

Allocation of common costs

295 The dispute between the parties related to the appropriate allocation of common costs between SCI's domestic and export sales. The question was how much of the fixed costs, which are common to both local and export product, should be allocated to product sold in the domestic market.

296 Wainer and Roberts submitted that a volume-based allocation of common costs is appropriate, i.e. it allocated common costs to the domestic and export businesses in proportion to the volumes of each business, thus assuming that the fixed costs were incurred equally across all products. The Commission reason for this was that SCI's export business in its view was not a marginal business.

297 Harman, on the other hand, was of the view that there is no single correct way to allocate common costs when a firm sells the same product to different customer groups. He considered potential alternative allocations, namely (i) a volume-based approach (as considered by the Commission); (ii) an economic-based approach, where common costs are allocated to the export business up to the point where it recovers economic cost; (iii) an avoidable cost approach that calculates the cost of the domestic business assuming that SCI is at a scale to produce domestic volumes only; and (iv) a standalone cost of the business where all common costs are allocated to the domestic business.²⁶⁰

298 It is noteworthy that Harman preferred different approaches for purified propylene and polypropylene. For the purified propylene analysis he contended that the avoidable cost allocation²⁶¹ is the preferred cost allocation. For polypropylene however he favoured the use of the economic cost allocation. Harman contended that this approach was consistent with the export business being a marginal or incremental business i.e. it is premised in the first instance on the fact that SCI

²⁶⁰ GH3 paragraph 3.18, 5th bullet, page 2020B. Harman's Slides 63 and 64 (Exhibit 47): summary of the cost allocation methods considered by Harman. The detail appears from GH 1 paragraphs 5.72 to 5.86; GH2 paragraphs 4.21 to 4.29; GH3 paragraphs 4.106 to 4.125.

²⁶¹ See GH2 paragraph 4.27, pages 1744B and 1745B. Also see Harman's Slide 64 (Exhibit 47).

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produces polypropylene primarily to serve the domestic market.²⁶² This approach resulted in a larger proportion of costs being allocated to domestic sales.

299 Padilla, in his Second Report, also considered the economic cost allocation as more appropriate as it treats all total costs not recouped from export sales as costs of the domestic business.²⁶³ Padilla described the economic based allocation as assuming that export sales earn an economic return equal to the supposed WACC and allocating remaining costs to domestic sales.²⁶⁴

300 We note that with regards to the economic-based cost approach, Harman found that under some scenarios, such as the SR2 Adjusted case, the economic-based approach is conceptually invalid, since it results in a higher proportion of common cost being allocated to the incremental export business than to the domestic business.²⁶⁵ We further note that he conceded that the economic based approach "*relies on the export business being marginal*".²⁶⁶

301 The effect of Harman's proposed adjustments on the price-cost markup is to reduce it for purified propylene by 1.5% (Tier 1) and 1.6% (Tier 2)²⁶⁷ and for polypropylene by approximately [6 - 8]%²⁶⁸.

302 For purified propylene Harman, under cross examination, accepted that it does not matter which cost allocation is used because the percentage of the cost being allocated was small.²⁶⁹ The effect is however much more significant for polypropylene.

303 We note that the typical allocation of common costs is between different products produced by the same firm, not between the production of the same product for different sales regions, in this case, between the local and export polypropylene markets. It is not rational to make this split between exports and local sales since the costs to produce the product are exactly the same for both.

²⁶² Behrens' witness statement, paragraph 138, page 473B.

²⁶³ JP2 paragraph 7.33, page 1108B.

²⁶⁴ JP2 paragraph 7.32, pages 1107B and 1108B.

²⁶⁵ GH3 paragraph 4.108, page 2080B.

²⁶⁶ GH3 paragraph 4.112, page 2081B.

²⁶⁷ SCI's submission of 19 February 2014, Table on page 1 (with tax effect).

²⁶⁸ See SCI's submission of 10 April 2014.

²⁶⁹ Harman's cross examination, page 2821, lines 4 to 9.

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304 It was common cause that exports accounted for a very large proportion of SCI's production and sale of polypropylene. Over the complaint period export sales volumes were about the same as local sales volumes, and therefore were a very significant proportion of SCI's sales (also see paragraph 33 above).²⁷⁰

305 Furthermore, the evidence confirmed that Sasol's investment decisions were made on the basis of serving the export market in addition to the local market. Indeed, SCI made decisions based on selling prices achievable in export markets, justified due to SCI's very low costs of production which ensure that they are competitive in the export markets.²⁷¹

306 As stated above, Harman's economic based approach relies on the assumption that SCI's export polypropylene business is marginal. We however have found no evidence in support of this business being marginal. Furthermore, Harman simply did not make out a case for the use of either the avoidable cost approach or the standalone cost approach as appropriate methodologies in this case. We therefore regard the volume-based approach as adopted by the Commission to be the most appropriate and we shall disregard Harman's proposed adjustments to the markups.

PURIFIED PROPYLENE PRICE-COST TEST RESULTS

307 Based on the above findings on the various disputes between the experts regarding the appropriate costs, we summarise below, in table format, the results of the price-cost test for purified propylene and polypropylene in Tables 1a and 1b and Tables 2a and 2b respectively.

308 The table immediately below is for purified propylene and we show the results separately for the Tier 1 and the Tier 2 prices charged to Safripol during the complaint period, as explained above. Although we do not agree with Harman's approach to consider the average of these two prices that were charged to Safripol, we do however also show Harman's approach based on the average of the Tier 1 and Tier 2 prices (also see paragraph 149 above).

²⁷⁰ JP1 Table 9, paragraph 3.58, page 736B.

²⁷¹ Even the initial investments were regarded as profitable at export prices; see Exhibit 42, page 7.

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309 We show the Commission's (Roberts') calculations (as agreed with SCI) immediately below in Table 1a and we then, in Table 1b, show SCI's (Harman's) proposed adjustments to Roberts' figures. As discussed above, we have accepted some of these adjustments and others we have rejected, as reflected below. The final row of the table shows the final result of SCI's markup over cost for purified propylene.

Table 1a Commission's purified propylene price-cost test results

Costs assumptions	Effect of individual changes on markups (%) (upward (+) or downward adjustment (-))			Price-cost markup		
	Tier 1	Tier 2	Harman's average of Tier 1 and Tier 2	Tier 1 price	Tier 2 price	Harman's average of Tier 1 and Tier 2 ²⁷²
SR2 Safripol Tier 1 and Tier 2 results (SR2, Table 12)				36.3	53.4	43.1
Agreed correction of errors in SR2 (Accepted by both the Commission and SCI)	+1.6 ²⁷³	+1.9 ²⁷⁴	+1.7	37.9	55.3	44.8
Commission's final result after agreed adjustment	-	-	-	37.9 ²⁷⁵	55.3 ²⁷⁶	-

²⁷² See SCI's submission of 19 February 2014, Table on page 1 (with tax effect).

²⁷³ Commission's submission of 19 February 2014, Table on page 1 (figure of +1.7%). Also see SCI's submission of 19 February 2014, Table on page 1, where it stated a figure of +1.6%. We have used the figure of +1.6%.

²⁷⁴ Commission's submission of 19 February 2014, Table on page 1; SCI's submission of 19 February 2014, Table on page 1.

²⁷⁵ See Commission's submission of 19 February 2014, Table on page 1.

²⁷⁶ Commission's submission of 19 February 2014, Table on page 1. Commission's figure of 55.4% has been corrected to 55.3%.

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310 The above table should be read as follows: The first row of figures that appears reflects Roberts' price-cost markup results from his Second Report.²⁷⁷ The second row of figures shows the agreed adjustments between the experts and the last row indicates the Commission's final result. According to the Commission the markups of purified propylene prices over actual costs during the complaint period was 55.3% for Tier 2 sales to Safripol and 37.9% for Tier 1 sales to Safripol.

311 We next reflect Harman's proposed changes to the Commission's calculations. We show the Tier 1 and Tier 2 results separately (as above) and also show Harman's average of the Tier 1 and Tier 2 price-cost markup results in the last column of the table. The individual effect of each of Harman's proposed downward (-) or upward (+) adjustments²⁷⁸ to the price-cost markup figures is shown in the first three columns of the table. As indicated in the table, we have accepted some of these proposed adjustments and rejected others. Where we have considered a range of figures, the range is shown.

Table 1b SCI's proposed changes to the Commission's purified propylene price-cost test results

312 First we adjust Roberts' abovementioned price-cost markups downwards to reflect the actual feedstock prices paid by SCI rather than Roberts' calculation of the "true" FAV of the feedstock. As depicted hereunder, this has a significant effect on the purified propylene markups.

²⁷⁷ Safripol Tier 1 and Tier 2 results, SR2, Table 12.

²⁷⁸ Most of the adjustments lower the markups of prices over costs.

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Costs assumptions	Effect of individual changes on markups (%) (upward (+) or downward adjustment (-))			Price-cost mark up		
	Tier 1	Tier 2	Harman's average of Tier 1 and Tier 2	Tier 1 price	Tier 2 price	Harman's average of Tier 1 and Tier 2
	Feedstock: Change from Roberts' "Sasol FAV" to FAV in financial accounts (thus based on actual feedstock prices paid)	-9 ²⁷⁹	-11 ²⁸⁰	-9.3 ²⁸¹	28.9	44.3

313 Next we make further adjustments for the use of the annuity method for calculating capital reward (upwards adjustment to Roberts' price-cost markups); the measurement of the asset base (downwards adjustment); and the return on capital (downward adjustment). We note that for the return on capital we consider a range of figures.

²⁷⁹ Commission's submission of 19 February 2014, Table on page 5 under paragraph 10. Also see SCI's submission of 19 February 2014, Table on page 1, where SCI gave a figure of -8.9%.

²⁸⁰ Commission's submission of 19 February 2014, Table on page 5 under paragraph 10. Also see SCI's submission of 19 February 2014, Table on page 1, where SCI gave a figure of -10%.

²⁸¹ See SCI's submission of 19 February 2014, Table on page 1 (with tax effect).

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Costs assumptions	Effect of individual changes on markups (%) (upward (+) or downward adjustment (-))			Price-cost markup		
	Tier 1	Tier 2	Harman's average of Tier 1 and Tier 2 ²⁸²	Tier 1 price	Tier 2 price	Harman's average of Tier 1 and Tier 2 ²⁸³
Weighted averaging of Tier 1 and Tier 2		No adjustment		28.9	44.3	35.5
Adjustment of period to include FY2001		No adjustment		28.9	44.3	35.5
Use of annuity method for calculating capital reward ²⁸⁴	+ 1	+1.1	+1.1	29.9	45.4	36.6
Measurement of asset base: Historical capital base to depreciated replacement cost asset values ²⁸⁵	IHS CERA index -2.8	IHS CERA index -3.2	IHS CERA index -3	27.1	42.2	33.6
Return on capital (with tax effect) – range considered ²⁸⁶	Range considered: From bond rate + 3% to bond rate + 5% (-0.6); From bond rate + 5% to period average WACC (-1.4) Combined effect: -[0.6 to 2]	Range considered: From bond rate + 3% to bond rate + 5% (-0.7); From bond rate + 5% to period average WACC (-1.6) Combined effect: -[0.7 to 2.3]	Range considered: From bond rate + 3% to bond rate + 5% (-0.6); From bond rate + 5% to period average WACC (-1.5) Combined effect: -[0.6 to 2.1]	[25.1 – 26.5]	[39.9 – 41.5]	[31.5 - 33]
Inclusion of group costs		No adjustment		[25.1 – 26.5]	[39.9 – 41.5]	[31.5 - 33]
Common costs		No adjustment		[25.1 – 26.5]	[39.9 – 41.5]	[31.5 - 33]
Final result				[25.1 – 26.5]	[39.9 – 41.5]	[31.5 - 33]

²⁸² See SCI's submission of 19 February 2014, Table on page 1 (with tax effect).

²⁸³ See SCI's submission of 19 February 2014, Table on page 1 (with tax effect).

²⁸⁴ See SCI's submission of 19 February 2014, Table on page 1.

²⁸⁵ See SCI's submission of 19 February 2014, Table on page 1.

²⁸⁶ See SCI's submission of 19 February 2014, Table on page 1.

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314 Although we do not have the return on capital adjustments for purified propylene on a “cumulative” basis taking into account the prior adjustments in the above table (as we have for polypropylene; see Table 2b below), such additional adjustments would not be of a magnitude to change our ultimate conclusions for purified propylene. We note that we have accepted only some of Harman’s proposed adjustments (as indicated in the above table) and furthermore, Sasol Propylene has a relatively low capital base compared to Sasol Polypropylene.

315 The final results shown in the above table mean the following: the markups of purified propylene prices over actual costs during the complaint period were in the range of [39.9 - 41.5]% for Tier 2 sales to Safripol and in the range of [25.1 - 26.5]% for Tier 1 sales to Safripol. On an average basis, on Harman’s approach, this figure is in the range of [31.5 - 33]%.

OTHER METHODS USED IN ASSESSMENT OF THE ECONOMIC VALUE OF PURIFIED PROPYLENE

316 The CAC recognised that, in addition to the price-cost test, the potential methods of measuring economic value include the following comparators:²⁸⁷

316.1 prices charged by the dominant firm for the same or a similar product in other markets, including export prices;²⁸⁸ and

316.2 prices charged by other firms in other geographic markets, provided that they have broadly comparable cost structures at comparable levels of output, and provided that these markets are characterised by effective competition in the long run.²⁸⁹

317 The CAC also held that a court may even establish that a dominant firm’s prices are unreasonably above the economic value of the good or service in question from other facts: one of which is where the dominant domestic firm is able to maintain different prices between export and domestic customers and embarks on an expansion of its production capacity wholly or mainly in order to increase its export sales. The court held that it would then be difficult to avoid the conclusion that its

²⁸⁷ Mittal (CAC) at paragraph [49].

²⁸⁸ Mittal (CAC) at paragraph [51].

²⁸⁹ Mittal (CAC) at paragraph [51].

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export price would be at or above economic value – at the expanded level of output intended. The court added “*In any event, the business calculations involved in the expansion could be expected to provide important evidence regarding both the current and future positions.*”²⁹⁰

318 The CAC further said that the results of these other tests may be sufficient to create a *prima facie* case against the dominant firm, “*leaving it to a firm in appellant’s position to adduce evidence to the contrary, if it is to avoid the case against it becoming conclusive.*”²⁹¹ The effect of this is to place a reverse onus on the dominant firm.²⁹²

319 We next consider if other methods are available for measuring the economic value of the purified propylene sold by SCI during the relevant period. Two other potential methods were considered, namely:

319.1 a comparison of (computed) export prices for purified propylene (see discussion below, these prices had to be imputed in this case since SCI does not export purified propylene); and

319.2 a comparison of prices charged by other firms with broadly comparable cost structures at comparable levels of output in competitive markets for purified propylene.

