v Mittal Steel South Africa Limited*, Case No.: 13/CR/feb04 06/09/2007; *Competition Commission v South African Airways (Proprietary) Limited*, Case No.: 18/CR/Mar01; *Competition Commission v Pioneer Foods (Proprietary) Limited*, Case No.: 15/CR/Feb07.

<sup>2</sup> *Commission v Federal Mogul Aftermarket Southern Africa (Proprietary) Limited*, Case No.: 08/CR/Mar01; *Harmony Gold Mining Company Limited v Mittal Steel South Africa Limited*, Case No.: 13/CR/feb04 06/09/2007; *Competition Commission v South African Airways (Proprietary) Limited*, Case No.: 18/CR/Mar01; *Competition Commission v Pioneer Foods (Proprietary) Limited*, Case No.: 15/CR/Feb07.

<sup>3</sup> *Harmony Gold Mining Company Limited v Mittal Steel South Africa Limited*, Case No.: 13/CR/feb04 06/09/2007.

<sup>4</sup> *Competition Commission v Pioneer Foods (Proprietary) Limited*, Case No.: 15/CR/Feb07.

<sup>5</sup> *Commission v Federal Mogul Aftermarket Southern Africa (Proprietary) Limited*, Case No.: 08/CR/Mar01.

annual turnover from South Africa and exports from South Africa. In its determination of appropriate penalties in the *Southern Pipelines* case, the Tribunal referred to certain of factors listed in section 59(3) but not all. The CAC disagreed with this approach, finding that the word ‘must’ indicated the legislature’s intent that all the relevant factors be considered. The CAC advocated an approach whereby a percentage, calculated with reference to all of the relevant factors, should be applied to the offending firm’s turnover in its preceding financial year for the purpose of determining the appropriate penalty. Only once the proposed penalty has been determined, must it be evaluated to ensure it does not exceed the section 59(2) cap. The CAC warned further that a court should pay equal attention to all of the factors listed in section 59(3).

The CAC also referred to *Woodland Dairies (Proprietary) Limited and Another v Competition Commission*,<sup>6</sup> where the Supreme Court of Appeal stated that ‘[t]he so-called administrative penalties bear a close resemblance to criminal penalties’. The CAC interpreted this *dictum* to mean ‘...that a penalty, criminal in nature, should be proportional in severity to the degree of blameworthiness, the nature of the offence and its effect on the economy in general and consumers in particular’. Relying on this interpretation and section 39(2) of the Constitution, the CAC reasoned ‘...that the doctrine of proportionality constitutes a further applicable factor in the determination of an appropriate constitutional penalty’. However, previous decisions have established that administrative penalties imposed under the Act are not criminal in nature. This further consideration may appear redundant to the extent that proportionality relates to the duration, gravity and extent of the contravention in addition to the level of profit derived from the contravention, factors already taken into account in the section 59(3) analysis. Further, considering proportionality comprises the aforementioned factors, this approach may therefore be contradictory to the CAC’s cautionary approach in respect of the application of section 59(3).

### **Total turnover or ‘affected turnover’?**

Although having calculated the appellants’ affected and total turnover, the Tribunal inexplicably utilized the latter as a base for the penalties in the *Southern Pipelines* case. The CAC held that when calculating the base figure, one must consider the benefits which accrue from the affected turnover. This conclusion was based on a legislative link which the CAC identified between the damage caused by the anti-competitive conduct and the profits accrued from the contravention as the majority of the relevant factors are qualified by the

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<sup>6</sup> 2010 (6) SA 108 SCA.

phrase, 'the contravention'. The CAC fortified its conclusion, stating that by using the affected turnover, the implication of the doctrine of proportionality, the interest of the consumer and the legitimate interests of the offending firm can be taken into account.

### **The “preceding financial year”**

Finally, the CAC commented in *obiter* that a plain reading of section 59 supports the conclusion that the base year for the determination of the cap is the financial year preceding that in which the penalty is imposed. The CAC substantiated this, noting the congruence of this interpretation with the Act's objective to 'deter anti-competitive behavior without destroying the offending firm's business'. The clarity in this approach is welcomed. However, the CAC regrettably introduced further uncertainty regarding the period applicable to determining the affected turnover as a base figure. Whereas the CAC limited its calculation in respect of SPC's penalty to 2008, as financial reports were only available for this year, Conrite's affected turnover was multiplied eight, being the number of years of Conrite's participation in the cartel. The latter reflects a stricter approach, which appears to conflict with the CAC's criticism of the Tribunal's approach.

Although the CAC has provided a welcome framework for the determination of penalties, many areas of uncertainty remain. It will take more time – or the introduction of fining guidelines – before there is a predictable approach towards administrative penalties.