320 We shall first discuss the (imputed) export price method and then the prices charged by other firms in other geographic markets.

Export price comparison for purified propylene

321 This method entails a comparison of the dominant firm’s export prices (if any) to its domestic prices. The theory underpinning this method of comparison is that where a product is traded, the export prices constitute a floor below which domestic prices will not fall, but towards which they should tend in a competitive

²⁹⁰ Mittal (CAC) at paragraph [52].

²⁹¹ Mittal (CAC) at paragraph [50].

²⁹² Davis “*Abuse of dominance, competition law and economic development: a view from the southern tip of Africa*” in Hawk, B (ed) 2010 *Annual Proceedings of the Fordham Competition Law Institute, Antitrust Law and Policy* (Huntington: Juris Publishing, 2011), at 337.

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market where supply exceeds demand.²⁹³ However, we note that in practice domestic producers can provide additional services to their domestic customers which would imply higher prices given the additional value added (also see paragraph 501 below).

322 As already stated above, purified propylene is not exported from South Africa; the purified propylene is converted to polypropylene which is exported (*inter alia* by SCI). There is therefore no export price for purified propylene to use directly in this analysis.

323 To overcome this problem, the Commission sought to measure the economic value of purified propylene based on the export prices of polypropylene. It did so by imputing a purified propylene price from polypropylene exports using the price formula in the Safripol Supply Agreement and substituting the local polypropylene prices with SCI's export prices.

324 In his First Report, Roberts selected SCI's polypropylene export prices to China (excluding the notional freight factor) as primary comparator.²⁹⁴ More specifically, he imputed from that value an export price for purified propylene by applying a formula (to SCI's export netback price for polypropylene) used in the Safripol Supply Agreement. That agreement calculated a price of purified propylene to Safripol based on what was called the "R ratio", which is the ratio of the price of polypropylene and the price of propylene in Europe and the United States using a 3-year moving weighted average.²⁹⁵ The Commission selected China as an appropriate export destination because the largest portion of Sasol Polymers's polypropylene exports was to China. Padilla criticised the Commission for its selection of specifically China as an export destination and argued that it would be more appropriate to compare the local price to an average export polypropylene price.²⁹⁶

²⁹³ Koster, transcript, pages 3804 to 3808.

²⁹⁴ SR1 paragraph 409, page 135B; and paragraph 496, page 158B; SR2 paragraph 264, page 248.

²⁹⁵ SR1 paragraph 397, page 131B.

²⁹⁶ See, for example, Padilla's evidence in chief, page 1996.

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325 In his Second Report, Roberts used “average deep sea prices” (i.e. excluding exports into Southern Africa) achieved by SCI for polypropylene and imputed a price for purified propylene on the same basis as in his First Report.²⁹⁷

Conclusion

326 At a level of principle we find that one cannot attach any significant weight to the Commission’s imputed export price for purified propylene. In this case the above price-cost test as performed by both parties in relation to purified propylene provides a more reliable method of determining the economic value of the purified propylene sold by SCI in South Africa during the complaint period. The latter view was shared by SCI.²⁹⁸

Purified propylene prices charged by other firms in other geographic markets

327 Both the Commission’s and SCI’s experts also compared SCI’s domestic purified propylene prices to the domestic prices charged by firms in other countries and regions. However, there was a fundamental point of dispute about which, if any, other countries could be used as meaningful comparators.

328 Padilla compared SCI’s purified propylene prices to the purified propylene prices charged in the USA, Western Europe, Taiwan and Thailand. Padilla selected these countries and regions with Koster’s assistance.²⁹⁹

329 Sleep’s view was that only low-cost producing countries could be considered and this excluded the USA and Western Europe. Koster for SCI disagreed and said that whether or not these countries were low-cost producers was irrelevant for the comparison.

330 We note that for this type of analysis to be of any value one would have to ensure that one compares like with like. In other words, for the purified propylene prices in other geographic markets to be compared without adjustment to SCI’s domestic purified propylene prices, the firms in those other markets would have to have broadly comparable cost structures to SCI.³⁰⁰ This is clear from the

²⁹⁷ SR2 paragraph 265, page 248B.

²⁹⁸ See SCI’s Heads of Argument, paragraph 346.1, page 157.

²⁹⁹ Transcript, Koster, pages 3668 and 3669.

³⁰⁰ Mittal (CAC) at paragraph [51].

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CAC's guidance in *Mittal*. The CAC namely held that "*Prices ordinarily charged locally in other markets by the same firm or by other firms with broadly comparable cost structures at comparable levels of output, may obviously serve as a measure of the 'economic value' of the same good or service in our market – if the other markets are shown to be, or can be assumed to be, characterised by effective competition in the long run.*"³⁰¹

331 The Commission and SCI however had different takes on the interpretation of "*broadly comparable cost structures*" as used by the CAC. In short, the Commission argued that this means that the firms in the other countries and regions must like SCI be 'low cost producers' of purified propylene in order to compare their domestic prices to that of SCI. SCI argued that this simply means that care must be taken when making comparisons between the prices of firms making the same or a similar product through "*wholly different methods of production*".

332 We reject SCI's interpretation of the CAC's guidance. What the CAC meant by comparable cost structures is clear and is exactly that. If it wanted to broaden the comparator to "*wholly different methods of production*" as contended by SCI it would have done so.

333 Furthermore, the above argument is similar to the special cost advantage debate that we have already dealt with. It is not helpful to consider other countries with high costs as comparators, because that misses the whole point of the excessive pricing exercise. We have already concluded that, in the context of our Act, SCI's low feedstock costs should be taken into account in the analysis given Sasol's particular history and lack of innovation on its part in relation to purified propylene and polypropylene. We therefore concur with the Commission that one should only consider other low cost producers of purified propylene as meaningful comparators to SCI.

334 Koster suggested that the comparator regions or countries must meet the basic criteria of (i) there being "*transparent pricing so that the pricing is clear*"; and (ii)

³⁰¹ *Mittal* (CAC) at paragraph [51].

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markets which are "*competitive with many buyers and sellers*".³⁰² He however conceded that "*There is indeed no perfect comparator for South Africa.*"³⁰³ Furthermore, although Koster was of the view that Europe and the USA were appropriate comparator regions for purified propylene,³⁰⁴ he conceded that he had not taken into account whether these countries were low cost producers since he regarded that as irrelevant.³⁰⁵ Sleep's evidence, on the other hand, was that these countries are not "*like comparators*", i.e. they are not low cost producers.³⁰⁶ This appears *inter alia* from Appendix A to Koster's First Report, which sets out the relative prices of feedstock propylene.³⁰⁷

335 We conclude that producers in Europe and the USA are not meaningful comparators to SCI due to their higher cost structures.

336 As stated above, Padilla also made comparisons of Sasol's local purified propylene prices with domestic prices in Taiwan and Thailand. Sleep testified that price discovery from Asia is generally unreliable because prices are not transparent. Sleep's testimony was "*During this period the Asian prices, we had quite a lot of spot prices. So the spot transactions, export prices and import prices for South Korea, Japan, there were domestic prices within South Korea and Japan. They're somewhat less representative in my view, somewhat less reliable than the US and European prices. ... I'm slightly less confident over the domestic prices after discount in the Asian markets. And as I said, there were some reasonable spot prices, there are some perfectly good export prices, but the domestic price after discount in the Asian markets, I believe are less reliable.*"³⁰⁸

337 Koster acknowledged that reaching any firm conclusion about price levels in these markets would require a careful market analysis that CMAI had not done in relation to the South East Asian countries and India, particularly to confirm that these are competitive markets, and this was the reason why Koster preferred

³⁰² Transcript, Koster, page 3668.

³⁰³ Transcript, Koster, page 3668.

³⁰⁴ Exhibit 18, Slide 7; also see Sleep's evidence in chief, page 683, line 14, to page 684, line 8.

³⁰⁵ Koster's cross examination, page 3754, line 22, and page 3755, line 2.

³⁰⁶ See Exhibit 18, Slide 7; Sleep's evidence in chief, page 676, lines 8 to 19; also see Industry Experts Joint Minutes Item 5.2, page 2350B.

³⁰⁷ RK1 pages 2211B and 2212B.

³⁰⁸ Sleep's evidence in chief, pages 711 and 712.

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Western Europe and the USA as comparator regions³⁰⁹ over these other, in his words, "*potentially less competitive markets*".³¹⁰ He stated "*We have preferred Western Europe and US as comparator countries and that's for a reason.*"³¹¹

338 We further note that MacDougall had no reliable expertise on Asian prices.

339 We conclude that the reliability of the Asia purified propylene prices is highly questionable and stress that contract prices are not useful for this analysis since we are concerned with actual transaction prices, which are not readily available for Asia.

Conclusion

340 Whilst one would prefer to look at a preponderance of evidence, one has to compare like with like and must also consider the reliability of the data and evidence relied on. Unfortunately there are no good comparators in other geographic markets in relation to purified propylene for the period under review. In these circumstances the price-cost test, as performed by both sides, again provides a more reliable method of assessing SCI's alleged excessive purified propylene prices in South Africa.

POLYPROPYLENE PRICE-COST TEST RESULTS

Background

341 Having ultimately concluded (after the appropriate value judgements as discussed below) that SCI's purified propylene prices charged were indeed excessive and given that the purified propylene and polypropylene markets are vertically related (since purified propylene as an intermediate good is an input in the production of polypropylene), we had to consider whether from an economics and financial perspective one needs to adjust the raw material costs used by the experts in the calculation of the costs of SCI's polypropylene business.

342 To make this determination we had to consider a number of facts, as discussed below.

³⁰⁹ Koster's cross examination, page 3782, line 20, to page 3783, line 4.

³¹⁰ Koster's cross examination, page 3785, lines 12 to 18.

³¹¹ Koster's cross examination, page 3783, lines 3 and 4.

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343 Behrens explained that Sasol Polymers's polypropylene business obtains propylene produced by Monomers at PPU1, PPU3 and PPU5. During the complaint period the polypropylene business also received propylene from PPU2.³¹²

344 We further need to explain the relationship between the purified propylene prices that Sasol charged to Safripol during the complaint period and to itself. During this period, SCI supplied purified propylene to Safripol pursuant to an agreement approved by the then Competition Board at the time of the Sasol and AECI merger in 1993. On 8 December 1994 Polifin and Safripol entered into a supply agreement pursuant to the Competition Board's concerns regarding the joint venture to form Polifin. The merging parties undertook that Polifin would supply Safripol on a non-discriminatory basis³¹³ and would offer Safripol an objectively justifiable portion of any increased propylene production on a similar basis.³¹⁴

345 Behrens confirmed that Sasol Polymers' Monomers and polypropylene businesses were run as separate businesses, and that Monomers charged the polypropylene business for propylene on the same basis as Safripol, making allowance for a pipeline charge³¹⁵.³¹⁶ Monomers also charged the polypropylene business a reduced price for export volumes, on the same basis as Safripol.³¹⁷

346 Thus, as a consequence of the Competition Board's ruling in 1994, the price at which Safripol received purified propylene and the price at which the downstream division which produces polypropylene within SCI received it are identical.

347 The above means that since we ultimately concluded (as reasoned below) that the purified propylene prices charged to Safripol (regardless of whether one considers the Tier 1 price or the Tier 2 price or the average of these two prices) during the infringement period were excessive, the prices for purified propylene

³¹² Behrens' witness statement, paragraph 199, page 487B.

³¹³ See *inter alia* transcript, Schoch, pages 459 to 461.

³¹⁴ The Competition Board, on the basis of these undertakings, concluded that it did not need to launch a formal investigation of the merger.

³¹⁵ In the case of Safripol, Monomers pumps the propylene about 140 kms from Secunda to Sasolburg whereas Sasol Polymers's polypropylene business is located in Secunda adjacent to Monomers. The pipeline charge accounts for pipeline maintenance costs, nitrogen costs, a depreciation charge, electricity costs and manpower costs.

³¹⁶ Behrens' witness statement, paragraph 200, page 487B.

³¹⁷ Behrens' witness statement, paragraph 202, page 487B.

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charged to Sasol Polymers therefore were also excessive. As indicated above, Behrens confirmed that "*Monomers charged the PP [polypropylene] business for propylene on the same basis as Safripol*".³¹⁸

348 We further considered what raw material cost figures the experts used in their price-cost test calculations for SCI's polypropylene business. For the polypropylene analysis Roberts used direct raw material costs as reported under variable costs in the polypropylene income statements of which purified propylene prices formed the main portion of variable costs.³¹⁹

349 Given the above facts and since we in the price-costs test for polypropylene need to consider the costs of purified propylene under competitive conditions in that market, we therefore had to adjust the raw material costs since the figures stated in the polypropylene income statements were inflated, i.e. they were based on the excessive purified propylene prices charged by Monomers. As concluded above, the markups of purified propylene prices over actual costs during the complaint period were in the range of [39.9 – 41.5]% for Tier 2 sales to Safripol and in the range of [25.1 – 26.5]% for Tier 1 sales to Safripol. On an average basis, on Harman's approach, this figure is in the range of [31.5 - 33]%. These prices were also charged to Sasol's subsidiary.

350 Except for making the necessary adjustment to the raw material costs figures as used by the experts for the polypropylene business, we present the price-cost test results for polypropylene on the same basis as for purified propylene (see Tables 1a and 1b above). We however show two scenarios as explained below.

351 We note that we requested both the Commission and SCI to present their price-cost test results for polypropylene if one makes a downward adjustment to the actual price paid by the polypropylene business for purified propylene (to the extent that this price was excessive).³²⁰ The Commission and SCI submitted this information on 10 April 2014 with clarification on 30 April 2014 (SCI) and 09 May 2014 (Commission). These figures were used in the tables below.

³¹⁸ Behrens' witness statement, paragraph 200, page 487B.

³¹⁹ SR1 paragraph 490, page 157B.

³²⁰ The Commission and SCI were asked to do these calculations under various scenarios of downwards adjustments to the actual purified propylene price charged to the polypropylene business.

Calculations

352 Given our finding that the purified propylene prices charged by SCI were excessive, including to its own subsidiary, the polypropylene results are shown for two scenarios: (i) a very conservative approach where the purified propylene prices charged to SCI (as reflected in the income statements of the Polypropylene business) were 20% excessive (i.e. based on the Tier 1 result for purified propylene), reflected in the tables below as the “-20% scenario”; and (ii) a more realistic scenario where the purified propylene prices charged to SCI were 30% excessive (i.e. based on the average of the Tier 1 and Tier 2 prices of purified propylene), reflected in the tables below as the “-30% scenario”.

353 We again start off by showing the Commission’s (Roberts’) calculations (as agreed with SCI) in Table 2a and then we show SCI’s (Harman’s) proposed adjustments to Roberts’ figures in Table 2b. As discussed above, we have accepted some of these adjustments and others we have rejected, as indicated in the table below. The final row of the table shows the final result of SCI’s markup over cost for polypropylene.

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Table 2a Commission's polypropylene price-cost test results

Costs assumptions	Effect on markups (%) (upward (+) or downward adjustment (-))		Price-cost markup	
	-20% scenario	-30% scenario	Very conservative - 20% scenario	More realistic - 30% scenario
SR2 results	-	-	35.5 ³²¹	47.9 ³²²
Agreed correction of errors in SR2 (Accepted by both the Commission and SCI)	+2.8 ³²³	+3.3 ³²⁴	38.3	51.2
Prices agreed: weighted average monthly prices ³²⁵ (accepted by the Commission)	-0.5 ³²⁶	-0.5 ³²⁷	37.8	50.7
Commission's final result after agreed adjustment			37.8	50.7

Table 2b SCI's proposed changes to the Commission's polypropylene price-cost test results

354 First we note that in the case of polypropylene no adjustment is required for feedstock costs (as we have done in the table above for purified propylene) since we have used the actual prices paid for purified propylene (with a downward adjustment, as explained above) in the polypropylene price-cost calculations.

³²¹ See the Commission's and SCI's submissions of 10 April 2014.

³²² See the Commission's and SCI's submissions of 10 April 2014.

³²³ See Commission's submission of 10 April 2014, where the figure is stated as +3.3%. Also see SCI's submission of 10 April 2014, where a figure of +2.8% is used. We have used the lower figure.

³²⁴ See Commission's submission of 10 April 2014, where the figure is stated as 3.9%. Also see SCI's submission of 10 April 2014, where a figure of +3.3% is used. We have used the lower figure.

³²⁵ Roberts accepted that volume-weighted annual averages are more suitable for local polypropylene prices and for export polypropylene prices. See Exhibit 28, paragraph 11.

³²⁶ See Commission's submission of 10 April 2014.

³²⁷ See Commission's submission of 10 April 2014.

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Costs assumptions	Effect on markups (%) (upward (+) or downward adjustment (-))		Price-cost markup	
	-20% scenario	-30% scenario	Very conservative - 20% scenario	More realistic - 30% scenario
Feedstock: Change from Roberts' "Sasol FAV" to FAV in financial accounts (thus based on actual feedstock prices paid)	No adjustment required since actual prices are used ³²⁸		37.8	50.7

355 Next we make further adjustments for prices including all rebates (downward adjustment to Roberts' price-cost markups); the use of the annuity method for calculating capital reward (upward adjustment); prices including delivery (potential downward adjustment); the measurement of the asset base (downward adjustment); and the return on capital (downward adjustment). We note that for "prices including delivery" and for the return on capital we have considered a range of figures.

Costs assumptions	Effect on markups (%) (upward (+) or downward adjustment (-))		Price-cost markup	
	-20% scenario	-30% scenario	Very conservative - 20% scenario	More realistic - 30% scenario
Markups weighted averaging (other than that agreed above)	No adjustment		37.8	50.7
Prices including all rebates	-3.4 ³²⁹	-3.6 ³³⁰	34.4	47.1
Adjustment of period to include FY2001	No adjustment		34.4	47.1
Use of annuity-based approach for capital reward	+2.2 ³³¹	+2.6 ³³²	36.6	49.7
Prices including delivery	Left open: -[0 to 1.4] ³³³	Left open: -[0 to 2.1] ³³⁴		

³²⁸ See SCI's submission of 10 April 2014, and its further submission of 30 April 2014.

³²⁹ See SCI's submission of 10 April 2014, page 3, and its further submission of 30 April 2014.

³³⁰ See SCI's submission of 10 April 2014, page 5, and its further submission of 30 April 2014.

³³¹ See SCI's submission of 10 April 2014, page 3, and its further submission of 30 April 2014.

³³² See SCI's submission of 10 April 2014, page 5, and its further submission of 30 April 2014.

³³³ See SCI's submission of 10 April 2014, page 3, and its further submission of 30 April 2014.

³³⁴ See SCI's submission of 10 April 2014, page 5, and its further submission of 30 April 2014.

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			[35.2 - 36.6]	[47.6 - 49.7]
Measurement of asset base: Historical capital base to depreciated replacement cost asset values	IHS CERA index -8.8 ³³⁵	IHS CERA index -10.4 ³³⁶	[26.4 - 27.8]	[37.2 - 39.3]
Return on capital (with tax effect)	Range considered: From bond rate + 3% to bond rate + 5% (- 2.4); From bond rate + 5% to period average WACC (-6.4) Combined effect: -[2.4 to 8.8] ³³⁷	Range considered: From bond rate + 3% to bond rate + 5% (-2.8); From bond rate + 5% to period average WACC (- 7.5) Combined effect: -[2.8 to 10.3] ³³⁸	[17.6 - 25.4]	[26.9 - 36.5]
Inclusion of all group costs	No adjustment ³³⁹		[17.6 - 25.4]	[26.9 - 36.5]
Common costs	No adjustment		[17.6 - 25.4]	[26.9 - 36.5]
Final result			[17.6 - 25.4]	[26.9 - 36.5]

356 We note that SCI's abovementioned return on capital figures were presented to us on a cumulative basis assuming that Harman's other proposed adjustments (shown above 'return on capital' in the above table) are in order. We have however accepted only some of Harman's proposed adjustments. The downward adjustments for the return on capital as shown in the table are thus overstated and should be lower. This means that the actual price-cost markups are higher than indicated in the table.

357 The final results shown in the above tables mean the following: SCI's markup of its polypropylene price over actual costs during the complaint period was in the

³³⁵ See SCI's submission of 10 April 2014, page 3, and its further submission of 30 April 2014.

³³⁶ See SCI's submission of 10 April 2014, page 5, and its further submission of 30 April 2014.

³³⁷ See SCI's submission of 10 April 2014, page 3, and its further submission of 30 April 2014. This effect is a cumulative effect, which is overstated since we have not accepted all of Harman's proposed adjustments. Also see the Commission's email correspondence of 09 May 2014.

³³⁸ See SCI's submission of 10 April 2014, page 5, and its further submission of 30 April 2014. This effect is a cumulative effect, which is overstated since we have not accepted all of Harman's proposed adjustments. Also see the Commission's email correspondence of 09 May 2014.

³³⁹ Also see email from SCI's attorneys of 23 April 2014 in response to a query of the Tribunal.

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range of [17.6 - 25.4]% measured on a very conservative basis (as explained above) and [26.9 - 36.5]% on a more realistic basis (see paragraph 352 above).

OTHER METHODS USED IN THE ASSESSMENT OF THE ECONOMIC VALUE OF POLYPROPYLENE

358 The Commission and SCI's experts also used two other potential methods to determine the economic value of polypropylene, namely (i) international polypropylene price comparisons; and (ii) a comparison of SCI's domestic prices and prices in export markets.

Polypropylene prices of other firms in other geographic markets

359 As stated above, the CAC in *Mittal* indicated that prices charged by other firms with broadly comparable cost structures may serve as a measure of the economic value of the product under consideration (see paragraphs 316.2 and 330 above).

360 Below we consider whether or not there are international price comparators for polypropylene. We consider domestic polypropylene prices in the USA and in Europe.

USA polypropylene prices

361 In relation to polypropylene prices in the USA and in Europe, Koster conceded that he had not taken into account whether these countries were low cost producers because he did not consider this relevant.³⁴⁰ Sleep's evidence was that these countries are not low cost polypropylene producers like SCI in South Africa. He said "*again it's not a like market*".³⁴¹ This also appears from Appendix A to Koster's First Report, which sets out relative prices of feedstock propylene (which cost constitutes around 85% of the polypropylene costs).³⁴²

362 There was however also an additional difficulty in attempting to compare the USA domestic prices to SCI's domestic prices because there was a range of reported prices, and disagreement between Nexant and CMAI on both contract prices and

³⁴⁰ Koster's cross examination, page 3754, line 22, to page 3755, line 2.

³⁴¹ See Exhibit 18, Slide 7; Sleep's evidence in chief, page 676, lines 8 to 19; also see Industry Experts Joint Minutes item 5.2, record page 2350B.

³⁴² Koster's cross examination, page 3845, lines 1 to 5.

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the extent of discounting in transaction prices, making reliable price comparison with the USA difficult. Koster stated "*I think it is wise for the Tribunal to take into account all the relevant prices*",³⁴³ but subsequently he took the dogmatic approach that the Tribunal should accept only CMAI's price line in the USA,³⁴⁴ even though CMAI's prices were on average at the upper end of the range of available prices. Koster said "*I would say it's not consistently the highest, but if we take these four lines, it is on average on the higher end of the range*".³⁴⁵ Koster also criticised the reliability of Nexant's price line for the USA on the basis that Nexant is not a price discoverer. However, this criticism we found to be misplaced. Nexant has access to several price discoveries and regularly reviews the reliability of these by talking directly to producers, particularly where it is concerned about the reliability of the prices being reported.³⁴⁶

363 Given that the USA is not a low cost producer of polypropylene we do not regard this to be a suitable comparator to SCI.

364 We next deal with European polypropylene prices as a potential comparator.

European domestic polypropylene prices

365 With regards to European domestic prices, the evidence was that European producers also do not have comparable costs to SCI. SCI has a considerable cost advantage derived from its cheap feedstock, the extent of which appears from Appendix A to Koster's First Report.³⁴⁷ Therefore, in order to make a comparison of SCI's domestic polypropylene prices to the prices in Western Europe, an adjustment had to be made for SCI's lower feedstock costs.³⁴⁸ Padilla did not make this adjustment and therefore his comparisons do not assist us.

³⁴³ Koster's cross examination, page 3727, lines 10 and 11.

³⁴⁴ Koster's cross examination, page 3761, lines 7 to 9.

³⁴⁵ Koster's cross examination, page 3765, lines 5 and 6.

³⁴⁶ Sleep's evidence in chief, page 699, lines 9 to 21; re-examination, page 850, lines 9 to 19; these reviews are not done only once a year as Koster suggested (cross examination, page 3727, lines 1 to 4 and lines 11 to 13). Koster's suggestion that the fact that CMAI prices are used as a base price for contracts suggests that they are more reliable is also misplaced (Koster's cross examination, page 3729, line 13, to page 3730, line 8). That simply indicates that this usage is established as a convention.

³⁴⁷ See pages 2211B and 2212B.

³⁴⁸ SR2 paragraph 305, page 258B.

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366 The Commission however did perform this adjustment basing its calculation on an estimate of SCI's feedstock costs being 25%³⁴⁹ lower than for Western Europe and on feedstock propylene costs accounting for around half of the price of polypropylene. Koster confirmed that an estimate of feedstock propylene costs of being around 85% of polypropylene costs would be a good indication of the cost.³⁵⁰ The price of polypropylene in Western Europe was on average 23% higher than costs according to Koster over 2004 to 2007.³⁵¹ Using an estimate of feedstock costs of 80% of the costs of polypropylene (lower than the 85% referred to by Koster but in line with the 90% he referred to as the proportion of purified propylene costs), and taking into account the average markup of the price of polypropylene of 23% above costs, this means that feedstock costs in Western Europe averaged 65% of the polypropylene price.

367 The calculations in Roberts' Second Report, Table 18,³⁵² can thus be updated for the advantage of SCI in terms of its feedstock compared to Western Europe refinery grade propylene in the complaint period and for feedstock being equivalent to 65% of the polypropylene price.³⁵³ Applying the lower SCI feedstock cost to Western Europe, but retaining the same absolute amounts for other costs and for the margins reduce the Western Europe prices by 19.5% (applying a 30% reduction to the feedstock cost being equivalent to 65% of the price).

368 The above calculation shows that SCI's domestic prices charged for polypropylene in the complaint period were 41% and 47% higher for respectively homopolymer and raffia grade compared to the Western Europe discounted prices computed on the basis of feedstock costs comparable to SCI. We note that the Commission's calculations exclude SCI's CEIP rebate. However, even including the rebate in the calculation will not alter our conclusion regarding these prices as comparator given SCI's significant feedstock advantage which, as stated above, lowers the Western Europe prices by 19.5% when taken into account.

³⁴⁹ See Behrens' witness statement, paragraph 216, page 490B.

³⁵⁰ Transcript page 3845, lines 1 to 5.

³⁵¹ From cash cost margins RK1. Fig 7, paragraph 6.28: average of \$249; and polypropylene costs of production, RK Slide 20 of \$1074 (\$927 being purified propylene and \$147 other costs).

³⁵² Record page 258B.

³⁵³ Using the lower 30% advantage obtained from Koster's data (rather than MacDougall's calculations).

Export polypropylene prices

369 We next consider the evidence relating to SCI's export prices for polypropylene compared to its domestic polypropylene prices. As stated above, the CAC in *Mittal* made it clear that one could estimate economic value by considering the prices charged by the dominant firm for the same or a similar product in other (geographic) markets, including export prices.

370 The CAC also confirmed that it may be possible to conclude that a dominant firm's prices are unreasonably above economic value simply from the fact that it maintains a price differentiation between export and domestic customers, and has embarked on an expansion of its production capacity wholly or mainly in order to increase its export sales. With regards to the latter we note that the Commission ultimately did not seek to rely on what was termed the "export shortcut" or investment decisions / expansions, including the so-called *Project Turbo* expansion, as a standalone test in our proceedings.³⁵⁴ We therefore do not deal with this aspect any further in these reasons.

371 The evidence was that SCI expanded capacity in 1998/1999 (PPU3) and as early as 1996 Polifin was already exporting more than 50% of its polypropylene production. A majority of SCI's exports after this expansion were to the Far East.

372 The Commission compared SCI's domestic prices for polypropylene to SCI's exports prices to China (SCI's lowest export netback³⁵⁵) and found that over the relevant cycle (FY02 – FY08) SCI's domestic prices were on average 32% higher than the export price to China.³⁵⁶ Padilla however criticised the Commission's choice of export destination and argued that it would be more appropriate to compare the local price to an average export polypropylene price.

373 We have taken a conservative approach and considered a comparison of SCI's export prices to the average deep sea price, where deep sea markets include all the export destinations to the exclusion of Southern Africa. Including the Southern African markets in the calculation in our view distorts the analysis since the

³⁵⁴ Commission's Heads of Argument, paragraph 222.

³⁵⁵ The value realised by SCI, after subtracting distribution, duties and other costs to make the sale to a foreign customer.

³⁵⁶ Exhibit 27, Slide 24.

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evidence was that prices achievable in regional markets are relatively close to those in South Africa.

374 Comparing the average export netback price for deep sea exports to SCI's local prices show that SCI's local prices for polypropylene over the relevant cycle (FY02 – FY08) were on average 23% higher than average deep sea export prices.³⁵⁷ The Commission found that these prices adequately cover costs.³⁵⁸

375 We furthermore note that one has to draw a distinction between cyclical dumping over the short run situation and persistent dumping. SCI's exports of polypropylene to the deep sea cannot be said to be of a cyclical nature.

"MITTAL 1" APPROACH

376 The CAC gave a theoretical framework for the determination of the economic value of a good or service by having regard to the "normal" costs and profits of firms in the long term competitive equilibrium. The court stated that using this method may require "*a fairly robust approach*" since long run normal profit is a notional concept. It said that in the quantification exercise "*A 'fairly robust approach' may thus have to be adopted particularly when account is taken that 'long run normal' profit and the conceptual basis upon which this term is predicated are notional. Within the context of adjudication, which deals with probabilities, these concepts cannot be employed with scientific precision.*"³⁵⁹

377 We are of the view that there is no separate so-called "Mittal 1" test as contended for by Padilla, since the CAC merely provided a theoretical framework for the abovementioned methods that have been widely accepted as suitable means of measurements of economic value, depending on the circumstances of the specific case. We do however discuss Padilla's approach to this and Roberts' response below.

378 In the Mittal 1 exercise, Padilla and consequently Roberts attempted to determine notional prices and costs in hypothetical purified propylene and polypropylene markets. These two experts however adopted vastly different interpretations in their

³⁵⁷ Exhibit 27, Slide 24.

³⁵⁸ Exhibit 27, Slide 24.

³⁵⁹ Mittal (CAC) at paragraph [49].

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economic modelling as to how this notional concept is to be applied in this case, i.e. what the "notional" prices and costs are in postulated hypothetical markets. Given that such approach necessarily requires that one postulates a situation that is not real i.e. with notional competitors, prices and costs, this is an elusive and complex approach, as borne out by the conflicting evidence of Padilla and Roberts.

379 The Commission argued that Padilla's Mittal 1 modelling of this hypothetical market is conceptually wrong and at odds with the principle itself while SCI argued that Roberts' approach is conceptually wrong and that it is not a legitimate Mittal 1 postulate.

380 The Commission, more specifically, argued that Padilla did not postulate the particular factual scenario in South Africa. According to the Commission, in Padilla's narrow interpretation of the CAC's guidance and in his modelling, one ends up in a completely artificial environment totally removed from the South African reality. It accused SCI of trying to get as far as possible away from examining SCI's actual prices and costs and to persuade the Tribunal that it must consider an entirely notional world unrelated to reality.

381 SCI submitted that Padilla's approach and assumptions were justified and based on *Mittal*. SCI further argued that the definition of 'economic value' is that of the CAC and not that of either Padilla or Roberts.

382 SCI criticised Roberts' approach to his postulated hypothetical market for being far larger than the actual South African market, populated by multiple clones of Synfuels and SCI, that is, competitors whose costs are identical to those of Synfuels and SCI.

383 We have already indicated above that one has to consider the specific facts of this case. As we further noted, the peculiar circumstances of this case, specifically the issue of SCI's low feedstock propylene costs and the history thereof, was not a factor that could have been considered in *Mittal*. The CAC's guidance was furthermore that what the expression 'economic value of a good or service' means and how it should be determined, must be ascertained by empirical enquiry.

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384 The expert testimony has shown that the so-called "direct" method of determining economic value in a "notional" market is by no means a simple task in practice, but rather an extremely complex one with the outcomes entirely dependent on the assumptions made by the experts. The assumptions made drastically affect the end results. Various questions arose regarding the required modelling in this method, for example: What does one postulate? How many sellers must one postulate? What market size must one assume? Is demand constant or must one adjust the volume of sales in the relevant market as competitors compete the price down and, if so, by how much? We note that the factual evidence of the plastic converters (i.e. the users of polypropylene) in this case was that they would buy more polypropylene at a lower price to produce more plastic goods in South Africa (see consumer detriment below).

385 Furthermore, one of the reasons for the complexity of this method is that to determine if such inference is appropriate in any given case, a fact bound investigation has to be done and the facts were highly disputed in this matter.

386 We have already concluded above that the CAC did not lay down a narrow, rigid approach to a section 8(a) enquiry. Padilla conceded that he had no regard to the interpretation of our legislation and also did not consider as relevant any of the economic history of Sasol/Synfuels/SCI. He said the following in cross-examination:

"ADV SUBEL: No, no, I'm asking about your approach to this, because my question really was very simple. To what extent did you investigate and consider Sasol's history?"

*DR PADILLA: It was irrelevant for me.*³⁶⁰

"ADV SUBEL: ... I just want to establish in your approach that you've disregarded Sasol's history and its particular position in the South African economy as irrelevant."

DR PADILLA: I don't see anything in [paragraphs 40, 43 or 52 of Mittal (CAC)] that does mean that I need to apply a different test of excessive prices for special

³⁶⁰ Padilla's cross examination, page 2089, lines 16 to 19.

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*companies or for companies that have enjoyed, allegedly enjoyed state support. I haven't read any of that. I wasn't instructed in that way*³⁶¹

387 In his interpretation of the CAC's judgement and his economic modelling Padilla thus had no regard to the objectives of our Act and the intentions of our legislature in enacting section 8(a) or to SCI's history as a Sasol subsidiary. This alone is a fundamental difficulty with his approach.

388 Furthermore, Padilla interpreted "*long run competitive equilibrium*" to mean conditions of "*free entry and free exit*" for notional competitors in the relevant market in which the firm under scrutiny is dominant.³⁶² This interpretation leads to a number of anomalies and ultimately renders the prohibition in section 8(a) of the Act redundant.

389 In determining prices, Padilla set out to model price outcomes in the market in which the dominant firm is alleged to be charging excessive prices (including pertinently the size of the market). This fundamentally subverts the entire analysis because it disregards the fact that the very basis of the complaint is that in that market there is never going to be more than one firm and therefore never going to be effective competition. Markets in which excessive pricing is likely to occur are precisely those markets where there never will be entry and exit by new entrants. Padilla acknowledged that competition authorities are not interested in situations where there are no or low barriers to entry.³⁶³ That is precisely the reason our Act prohibits the exploitative abuse of charging excessive prices – because these high prices are unlikely to attract new entry.

390 In our view a model that accepts monopoly pricing as a price in the long run competitive equilibrium is not a model that articulates the concept of long run competitive equilibrium in accordance with the principles set out in *Mittal*. The CAC expressly stated that long run competitive equilibrium is a state in which all pure profit is competed away, i.e. one in which there is competition and prices are cost-reflective.

³⁶¹ Padilla's cross examination, page 2090, line 18, to page 2091, line 3.

³⁶² Padilla's cross examination, page 2019, lines 7 to 9.

³⁶³ Padilla's cross examination, page 2127, line 3, to page 2128, line 12.

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391 The effect of Padilla's modelling is that section 8(a) of the Act cannot be used to remedy high prices in a market in which "*there is no constraint from abroad and internally there is no room for a second competitor.*"³⁶⁴ Padilla's suggestion was that such a market would have to be the subject of regulation.³⁶⁵

392 Furthermore, Padilla's modelling is flawed insofar as it seeks to determine prices based on the costs of a new entrant. It is clear that the CAC, in referring to conditions of long run competitive equilibrium, had in mind the costs of firms already competing in the market, including the dominant firm itself. The CAC's suggestion *inter alia* of the use of comparator prices in other markets "*by firms with broadly comparable cost structures*" (see paragraph 330 above) clearly indicates that the appropriate method is to consider what pricing would be under conditions of effective rivalry between firms with similar costs to the incumbent. The purpose is to evaluate what would have been the pricing had there been effective competition in the relevant market, not what pricing would be required for there to be new entry in the relevant market.

393 We further reject Padilla's interpretation that "special advantage" means "any firm-specific advantage" and that any such cost advantage should be excluded entirely from the analysis. Padilla simply assumed that SCI's lower cost must be a product of its efficiency; he never considered that a cost advantage might not be the product of the firm's own efforts, for example simply the result of previous state largesse. It is precisely this situation, however, where the abuse of excessive pricing is likely to occur.

394 We conclude that Padilla's "Mittal 1" applied modelling is inappropriate. He specifically did not recognise the broader considerations raised by *Mittal* and furthermore had no regard to our Act and the objects of our particular legislation. One cannot responsibly in the spirit of the construct of our Act find that SCI should be treated as if it never received any state support as, by implication, contended by Padilla. As we have already highlighted above, the CAC was clear that history and context are relevant factors in a section 8(a) enquiry (see paragraphs 96 and 97 above).

³⁶⁴ Padilla's cross examination, page 2207, line 19, to page 2208, line 3.

³⁶⁵ Padilla's cross examination, page 2208, lines 3 to 5.

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395 As said above, Roberts' "Mittal 1" approach was an abstract postulated notional market populated by Synfuels and SCI clones. As far as this "cloning" approach is concerned, we similarly reject this approach. It is artificial in the sense that it increases the size of the relevant market to infinite proportions.

396 Ultimately we want to get as close as possible to a realistic and rational assessment of whether or not a particular price charged in a particular relevant market was excessive. This requires a pragmatic approach based on the actual facts and includes a consideration of the history of the dominant firm and why it was able to charge a price higher than the economic value of the good in question. An ahistorical and acontextual approach to the facts of this case would be wrong and frankly negligent on our part.

397 Furthermore, as noted above, the CAC quoted with approval that the dominant firm's own incurred costs will no doubt form an important evidential ingredient in the enquiry. Given Padilla's and Roberts' vastly different approaches to what any "notional" market would look like, and specifically given the artificiality in both approaches to promote their own respective cases, we find that the actual costs of SCI, with certain adjustments, provide a more reliable indicator of the relationship between SCI's prices and the economic value of the purified propylene and polypropylene sold during the complaint period. The price-cost test, as discussed above, provides concrete and real evidence of the actual costs of SCI. The only caution to this is that the costs must not be atypical, i.e. it must correspond to the competitive norm. However, here again the specific and peculiar circumstances of SCI have to be considered.

398 We next assess if the purified propylene markups as indicated in Table 1b above are reasonable in relation to the economic value of the propylene. We do the same for polypropylene based on the price cost-test results in Table 2b and the other appropriate comparators. We make these value judgements in the context of the market characteristics of the South African purified propylene and polypropylene markets in which SCI is a dominant firm with a particular history, as explained below.

FIRST VALUE JUDGEMENT: REASONABLE RELATION TO ECONOMIC VALUE

Background

399 The CAC indicated that the definition in the Act of an excessive price as one that bears "*no reasonable relation*" to the economic value of the good or service in question requires that the price actually charged have a reasonable connection or link to the economic value of the good or service.³⁶⁶ The critical question thus is: when can it be said that the excess of an actual price over the economic value of the good or service is such that the former no longer bears a reasonable relation to the latter? A finding that an actual price is higher than the economic value is therefore not sufficient on its own - the price must also bear no reasonable relation to the economic value of the good or service. Put differently, a price charged which reasonably relates to the economic value of the good or service does not contravene section 8(a) of the Act. In practical terms this means that some allowance is made in the assessment for a margin of error in the determination of the economic value of the good or service in question.

400 Due regard must be paid to the fact that a dominant firm's price for the product or service may justifiably be higher than its economic value. An example would be the pricing of a patented product where the patent holder has the right to the economic exploitation of the innovation for a limited period. Accordingly, a patent holder may charge a price which bears no relation to the economic value of the product for the duration of the specific patent. This, however, is not a relevant factor here.

401 The Commission argued that SCI's prices charged for both purified propylene and polypropylene during the complaint period bore no reasonable relation to the economic value of those products. SCI, on the other hand, submitted that even if SCI's actual prices for both purified propylene and polypropylene exceeded the economic value thereof, they were still well within the range of prices that bore a reasonable relation to the economic value of these products.

³⁶⁶ Mittal (CAC) *inter alia* paragraph [32].

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402 SCI further submitted that this excess of the actual price over economic value must be both clear and blatant. It was of the view that a finding that a price is excessive should only be made if multiple corroborative analyses all point in the same direction. Padilla referred to this as the "*preponderance of evidence*".³⁶⁷ SCI also argued that the excess must be blatant so as to preserve the constitutional validity of the prohibition. According to SCI, without the requirement of a blatant excess, the prohibition would offend the constitutional requirement of the rule of law that laws, including the Act, must - with reasonable certainty - describe what is permissible and what is not.

403 Not surprisingly, Padilla contended that a very high threshold should be met in this value judgement of the court. He would have it that the difference between the actual price and economic value must be "*significant*"³⁶⁸ and that a minimum threshold would be in the order of 40%.³⁶⁹ In final argument SCI even submitted that the margin above economic value must be in the order of 50% or higher and that any smaller margin would make it impossible for a South African producer to determine with reasonable certainty what it may charge for its products.

Assessment

404 The CAC was clear that the reasonableness assessment involves a value judgment,³⁷⁰ that there is no hard and fast threshold and that any price that is higher than economic value may, depending on the circumstances, be found to be excessive.³⁷¹ There thus exists no set standard on what magnitude of actual pricing over economic value of the good/service in question is considered unreasonable or excessive.

405 What is further evident from the CAC's guidance is that one cannot follow a rigid approach; one must do this value judgement exercise on a case-by-case basis considering the factual context. This includes all the particular facts, including the nature of the goods/services in question and other market features/characteristics. This accords with international best practice which

³⁶⁷ Transcript, Padilla, page 1812.

³⁶⁸ Padilla's evidence in chief, page 1813, lines 9 to 11.

³⁶⁹ Padilla's evidence in chief, page 1813, lines 9 to 11; page 1981, lines 3 to 9.

³⁷⁰ Mittal (CAC) at paragraph [32].

³⁷¹ Mittal (CAC) at paragraphs [32] and [43].

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points to the importance of considering the nature of the good/service in question and the position of the dominant firm and its consumers in the overall assessment of whether the price concerned bears a reasonable relation to the economic value of the product/service.³⁷²

406 As far as Padilla's suggested thresholds are concerned, as we have indicated above, Padilla had no regard to our Act and the objects of our particular legislation. Furthermore, Padilla ultimately conceded that a difference of as little as 25% might be judged as being unreasonable;³⁷³ he said "*some of them [thresholds] are below even 15% or 25%, which is another threshold that has been tossed out in various reports by the Commission*"³⁷⁴ and "[t]he real number does not really matter. The actual number does not really matter. What matters is that there has to be a significant difference".³⁷⁵ We further note that a margin of, for example, 25% has been considered in an EU case.³⁷⁶

407 Be that as it may, whilst approaches to reasonableness in other jurisdictions may provide a very basic guideline to us, our approach must - as the preamble of our Act enjoins one to do - consider the unique history and needs of our country. This includes the dominant firm's market position historically, how it came to be in that dominant position and any protection that it enjoyed, if applicable. In the value judgement one therefore has to ask if it is reasonable to have a particular differential between the actual price and the economic value of the good in question considering the circumstances and reasons why the dominant firm is in a position to price in the way that it does. Since history and context become of critical import and being mindful of our country's unique history one has to be particularly cautious of lifting the bar too high or setting a rigid threshold for reasonableness. Developing countries like South Africa have a greater prevalence of entrenched dominant firms than the large open economies and also face different economic challenges. This is due to various factors *inter alia* scale and network economies relative to the size of our local market, transport

³⁷² SR1 paragraphs 439 to 440, page 147B; SR2 paragraph 333, page 265B; also see Padilla's evidence in chief, pages 2403 to 2406.

³⁷³ Padilla's evidence in chief, page 1813, lines 18 to 20.

³⁷⁴ Padilla's evidence in chief, page 1981, lines 7 to 9.

³⁷⁵ Padilla's evidence in chief, page 1813, lines 20 to 22.

³⁷⁶ *Deutsche Post AG v Commission*, COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail (2001), paragraph 166. See also Padilla's evidence in chief, page 2403.

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and logistics challenges and a legacy of state support to certain industries. This warrants us to adopt a cautious approach.

408 Furthermore, since excessive pricing is an exploitative abuse one must not only have regard to the interests of the dominant firm in the reasonableness assessment, but also consider the effects of the dominant firm's pricing on its customers or consumers, in this case the downstream producer(s) of polypropylene (i.e. Safripol) and plastic goods (i.e. various plastic converters). Padilla conceded that the effects on these downstream customers are an important consideration in the overall assessment. Responding to questions from the Tribunal he stated "*Excessive pricing at the convertor level could damage the investment decisions of convertors. I cannot deny that. I mean if the proposition that I think I have established empirically in my submission is that there is a relationship between investment levels and cash flows. So you would have (sic) take that into consideration and balance that with the effects on investment at higher levels of the value chain. It is precisely for that reason that one of the conditions that we didn't discuss the other day, in Evans/Padilla, refers to potential damage in adjacent markets. In this case, the adjacent market would be the convertor market, but a proper analysis requires that you investigate exactly what is the elasticity of investment, relative to prices at the level of the production chain. I haven't done that. I have done the ... I have analysed the elasticity of investment to cash flows at the higher levels, at the Synfuels and SCI levels and it's fairly significant. So there should be a balance in exercise there.*"³⁷⁷

409 Thus, when exercising our value judgment over reasonableness we must not lose sight of the effects on customers operating in downstream markets. As we shall discuss below, the evidence has been that prices in the range of 20% (or more) above economic value have had significant adverse effects on both Safripol (competing at the polypropylene level) and on the plastic converters (that use polypropylene in their production processes).

410 In conclusion: the size of the difference between the actual price and the economic value of a good or service must always be gauged with reference to the larger context in which it is charged by the dominant firm, including its

³⁷⁷ Transcript, Padilla, pages 2409 and 2410.

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downstream effects. One cannot rigidly decide on a percentage figure, as suggested by Padilla and SCI's counsel. We reiterate that, as borne out by *Mittal*, this is a value judgement that must be done on a case-by-case basis informed by the specific facts. This includes the nature of the product concerned and the impact of the conduct on downstream customers and industries (and ultimately on our economy). Too high input prices adversely affect the developmental objectives of our country as an emerging economy including our ability to compete internationally, grow local markets and the creation of additional job opportunities.

411 We have already dealt with the way in which the CAC advised that 'special cost advantages' should be treated in the reasonableness value judgement. As we have further pointed out, the specific facts of this case were not considered in *Mittal*. We have concluded that SCI's low feedstock costs must be considered in the overall assessment.

412 Given the invariable complexity of excessive pricing analyses one would like to have regard to the preponderance of the available evidence rather than to a single benchmark, provided that the available economic data and evidence are reliable, that suitable, like-for-like comparators are used and that the economic assumptions and findings are supported by and correspond to the factual evidence. A certain test may therefore in a given case be a better indicator than others and this can only be determined on a case-by-case basis.

413 In assessing whether the above found differences between SCI's prices and the economic values of respectively purified propylene and polypropylene are reasonable we have had regard to the following features/characteristics of the South African purified propylene and polypropylene markets:

413.1 it is common cause that SCI is the dominant firm in the South African market for the manufacture and supply of purified propylene. We have further concluded that SCI is also a dominant firm in the production and sale of polypropylene in South Africa;

413.2 the barriers to entry into these markets are high and non-transitory. In particular, access to the purified propylene and polypropylene markets would

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require a reliable and significant supply of feedstock propylene. There is no such supply in South Africa other than by Sasol;

413.3 purified propylene and polypropylene are commodity products in mature industries and are produced in significant quantities to homogeneous specifications;³⁷⁸

413.4 SCI has a cost advantage as the producer of purified propylene and polypropylene due to the nature of feedstock propylene as a by-product in Sasol's fuel operations;

413.5 Synfuels has an abundance of feedstock propylene as a by-product and poor alternative uses for that feedstock;

413.6 SCI has not been able to demonstrate that its market positions in purified propylene and polypropylene are the result of innovation or risk-taking on its part;

413.7 it cannot be denied that Sasol has enjoyed very significant state support for its fuels business for a protracted period of time, which it has leveraged to create its positions of dominance in the domestic markets for purified propylene and polypropylene. The CAC has made it clear that history matters and therefore Sasol's history of significant state support cannot be ignored in this value judgement; and

413.8 as borne out by the testimony of Safripol and the plastic converters, high input prices for both purified propylene and polypropylene have had wider implications for our emerging economy since they have had marked negative effects on the relevant downstream industries. The high prices of these intermediate goods have affected the ability to effectively compete in the downstream industries and in the case of the plastic converters have generally retarded their ability to innovate and increase local production.

³⁷⁸ GH1 paragraph 4.3.

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414 The above features are not reflective of competitive markets and we conclude that there is no basis for SCI to be rewarded by being permitted to make returns above a 'normal' profit.

415 As concluded above, in the case of purified propylene the price-cost test is the only reliable indicator of the economic value of the purified propylene sold by SCI during the complaint period. The final price-cost test results for purified propylene show that prices over actual costs during the complaint period were in the range of [39.9 - 41.5]% for Tier 2 sales to Safripol and in the range of [25.1 - 26.5]% for Tier 1 sales to Safripol. On an average basis, on Harman's approach, this figure is in the range of [31.5 - 33]%.

416 In the case of polypropylene we have had regard to the price-cost test, an international comparator after adjusting for SCI's comparative low feedstock costs, as well as SCI's export prices for polypropylene. The final price-cost test results for polypropylene show that SCI's markup of its polypropylene price over actual costs during the complaint period was in the range of [17.6 - 25.4]% measured on a very conservative basis (as explained above) and [26.9 - 36.5]% on a more realistic basis. The other two methods used to determine economic value show the same trend. A comparison of SCI's domestic polypropylene prices to the prices in Western Europe indicate that SCI's domestic prices for polypropylene were 41% and 47% higher for respectively homopolymer and raffia grade in the relevant period compared to the Western European discounted prices computed on the basis of feedstock costs comparable to SCI. Furthermore, a comparison of SCI's local and export prices indicated that SCI's local prices for polypropylene over the relevant cycle (FY02 – FY08) were on average 23% higher than average deep sea export prices.

417 After having regard to the abovementioned price-cost test results for purified propylene and the nature of the product, its importance as intermediate input in industrial development, the market's characteristics and other circumstances, the objects of our Act understood in the context of the South African economy and the history of SCI as dominant firm and how it acquired its dominance, we find that both the Tier 2 price and the Tier 1 price charged to Safripol during the infringement period bear no reasonable relation to the economic value of the

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purified propylene. This finding would remain unchanged if we were to follow Harman's approach of the average of the Tier 1 and Tier 2 prices charged to Safripol.

418 Having regard to the abovementioned factors and circumstances we similarly find that the price-cost test results for polypropylene and the other methods used show that there is no reasonable relationship between the price charged by SCI's to the local plastic converters for polypropylene during the complaint period and the economic value of the polypropylene.

419 We further have to make a value judgement on whether or not SCI's pricing conduct in relation to purified propylene and polypropylene caused harm to consumers. We do this next.

SECOND VALUE JUDGEMENT: CONSUMER DETRIMENT

420 One of the elements of the test for a finding of excessive pricing as laid down in *Mittal* is that it must be "to the detriment of consumers" (see paragraph 56.2 above).³⁷⁹ The CAC further indicated that this consumer harm aspect also involves a "value judgement".

421 We note that excessive pricing is a so-called "exploitative" abuse, as opposed to an exclusionary abuse. The Tribunal made this distinction in *The Competition Commission v South African Airways* [2005] 2 CPLR 303 (CT). The Tribunal pointed out that "[m]odern antitrust law identifies two species of abuse of dominance" and described an exploitative abuse as one which "focuses on the effect of the abuse on the consumer, who, in consequence of the output decisions of the dominant firm, may be facing output constraining behaviour and hence higher prices."³⁸⁰

422 The CAC in *Mittal* further made it clear that in the context of section 8(a) 'consumers' must be given a broad interpretation and a wide meaning. The CAC found by way of *obiter dictum* that while customers and consumers are distinct concepts in the Act, harm to consumers may take the form of harm to the

³⁷⁹ *Mittal* at paragraph [32].

³⁸⁰ *Mittal* at paragraph [32]. Tribunal decision of 28 July 2005, at paragraph 114.

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customers of the dominant firm where that customer “*productively*” consumes the product in question.³⁸¹

423 Potential harm to consumers thus, in this context, includes harm to customers who consume the relevant product in their own (downstream) production processes. As explained above, both purified propylene and polypropylene are intermediate products used as inputs by other manufacturers. In particular, Safripol is a local consumer of purified propylene in its production of polypropylene. Polypropylene is an input in the production of plastic goods and therefore the price thereof has implications further down the value chain on the plastic converters. These effects ultimately could filter down to the end consumers of finished plastic products, either in the form of price, quality or product range (i.e. product choice), as explained below.

424 We shall first discuss the effects of SCI’s purified propylene pricing on Safripol and then discuss the effects further down the value chain.

Harm to Safripol as a direct consumer of purified propylene

SCI’s arguments

425 SCI alleged a number of reasons why, in its view, Safripol suffered no consumer detriment, namely that:

425.1 Safripol procured purified propylene at SCI’s internal “transfer” price during the complaint period. We have already dealt with this issue above;

425.2 this is not a refusal to supply case; SCI simply had no additional purified propylene available to supply to Safripol during the complaint period;

425.3 Schoch did not dispute Behrens’ evidence that Safripol had not taken its full allocation of purified propylene volumes from SCI during the complaint period.³⁸² SCI alleged that if Safripol considered that there was sufficient demand for polypropylene during this period, it would have purchased its full allocation from SCI and utilised its excess capacity to produce saleable polypropylene. The fact that Safripol did not do so shows that there was

³⁸¹ Mittal at paragraph [55].

³⁸² Transcript, Schoch, pages 510 and 511.

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simply insufficient demand to justify even an "incremental" expansion of capacity during the complaint period, much less a "step-expansion". Safripol was still making "incremental" expansions to its plant in 2011 and if Safripol was so intent on expansion during the complaint period, it would clearly have made these expansions sometime between 2004 and 2007; and

425.4 Schoch's evidence as regards harm relates to a different time period to that of the complaint period.

Assessment

426 It was common cause that purified propylene is the major input in the production of polypropylene. According to Schoch the price of propylene represents approximately [80 - 100]% of Safripol's total variable costs and about [70 - 100]% of its total costs of producing polypropylene.³⁸³ He confirmed this in his evidence in chief and added "*We do these calculations on a regular basis, so we have that on a monthly basis, if not more often, we look at the cost.*"³⁸⁴ Koster indicated that the cost of feedstock could be approximately 85% of the polypropylene costs. Koster testified:

"ADV WESLEY: And because feedstock makes up as I recall 85% of the total costs of producing polypropylene, is that correct?"

DR KOSTER: That could be ja depending on the period because of the energy prices over time this percentage will also change. But it could be a good indication."³⁸⁵

427 On the issue of supply volumes to Safripol, we note that although SCI offered Safripol additional purified propylene volumes in 2005 from the *Project Turbo* yield, it required that Safripol first exhaust the entire supply volumes under the Tier 1 and Tier 2 formulae before it was permitted to purchase the *Project Turbo* volumes.³⁸⁶ Schoch explained that Safripol could not agree to this since to do so

³⁸³ Schoch's witness statement, paragraph 31, page 32B.

³⁸⁴ Transcript, Schoch, page 403.

³⁸⁵ Transcript page 3845, lines 1 to 5.

³⁸⁶ Schoch's supplementary witness statement, paragraph 16, pages 38B and 39B.

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would have required Safripol to [...].³⁸⁷ The reasons advanced by Sasol,³⁸⁸ namely that Dow rejected the offer, was not supported by evidence.³⁸⁹

428 With regards to Safripol not taking all purified propylene volumes from SCI, Schoch explained that Safripol was “*maximising as much as possible, the purchases from [...]*”³⁹⁰ and “*So we just maximise on a daily basis the majority of product we can get from the most ... from the [...]. [...]. So we were taking as much [...] as possible and then to the degree that we have to supplement, we were taking Sasol.*”³⁹¹

429 Schoch’s evidence was furthermore that SCI has not offered any further volumes of purified propylene to Safripol since 2005.³⁹²

430 With regards to Safripol’s polypropylene production capacity, this capacity stood at [...] tonnes per annum during the complaint period.³⁹³ The evidence was that Safripol undertook a number of incremental expansions historically,³⁹⁴ but in order to significantly expand its production it would have to undertake a so-called “step-expansion”. Safripol further indicated that it was in a position to undertake such an expansion, which would increase its current production capacity to [...] tonnes.³⁹⁵ It was further clear that Safripol’s potential to increase its polypropylene capacity is constrained by SCI’s purified propylene pricing, including the higher Tier 2 price charged,³⁹⁶ and that these constraints specifically limit Safripol’s domestic sales of polypropylene.³⁹⁷

431 Although Schoch acknowledged that Safripol’s “main” constraint was an input (volume) constraint, this was not the only constraint. He went on to specifically mention “*the other*

³⁸⁷ Schoch’s evidence in chief, page 379.

³⁸⁸ Schoch’s cross examination, page 549, lines 13 to 22.

³⁸⁹ Schoch’s cross examination, page 550, lines 1 to 9.

³⁹⁰ Schoch’s cross examination, page 510, lines 8 to 20.

³⁹¹ Schoch’s cross examination, page 511, lines 5 to 8.

³⁹² Schoch’s cross examination, pages 549 and 550.

³⁹³ Schoch’s witness statement, paragraph 34.3, page 33B; Schoch’s supplementary witness statement paragraph 3, page 36B; also see transcript page 355, lines 18 to 20.

³⁹⁴ Schoch’s evidence in chief, page 429, lines 15 to 20; Schoch’s cross examination, page 541, lines 8 to 14.

³⁹⁵ Transcript, page 355, lines 14 to 17; see also page 360, lines 13 to 21.

³⁹⁶ Transcript page 369, line 17; page 385, lines 9 to 14.

³⁹⁷ Safripol’s average export figures stand between [...]%. See Schoch’s evidence in chief, page 408, line 16. Also see Schoch’s witness statement, paragraph 18, page 26B.

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*constraint is in terms of the margin that we have available for our business.*³⁹⁸ Schoch was further clear that *"Between 2004 and 2007 Safripol faced the constraint that any incremental volumes of propylene were only available at the higher Tier 2 price."*³⁹⁹

432 A lower purified propylene price charged to Safripol could enable Safripol to: (i) lower its polypropylene price and offer cheaper polypropylene to the plastic converters; and/or (ii) expand its polypropylene production capacity and offer more product to converters; and/or (iii) provide (more) technical service and product development support and assistance to customers and thus compete better. One or more of these measures would increase Safripol's ability to effectively compete with SCI in the polypropylene market, as explained by Schoch: *"clearly a reduction of price we have to assume, of the propylene price, we have to assume that the equal conditions of the selling price is going to be giving you more profitability. If you have more profitability, you can afford more in terms of your production expansion. You can afford to put more capital for an expansion. You can afford to offer more discounts to your customers and try to participate in more sales."*⁴⁰⁰

433 The difficulty with the customer/consumer detriment value judgement is that what is relevant is what a customer's behaviour would have been during the specific period of the alleged contravention if one assumes a significantly lower price i.e. a non-excessive one. Thus, the question to be answered is not what Safripol did during the complaint period under the excessive purified propylene prices, but what it likely would have done if it was charged a significantly lower price for this input. Further, one cannot assume, as SCI did, that the plastic converters' demand for polypropylene during the complaint period would have remained the same under a significantly lower polypropylene price.

434 In our value judgement the purified propylene prices charged by SCI to Safripol during the infringement period were to Safripol's detriment. The evidence was very clear that the input price of purified propylene into polypropylene production is extremely important and plays a fundamental role in the strategic decisions of a polypropylene producer, including its decisions regarding expansion in the market, technical service and product development support, as testified by Schoch. It was further common cause

³⁹⁸ Transcript, Schoch, page 412.

³⁹⁹ Schoch's witness statement, paragraph 35.

⁴⁰⁰ Schoch's witness statement, paragraphs 37 and 38, page 34B; Schoch's evidence in chief, page 435, line 19, to page 436, line 2.

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that the cost of purified propylene makes up a high proportion of the costs of producing polypropylene, as confirmed by the testimony of both Koster and Schoch. By charging its rival in the polypropylene market high prices for purified propylene, and thus increasing Safripol's raw material costs, SCI inhibited Safripol's ability to effectively compete with it in the production and sale of polypropylene to the plastic converters. The effect of the excessive pricing of purified propylene thus was that competition in the polypropylene market in South Africa was muted.

Conclusion

435 Based on the above, we conclude that consumer detriment has been demonstrated in relation to SCI's pricing for purified propylene during the infringement period.

436 We below also consider the potential further downstream effects in the value chain.

Downstream harm

437 From the evidence of the plastic converters we know that there is no substitute for polypropylene in the production of finished or household plastic products.⁴⁰¹ Moreover, not only is polypropylene a core input to the converters but it represents in many cases the single biggest cost component in the production of finished plastic products.⁴⁰² Polypropylene costs can be as high as [80 - 100]% of a converter's raw material and packaging costs,⁴⁰³ [40 - 60]% of the total costs and [20 - 30]% of the selling price.⁴⁰⁴ Furthermore, Jacob of SA Leisure used the example of a slumber chair costing breakdown to explain these costs, which reflected that raw material costs in some products reach a cost percentage level of up to 80%.⁴⁰⁵

438 Behrens accepted that the cost of polypropylene is the single biggest cost for converters in the manufacturing of many of their products.⁴⁰⁶ He further accepted that competition in the plastic goods markets is largely on price and that converters are very

⁴⁰¹ Jacob's witness statement, paragraph 10, page 8B; Lebi's witness statement, paragraph 11, page 15B.

⁴⁰² Jacob's witness statement, paragraph 16, page 10B; evidence in chief, page 104, line 6, to page 106, line 21; Lebi's witness statement, paragraphs 18 and 19, pages 17B and 18B.

⁴⁰³ Jacob's evidence in chief, page 106, lines 10 to 20.

⁴⁰⁴ The balance of costs for SA Leisure other than polypropylene raw material costs is reflected in Jacob's witness statement, paragraphs 15.1 to 15.4, page 9B; and for Usabco in Lebi's witness statement, paragraph 18.1 to 18.5, page 17B.

⁴⁰⁵ Transcript, pages 96 to 100, as well as page 105.

⁴⁰⁶ Behrens' cross examination, page 3968, lines 16 to 19.

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price sensitive to the input price of polypropylene.⁴⁰⁷ He said that SCI appreciated the importance of polypropylene prices to the converter and therefore had historically offered various rebates to converters to help them achieve more sales.⁴⁰⁸ One of these rebates was the so-called CEIP⁴⁰⁹ rebate.⁴¹⁰

439 We note that SCI attempted to rely on the Fund for Research into Industrial Development, Growth and Equity (FRIDGE or Ozone) study in support of its allegation that the demand for polypropylene at the retail level, in the form of polypropylene-containing products, is relatively inelastic. Professor Fedderke measured it at 0.2% for polypropylene.⁴¹¹ Based on this Behrens made the allegation that lower polypropylene prices would not lead to increased local demand for end plastic products and therefore would not result in increased sales for the plastic converters.⁴¹²

440 We however place no reliance on the above studies as evidence in this matter. SCI did not put up any witness that could speak to these reports. Its correctness was challenged by the Commission, already in Roberts' First Report,⁴¹³ and again during the hearing. As Tribunal we would have had to interrogate these reports' methodologies, the assumptions made and their findings, which on the face of it seem highly questionable. If SCI wanted to rely on these reports it should have put up a witness that could speak to these issues. Behrens was not a competent witness to speak to these reports and could not provide evidence relating to *inter alia* the research methodologies used, the underlying premises/assumptions that these reports are based on and the merits of their conclusions.⁴¹⁴ Behrens conceded: "*As to the finer points of it, as for instance, in Prof Fiderke's (sic) work I agree with you that I don't have the expertise in that area.*"⁴¹⁵

⁴⁰⁷ Behrens, transcript, page 3968, lines 10 to 15.

⁴⁰⁸ Behrens, transcript, page 3970, lines 11 to 13.

⁴⁰⁹ An export rebate available to converters for the polypropylene content of finished products that they export.

⁴¹⁰ Jacob's witness statement, paragraph 12, page 9B; Jacob's evidence in chief, page 91; Leb's evidence in chief, page 227.

⁴¹¹ Transcript, Behrens, pages 3876 to 3883, with reference to the South African Econometric Research Unit (SAERU) study by Prof Fedderke at SCI's bundle page 2481ff and FRIDGE Study at SCI's bundle page 3258ff. See also SR1, page 174B, paragraph 553.

⁴¹² Behrens' cross examination, page 3969, lines 15 to 19.

⁴¹³ SR1 paragraphs 552 to 557, pages 173B to 176B.

⁴¹⁴ Behrens, transcript, page 4109, lines 1 to 20; as well as pages 4111 to 4113.

⁴¹⁵ Behrens, transcript, page 4109, lines 13 to 15.

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441 We therefore find Behrens' allegation that lower polypropylene prices would not improve the plastic converters' market position to be without any foundation whatsoever. There is no evidence in support of SCI's allegation that the markets in question are inelastic or relatively inelastic. Padilla certainly did not put up such evidence.

442 Furthermore, it is incorrect to focus on harm to consumers only in the form of higher prices for end-products, as argued by SCI, since end consumer harm can take forms other than mere price. The evidence was that the potential effects on final consumers of plastic goods extend to both quality and choice of the products offered by the converters during the infringement period. This was confirmed by the evidence of both Jacob and Lebi. Behrens however also acknowledged that competition in the plastic goods market is not limited to price: *"So maybe Chinese domestic ware producers have developed product, which has got a different application which South African converters haven't yet cottoned onto or don't have the technology to emulate. So there's actually more going on here than just a straight price issue. To me that's absolutely clear."*⁴¹⁶

443 A further important feature of the polypropylene market is that the local converters compete with imports of finished plastic products.⁴¹⁷ It is thus also important to consider if lower input prices for polypropylene would affect the ability of converters to produce (more) products locally to replace imported finished plastic products.

444 We note that SCI's own internal documents acknowledge competition from imported finished goods. An internal memorandum of April 2012⁴¹⁸ tells us that imports have since 2000 captured significant market share downstream. Volumes of imports increased fourfold in the period 2000 – 2011.⁴¹⁹ One of the results of this, according to the SCI review, is that converters exited the business.⁴²⁰

445 Competition from imported finished products is further acknowledged by SCI's offered import replacement rebate to converters. This rebate was aimed at manufacturing

⁴¹⁶ Transcript, Behrens, page 4068, lines 13 to 17.

⁴¹⁷ *Inter alia* Jacob's evidence in chief, page 111, line 2, to page 112, line 2.

⁴¹⁸ See *Internal Memorandum* dated 25 April 2012 at page 3740 of SCI's bundle; also see colour copies of the slides at page 3753 contained in Exhibit 7 at pages 44 and 45; Behrens' cross examination, pages 4038 to 4044.

⁴¹⁹ *Internal Memorandum* dated 25 April 2012, SCI's bundle, page 3753.

⁴²⁰ *Internal Memorandum* dated 25 April 2012, SCI's bundle, page 3754; Behrens' cross examination, page 4042, line 15, to page 4043, line 5.

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products locally that would otherwise have been imported into South Africa⁴²¹ and was offered on the condition that the related product was not already being produced by another South African converter.⁴²² Behrens testified *"If we recognise that particular imports are putting a sector under threat we would also see whether we can assist customers then in maintaining market in competition with importers of converted goods."*⁴²³

446 Both Jacob and Lebi testified that they have to compete locally with cheaper imports which are surging into our market. These products are coming from countries such as Israel, Turkey and China. This applies specifically to the high volume, low margin items, for example storage and food containers.⁴²⁴ This has become more distinct in recent years as importing became easier, thus enabling retailers to import directly, cheaply and in great volumes.⁴²⁵ Behrens acknowledged this and testified that the increase in imports has been caused almost entirely by what he described as the *"China phenomenon"*.⁴²⁶ Behrens furthermore conceded that the converters by taking import sales could increase their output volumes, even if local demand did not increase.⁴²⁷

447 We also note that SCI attempted to argue that the plastic converters' situation is not caused by SCI's pricing but by global competitive factors beyond SCI's control. Jacob in her evidence referred to these global factors and to local macroeconomic conditions.⁴²⁸ However, this argument fundamentally ignores the aim of an excessive pricing assessment. Whilst a number of global factors, or for that matter the costs of other inputs such as energy and labour, may have influenced the businesses of plastic converters, this does not lead to the conclusion that an excessive price charged for an input is irrelevant to that business. Indeed a high price for their most significant input could potentially cause harm to local plastic converters and impact their strategic decisions. Many South African firms that export would be subject to global competitive

⁴²¹ Lebi's witness statement, paragraph 14, page 16B; Lebi's evidence in chief, page 229, lines 3 to 8.

⁴²² Lebi's witness statement, paragraph 14.3, page 16B; Lebi's evidence in chief, page 229, line 14, to page 230, line 2.

⁴²³ Transcript page 4077, lines 9 to 12.

⁴²⁴ Jacob's witness statement, paragraph 17, page 10B; Jacob's evidence in chief, page 111, line 5, to page 112, line 2; Lebi's witness statement, paragraphs 20 to 22, page 18B.

⁴²⁵ Lebi, transcript, page 192, line 21, to page 193, line 5; transcript, page 111, lines 18 to 22.

⁴²⁶ Transcript, Behrens, page 4068.

⁴²⁷ Behrens' cross examination, page 3970, lines 1 to 6.

⁴²⁸ Transcript, Jacob, pages 108 and 111.

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factors and it is precisely in such an environment where “non-excessive” input prices become crucial to effectively compete.

448 The question is not, as argued by SCI, whether the converters were able to compete with imports or not given SCI's pricing. If they were not able to compete at all they would have exited the market. The question is if high input pricing had an effect on the local converters' strategic decisions, including pricing and/or product development, and if that caused them harm.

449 SCI further argued that the South African based converters are protected by a 20% duty on imported products. We find this of no relevance in the assessment. Whether the Chinese exporters receive a range of incentives from their government is also of no relevance. We are concerned with the effect of high input prices on local producers in the market realities that they compete in and the evidence was that the local plastics producers struggle to compete with cheap imports despite this import duty.

450 With regards to the effect of lower input prices on the plastic converters' businesses, Lebi and Jacobs gave evidence that a [...] reduction in the polypropylene price (as compared with the import parity price) would allow them to: (i) reduce their production costs;⁴²⁹ (ii) improve competitiveness in export markets;⁴³⁰ and (iii) better compete in the South African market against imported finished product given the very small margins on most products.⁴³¹ Lebi's evidence furthermore was that a [...] % decrease in polypropylene prices would enable Usabco to produce more finished products locally.⁴³² Lebi also testified that a [...] ⁴³³ reduction in SCI's polypropylene prices would enable Usabco to displace imports in the South African market by moving the manufacturing of its own imported products, currently toll-manufactured in China, back to South Africa and/or by bettering prices offered by third party importers to retailers.⁴³⁴ The following passage is instructive of what Lebi would have done during the

⁴²⁹ Lebi's witness statement, paragraph 30, page 20B; also see Jacob's witness statement, paragraph 21, page 11B.

⁴³⁰ Lebi's witness statement, paragraph 34.3, page 21B.

⁴³¹ Jacob's witness statement, paragraph 20, page 11B; Lebi's witness statement, paragraph 27, page 19B; also see paragraph 34.1, page 20B.

⁴³² Lebi's evidence in chief, pages 189 to 191; also see Lebi's witness statement, paragraph 10, page 15B.

⁴³³ Lebi's witness statement refers to the effect of a 20% reduction in polypropylene prices from SCI (see paragraph 30, page 20B), but his evidence related to a 30% reduction in prices: see transcript, Lebi, pages 304 and 305.

⁴³⁴ Transcript, Lebi, pages 223, 245, 246 and 304.

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infringement period with regards to the China toll-manufacturing if it then paid a lower price for polypropylene:

“ADV WESLEY: And if you have received then prices of polypropylene that were [...]% lower than the price you had actually received in 2004 or 2005, what would you have done then with the four sided lock box and Comfigrip?”

MR LEBI: Well already in 2004 and 2005 I would have made it here.”⁴³⁵

451 Furthermore, as stated above, converters do not compete only on price but also on the development of new plastic products. The latter promotes the choice of product to final consumers. SCI's commercial practice underscores the relevance of this. SCI offered what it termed a “development rebate” to converters, applicable to new products developed. This rebate was in the amount of roughly 2% of the value of the product used in the new product and was applicable only for the first six months of sales of the new product. This was confirmed *inter alia* by Jacob.⁴³⁶ Too high polypropylene prices thus have an inhibiting effect on innovation in the local plastic goods manufacturing market.

452 We further reject SCI's submission that there is no effect on final consumers because the converters would be unlikely to pass on cost savings to their customers since they do not price on a “cost plus” basis. If the polypropylene input costs of the converters were significantly lower, they could apply the price reduction in a number of ways. They could elect to pass on some of the savings to their customers or they could reinvest profits from additional margins into building capacity, improving quality and/or introducing new products or ranges of products. One or more of these actions would benefit final consumers, as confirmed by Jacob.⁴³⁷

453 Our Act is concerned with economic efficiency and the effects on different groups in the economy, including consumers and small businesses. The question is if the plastic converters could have competed better on either price, quality or product choice with lower input prices and that question was answered, in the affirmative, by the converters

⁴³⁵ Transcript, Lebi, page 223.

⁴³⁶ Jacob's evidence in chief, page 92, line 16, to page 93, line 12.

⁴³⁷ See, for example, Jacob's evidence in chief, page 113, lines 9 to 17.

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in the clearest possible terms. We therefore find that consumer harm has been demonstrated.

CONCLUSION ON SECTION 8(a) CONTRAVENTION

454 Having found that there is no reasonable relationship between the prices charged by SCI for purified propylene and polypropylene during the relevant period and the economic value of those products and, furthermore, that consumer harm has been demonstrated in relation to both of these products, we conclude that SCI has contravened Section 8(a) of the Act by charging excessive prices both for purified propylene and polypropylene during the complaint period.

RELIEF: PURIFIED PROPYLENE

455 As stated above, the Commission asked for relief in the forms of a behavioural remedy and an administrative penalty. More specifically, the Commission in its notice of motion *inter alia* sought the following relief in relation to purified propylene: that SCI be ordered to:

455.1 sell purified propylene on an ex-works basis without discriminating in price between customers on the basis of their location;

455.2 sell purified propylene to customers in the domestic market at no more than a price to be calculated by applying the R ratio in the 1994 Safripol Supply Agreement to SCI's ex-works polypropylene price; and

455.3 pay an administrative penalty equal to 10% of its 2009 turnover in respect of the alleged contravention.

456 We shall first address the proposed behavioural remedy and then the proposed administrative penalty.

Behavioural remedy

457 We note that during the complaint period SCI determined its domestic price(s) of purified propylene by reference to the prices of polypropylene, in terms of a formula expressed as a ratio.

Commission's recommendation

458 As stated above, the Commission proposed a remedy that requires the implementation of a ratio to determine future purified propylene prices, namely that SCI's purified propylene sales are to be at a price calculated by applying the R ratio in the 1994 Safripol Supply Agreement to SCI's ex-works polypropylene price. In this agreement the R ratio was the average international propylene price : polypropylene price ratio based on the average of the average North-West European and average USA polypropylene and propylene contract prices.⁴³⁸

459 We note that the Commission's proposed relief is forward-looking, i.e. it relates to SCI's pricing of purified propylene from the date of the Tribunal's order into the future.

460 The Commission argued that this remedy is appropriate since the use of the R ratio, as contained in the then purified propylene supply agreement between SCI and Safripol, was the commercial reality during the complaint period.

461 In closing argument the Commission, however, also suggested that an alternate ratio might be the ratio that applies in Safripol's supply agreement with Sapref.⁴³⁹

462 The Commission also suggested that, to avoid the problem of price information exchange between SCI and Safripol in relation to domestic polypropylene prices, the ratio could be applied to Asian polypropylene prices, or to whichever region is SCI's major export destination.⁴⁴⁰ The information sharing issue is explained below.

SCI's submissions

463 SCI argued that the R ratio is inappropriate in its own terms and contended that the 1994 agreement was terminated by the parties as a result of the Commission's investigation in this matter, and the parties concluded a new supply agreement in February 2011 which contains a different pricing mechanism.

⁴³⁸ Commission's Complaint referral, Annexure "IL5", clause 10.1(b), page 57A.

⁴³⁹ Schoch's evidence in chief, page 399, lines 16 to 19.

⁴⁴⁰ Schoch's evidence in chief, page 450, lines 12 to 19; Sleep's evidence in chief, page 752, lines 12 to 20.

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464 SCI further criticised the Commission's prayer on the basis that it amounts to price setting and submitted that on that basis alone it is incompetent. SCI referred to the CAC which in *Mittal* stated: "*The powers and duties of the competition authorities, and their limitations, are contained in the Act. The authorities are not called upon to set a price for a good or service. It is incumbent on the Tribunal, if necessary to determine whether a specific price is 'excessive' in contravention of s 8(a). There is no suggestion in the Act that the competition authorities should regulate and set prices.*"⁴⁴¹

Background

465 We shall first explain the issue of past information sharing between SCI and Safripol, which was related to the determination process of the purified propylene price, and thereafter, explain the current pricing practice for SCI's supply of purified propylene to Safripol.

466 The Commission investigated Sasol Polymers' and Safripol's pricing practices relating to purified propylene and found *inter alia* that the parties had acted in contravention of section 4(1)(b)(i) of the Act, since the pricing formula, and related provisions of the propylene supply agreement between the parties and its operation, had resulted in them sharing competitively sensitive information relating to the pricing of polypropylene.

467 The Tribunal confirmed settlement agreements for Safripol and SCI on 25 August 2010 and 24 February 2011 respectively in which both parties admitted to contravening section 4(1)(b)(i) of the Act. SCI admitted that the pricing formula and related provisions of the supply agreement for the supply of propylene to Safripol, which contained restrictive terms regarding pricing and the pricing of volume tranches, and its implementation, amounted to the indirect fixing of a price or trading condition in terms of the Act.

468 In terms of the SCI settlement agreement, SCI undertook *inter alia* that any amendment of the supply agreement or any substituted agreement will comply with the principle that the price of purified propylene will be set independently from that

⁴⁴¹ *Mittal* (CAC) at paragraph [47].

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of polypropylene sold in Southern Africa and will not contain any requirement to exchange any information relating to polypropylene prices and volumes sold in Southern Africa.

469 Schoch confirmed that because of these consent agreements there were discussions between the parties in order to arrive at a different basis for the determination of the pricing of purified propylene and an agreement was ultimately struck between the parties in that regard in February 2011.⁴⁴²

470 Behrens' evidence was that "[a]s a result of the Commission's investigation, SP and Safripol in February 2011 concluded a new supply agreement. The new agreement sets minimum and maximum prices for the propylene supplied and eliminates export rebates."⁴⁴³ He further confirmed that the differential pricing of volumes up to and above [...] 000 tons no longer exists.⁴⁴⁴

471 Schoch explained the new pricing methodology as follows: "*this agreement takes the average of the U.S. and European price for propylene multiplied by a discount which is then specified here, which is different for different years and that yields then a price for propylene. It then has a provision that that price must be within a certain band of the margin taking as Polymer minus Monomer and if it is within that band, it is okay and if it is not, then there is the provision that a deemed hardship ... well, it gets first corrected to be within those bands to the benefit of both parties. So, if the price is too high, then Sasol will take the price down and if the price is too low, then they will take the price up and with as long as it is within those bands, everything works fine. If it is not during those bands, it gets corrected and if it needs to be corrected more than six times in a running twelve month period, then there is a provision that states that we would be considered as deemed hardshipped and something needs to be done about it.*"⁴⁴⁵

472 Schoch then explained that although the parties concluded this agreement in February of 2011, five months later Safripol had to declare hardship "*because what the agreement was yielding was not what was intended to be yielding ... ten*

⁴⁴² Transcript, page 486.

⁴⁴³ Behrens' witness statement, paragraph 198.

⁴⁴⁴ Behrens' witness statement, paragraph 198.

⁴⁴⁵ Transcript page 487, line 17, to page 488, line 8.

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*months later in November of 2011 that that hardship became a deemed hardship ... As a consequence of that, we were then forced to go into mediation to alleviate that and during that mediation we then reached the agreement for an entering formula which is being applied until June 2013*⁴⁴⁶ He added *"we feel that the solution to the formula to work is some benchmark related to the Asian Polymer price."*⁴⁴⁷

473 Schoch also explained why, in his view, the current formula does not work in practice: *"The formula was not allowing a margin which was sustainable for Safripol. It was resulting in Monomer prices which were extremely high compared to the Polymer prices that could be reached and that was due to a number of factors of market dynamics"*⁴⁴⁸

474 The new pricing regime as agreed between SCI and Safripol, although it eliminates information sharing of polypropylene prices, may thus not be achieving its intended goal.

Assessment

475 Regarding the issue of our powers under the Act to impose a behavioural remedy in an excessive pricing case, we note that both price analyses and determinations as to what prices ought to be are inherent in much of the work competition authorities undertake, particularly in cases of excessive pricing and/or margin squeeze. It is unthinkable that competition authorities in excessive pricing cases, which are by their very nature exploitative and potentially detrimental to consumers (as discussed above), and which are likely to occur in markets characterised by enduringly high barriers and ineffective competition, would not be empowered to impose a remedy, other than an administrative penalty, in order to correct and give certainty regarding the pricing behaviour of the dominant firm. Foreign competition authorities' views on potential remedies for excessive pricing abuses extend well beyond the mere imposition of administrative penalties and vary widely depending on the facts of each case. Examples of potential approaches are: cease and desist orders;⁴⁴⁹ the removal of structural or other barriers to reduce or eliminate the risk

⁴⁴⁶ Transcript page 489, lines 8 to 21.

⁴⁴⁷ Transcript page 489, line 21, to page 490, line 2.

⁴⁴⁸ Transcript page 490, lines 1 to 4.

⁴⁴⁹ For example practice in Chile.

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of future excessive prices;⁴⁵⁰ commitment decisions where the dominant firm in question offers commitments, for example lower prices, the lowering of customers' switching costs or increased transparency;⁴⁵¹ profitability and/or price caps;⁴⁵² and the lowering of prices^{453 454}

476 The unlawful conduct in excessive pricing directly concerns prices. It is evident from a plain reading of sections 58(1)(a)(i) to (vii) of the Act that the list of orders that the Tribunal may impose is not exhaustive. That section provides that the Tribunal "*may make an appropriate order including*" those listed in 59(1)(a)(i) - (vii). The legislature must have intended that if an excessive price in terms of the Act is indeed established, that there ought to in principle be a means by which such pricing behaviour can be altered. The alternative would be for the Tribunal to do nothing about future exploitative pricing in markets in which the prospect of effective competition is bleak and which may continue to cause consumer harm.

477 In an ideal world, one would remedy the situation by restoring effective competition in the market. One way of achieving this would be to identify and eliminate the foundation or root cause(s) of the problem(s) at source, for example by removing barriers to entry or other structural problems in the market or by stimulating competition in the market in some other way, for example by facilitating customer switching. However, these options may not always be available in a given case.

478 We note that the Tribunal specifically invited SCI to suggest any remedy that it deemed appropriate. However, SCI did not put up any remedies as alternatives to the behavioural remedies and administrative penalties suggested by the Commission.

479 In the case of purified propylene sold in South Africa there is no prospect of competitive forces determining (future) prices and correcting SCI's excessive pricing - thus "self-correction" in the market is entirely unlikely since there is no competitive market in South Africa. Sleep described this market as one with "*limited*

⁴⁵⁰ For example Denmark's position and also used in Greece.

⁴⁵¹ For example suggested by Brazil, Germany and Finland.

⁴⁵² Used in Greece.

⁴⁵³ Hungary's view of a potential remedy.

⁴⁵⁴ OECD Round Table on Excessive pricing, 2011, DAF/COMP(2011)18.

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*numbers of buyers and sellers who by deem of their historical position are tied together*⁴⁵⁵

480 In these circumstances, since the contravention directly relates to SCI's pricing of purified propylene and since there are no market forces to determining those, fashioning a remedy that foreshadows pricing as an outcome appears to be the only practical remedy. We thus consider a behavioural remedy to be appropriate and necessary. More importantly, imposing a price-related behavioural remedy gives certainty to not only SCI regarding its future pricing, but also to customer(s) on which they may base their (strategic) decisions while remaining within the confines of the Act.

481 Behrens acknowledged that North-Western Europe and the US Gulf were markets in which propylene was (and continues to be) heavily traded. He also confirmed that in South Africa there were no local merchant monomer sales from which domestic prices for propylene or ethylene could be determined.⁴⁵⁶

482 He further confirmed that during the complaint period contract prices in North-West Europe and the US were an appropriate basis for calculation of the R ratio because they were large markets with substantial trade in monomers and polymers, and were therefore regarded as providing an accurate reflection of the price relationship between propylene and polypropylene prices in an efficient market.⁴⁵⁷

483 He also said that the use in the pricing formula of a three-year rolling average of the international propylene/polypropylene price ratio smoothes the effects of the significant volatility in international propylene and polypropylene prices which can be problematic for smaller operations such as those of Safripol.⁴⁵⁸

484 Padilla confirmed that the rationale underlying the formula was to ensure that the price paid by Safripol for (ethylene and) propylene was linked to the price relationship between those monomers and the respective polymers (polyethylene

⁴⁵⁵ Transcript, page 750, lines 15 to 17.

⁴⁵⁶ Behrens' witness statement, paragraph 163.

⁴⁵⁷ Behrens' witness statement, paragraph 167.

⁴⁵⁸ Behrens' witness statement, paragraph 168.

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and polypropylene) in international markets where (differently from South Africa) monomers were actively traded.⁴⁵⁹

485 Given the above, we have, in principle, accepted the Commission's proposed remedy since SCI and Safripol recognise the pricing methodology in their supply agreements during the complaint period which, as explained above, derive a price for purified propylene by applying a ratio to polypropylene prices. The implementation of a ratio to determine purified propylene prices is necessary because there is no prospect of competitive forces determining the price of purified propylene.

486 We however note that SCI raised the concern that the then applied R ratio is no longer the best indicator of what a market price for purified propylene might be in an efficient market. It specifically mentioned that Asian prices may be a better benchmark, quoting Schoch.

487 Schoch testified that *"Over time there has been a dislocation of markets, such that for the last whatever 10 years or so, really the people commanding the world price is the Asian price ... So, through the time, there has been a dislocation such that US and Western Europe are no longer the benchmarks that are really determining to what would be the competitive price in the market in South Africa. There should now be some kind of a relationship to the Asian price, which is the one that informs the prices in South Africa."*⁴⁶⁰ He also said that *"both parties [Safripol and Sasol] agree that it is the Asian markets that inform the South African market. However, unfortunately in Asia one does not have reliable published data for Monomers. That does not exist unfortunately. We can only get reliable data for Polymers and therefore we are suggesting to take it then from the published international prices of Polymers which is what is basically determining the price levels in South Africa."*⁴⁶¹

488 Sleep's testimony was that *"the Asian polypropylene price is relevant in that the polypropylene convertors in South Africa and therefore downstream into the, manufacturing industry, the polypropylene convertors are competing with Asian*

⁴⁵⁹ JP1 paragraph 8.48, page 795B.

⁴⁶⁰ Transcript, Schoch, page 445.

⁴⁶¹ Transcript, Schoch, page 490, lines 5 to 11.

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producers of buckets or components. And therefore the Asian polypropylene price in that context certainly has some relevance."⁴⁶²

489 As stated above, the Commission also indicated that to avoid the problem of price information exchange between SCI and Safripol in relation to domestic polypropylene prices the ratio could be applied to Asian polypropylene prices or prices in another region. However, the Commission did not provide further details about this region, why the region would be appropriate to use, what prices should be used, for example average contract or discounted prices, as well as the source(s) of such pricing data to be used,

490 As previously noted, notwithstanding being invited to do so, SCI failed to suggest any superior alternative to that proposed by the Commission.

491 Having regard to all of these factors, we impose the following remedy for purified propylene:

491.1 SCI must not discriminate between the purified propylene price charged internally within Sasol and the price charged to customers such as Safripol;

491.2 SCI and the Commission must within 90 days hereof submit a proposed pricing remedy to the Tribunal which remedy must include the following:

491.2.1 A formulation in which the price of purified propylene to customers in the domestic market is determined by applying the R ratio⁴⁶³ to a benchmark which must be developed by reference to a region(s) in the world with the lowest polypropylene prices;

491.2.2 A provision for the review of the benchmark from time to time so as to ensure that the lowest price purified propylene is delivered to domestic customers, and/or

491.2.3 Alternative remedies to achieve the objectives envisaged in 491. 2.1 above.

⁴⁶² Transcript, Sleep, page 752, lines 12 to 20.

⁴⁶³ R ratio being the average international propylene price : polypropylene price ratio based on the average of the average North-West European and average USA polypropylene and propylene contract prices.

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492 The Tribunal may if it deems appropriate convene an oral hearing in respect of the proposals submitted by the parties.

RELIEF: POLYPROPYLENE

493 In its notice of motion⁴⁶⁴ the Commission sought the following remedies in relation to the prices charged by SCI for polypropylene in the domestic market:

493.1 ordering that Sasol sell polypropylene on an ex-works basis without discriminating in price between customers on the basis of their location; and

493.2 ordering that Sasol pay an administrative penalty for the contravention equivalent to 10% of its annual turnover in the Republic and its exports from the Republic in the financial year 2009.

494 The Commission submitted that this remedy will have the effect of lowering SCI's domestic prices without a need to regulate price levels.

495 Padilla and Malherbe raised a number of concerns in relation to the proposed remedy, namely (i) in the first place, it was suggested that SCI's export prices do not cover its costs;⁴⁶⁵ (ii) Malherbe suggested that the remedy would disincentivise future investment and exporting by SCI; (iii) Malherbe also expressed the view that the remedy might have a "chilling effect" in other industries where other dominant firm operate;⁴⁶⁶ and (iv) Malherbe further suggested that SCI might reduce its existing production in the face of such a remedy.⁴⁶⁷

Assessment

496 We first deal with SCI's experts' criticisms of the Commission's proposed remedy.

497 With regards to SCI's future investment and exporting Malherbe conceded that:

⁴⁶⁴ See record pages 3A and 4A.

⁴⁶⁵ Exhibit 53, Slide 33.

⁴⁶⁶ Malherbe's cross examination, page 3144, lines 7 to 9.

⁴⁶⁷ Malherbe's cross examination, page 3149, lines 2 to 7.

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497.1 there is no prospect of any new investment by a firm other than SCI in the domestic polypropylene market in the foreseeable future;⁴⁶⁸

497.2 there is also no prospect of SCI investing in a new plant, because its existing capacity already significantly exceeds local demand. Malherbe said "*I agree with you that SCI is not in a position where it's about to decide to build a new plant at any type of scale, because it already has a plant, in fact, two plants that service South Africa*";⁴⁶⁹ and

497.3 any disincentive to invest upstream resulting from the remedy would have to be weighed against the increased incentive to invest downstream that would result from lower polypropylene prices, a point Malherbe had not considered but which he acknowledged "*might well be the case*".⁴⁷⁰

498 With regards to the view that the remedy might have a "chilling effect" in other industries, this is simply scare-mongering. This case is about SCI (and not other firms) contravening the Act by charging excessive prices; SCI is a firm that achieved its market positions as a result of significant state support for a protracted period of time, i.e. not due to its own innovation or risk-taking in the markets concerned.

499 With regards to the view that SCI might reduce its existing production in the face of the remedy, if SCI shut in production to permit it to charge higher prices in the domestic market then this would amount to shutting in of capacity in order to raise prices and would be a deliberate circumvention of the Tribunal's order.

500 We further note that despite his criticisms of the Commission's proposed remedy Malherbe did not suggest any alternative workable remedy himself.⁴⁷¹

501 We further note that the proposed remedy does not necessarily mean that exports and domestic sales will be at the exact same price. Koster correctly pointed out that in fact, domestic sales prices could be higher than export prices because of the additional services offered to domestic customers, which may be taken into

⁴⁶⁸ Malherbe conceded that this must be true; Malherbe's cross examination, page 3142, line 18, to page 3144, line 4.

⁴⁶⁹ Malherbe's cross examination, page 3144, lines 16 to 19.

⁴⁷⁰ Malherbe's cross examination, page 3146, lines 1 to 6; page 3147, lines 6 to 12.

⁴⁷¹ Malherbe's cross examination, page 3149, line 11, to page 3150, line 13.

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account in determining prices. He specifically mentioned "*technical support*" given to domestic customers.⁴⁷² Behrens indicated that he took note of this principle.⁴⁷³

502 With regards to SCI's allegation that its export prices do not cover its costs, we find that the Commission has demonstrated that that is not correct, even on SCI's existing prices. Furthermore, lower domestic polypropylene prices will result in increased domestic sales because of increased demand of polypropylene by the local plastic converters.⁴⁷⁴ We have explained above the plastic converters' views on the likely impact of lower polypropylene prices on their businesses. This essentially means that SCI will export less to its current lower priced export destinations and so the average export prices will be higher than present.⁴⁷⁵

503 Insofar as SCI is presently not able to export more to the higher priced regions, such as Western Europe, due to threats of antidumping because its domestic prices are so much higher than its export prices, this will not be an issue after the non-discrimination remedy is in place. Koster confirmed that, from a volume perspective, having regard to the size of the European market, SCI could make all of its exports into Europe if it wished (although this would require it to conclude contracts).⁴⁷⁶

504 These exports should be profitable because the extent of SCI's cost advantage outweighs its transport costs to Europe. SCI's cost to deliver polypropylene to Europe appears from its own discovered data. In the complaint period the costs for distribution to Europe were in the order of \$100 to \$150 per tonne.⁴⁷⁷ This compares with an average difference in feedstock cost between SCI and Western Europe over the same period of \$197/tonne⁴⁷⁸ (at the One Tier price). The remedy thus does no more than requiring SCI to be as efficient as a typical European

⁴⁷² Koster's evidence in chief, page 3677, lines 13 to 20; Koster's cross examination, page 3778, lines 7 to 16; and page 3808, lines 8 to 16; Koster's response to Tribunal questions, page 3860, line 4, to page 3861, line 7.

⁴⁷³ Transcript, page 3978, lines 14 to 21.

⁴⁷⁴ Malherbe agreed with this, although he said that he did not know what the price elasticity of demand was for polypropylene; Malherbe's cross examination, page 3137, lines 6 to 14; page 3139, line 18, to page 3140, line 5.

⁴⁷⁵ Malherbe's cross examination, page 3140, lines 8 to 17.

⁴⁷⁶ Koster's cross examination, page 3845, line 10, to page 3846, line 7.

⁴⁷⁷ See data in SCI discovery, Item 374.

⁴⁷⁸ RK1 Annexure A, pages 2211B and 2212B.

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producer and to make similar returns (in fact it will make higher returns because its advantage is greater than the transport cost).

505 We point out that according to Koster, most producers make losses at troughs in the cycle (as prices are roughly equal to cash costs), so a remedy that means SCI might also do so is not objectionable.⁴⁷⁹

506 The rationale underpinning the Commission's proposed remedy is to prevent SCI from segmenting the market into export sales and domestic sales. The effect of this should be that domestic polypropylene prices tend towards the export prices. Thus it is designed to allow prices to settle at levels determined by supply and demand balances, i.e. it is responsive to competitive forces that may change over time.

507 Based on the above, we impose the following behavioural remedy in relation to polypropylene:

507.1 SCI must sell polypropylene on an ex-works basis without discriminating in price between any of its customers no matter where they are located.

508 There should be no practical difficulty in implementing this remedy. We note that Sasol agreed to a similar remedy in the *Sasol Nitro*⁴⁸⁰ complaint.

Monitoring of remedies

509 In relation to compliance and monitoring of the behavioural remedies for both purified propylene and polypropylene:

509.1 SCI must, in writing, on an annual basis, within three months of its financial year end, report to the Commission on its compliance with the imposed behavioural remedies for both purified propylene and polypropylene. This annual report shall be accompanied by an affidavit deposed to by a senior manager of SCI confirming compliance with the behavioural remedies and the accuracy of the report. The accuracy of the report and annual compliance with the behavioural remedies must furthermore be verified by SCI's external auditors.

⁴⁷⁹ Exhibit 59, Slide 9.

⁴⁸⁰ Settlement agreement as confirmed by the Tribunal on 20 July 2010; Case numbers 45/CR/May06 and 31/CR/May05.

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509.2 The Commission may at any time request any additional information from SCI which the Commission considers necessary for the monitoring of compliance with the imposed remedies.

510 We next deal with the issue of administrative penalties.

ADMINISTRATIVE PENALTIES FOR PURIFIED PROPYLENE AND POLYPROPYLENE

Commission's recommendations

511 The Commission proposed that SCI be ordered to pay administrative penalties of 20% of its turnover for the year 2007 for purified propylene sold to Safripol (excluding export rebates) multiplied by 8 years (being the period 1999 to 2007), subject to a cap of total SCI turnover for the year 2013; and 20% of its turnover for the year 2007 for polypropylene to domestic customers (excluding sales under special rebates) multiplied by 8 years (being the period 1999 - 2007).

SCI's criticisms

512 SCI raised a conceptual criticism arguing that the Tribunal may only impose a penalty for prohibited practices if *mens rea* (*dolus* or *culpa*) has been demonstrated on the part of the respondent. In other words, so SCI contends, the Tribunal is only competent to impose an administrative penalty following a finding that SCI deliberately or negligently contravened the Act. More specifically, it argued that recognising that administrative penalties are punitive and criminal in nature, although not in fact criminal offences, the fundamental principle at common law, namely that there should be no responsibility or no punishment without fault, is applicable in the circumstances of this case. It further argued that even if there is no statutory requirement of *mens rea*, the imposition of penalties on a first-time offender under section 59(1) of the Act is not appropriate absent "*the prior existence of a clear rule*", the breach of which carries an inference of blameworthiness or culpability.

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513 SCI also raised a methodological criticism to the Commission's calculation of the suggested penalty, namely that the Commission did not follow the six step process set out by the Tribunal as most recently applied in *Telkom*.⁴⁸¹

514 We shall apply the abovementioned six step process in determining the appropriate penalties.

Assessment

515 A contravention of section 8 of the Act is subject to the imposition of an administrative penalty in terms of Section 59(1)(a) of the Act. In terms of section 59(1)(a) a firm is liable for a penalty for a section 8(a) contravention, even if, as is the case with SCI, it is a first time offender of this section. In terms of section 59(2) of the Act the administrative penalty "*may not exceed 10 per cent of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year*".

516 The imposition of a fine is seen as a common remedy for excessive pricing abuses in many other competition jurisdictions. This is, for example, the view of the Brazilian, Chilean, Finnish, Greek, Hungarian and Indian competition authorities, to name but a few.⁴⁸²

517 With regards to the issue of *mens rea*, the Tribunal also dealt with this issue in the *Mittal* matter.⁴⁸³ In that case the Tribunal explained that there is a difference between permissibility and appropriateness, i.e. a fine may permissibly be imposed without *mens rea* having been shown, but it may not be appropriately imposed. The Tribunal explained that "*... in determining the question of the appropriateness of imposing a penalty on a first time transgressor we must apply the policy distinction created in the Act to the facts of this case. Rather than framing the question as one requiring the reading in of a requirement of mens rea, as Mittal suggests, we read the section as one requiring the prior existence of a clear rule before a firm can be fined. Thus the clear rule emerges, either from the language of*

⁴⁸¹ *The Competition Commission and Telkom SA Ltd*, Tribunal case no. 11/CR/Feb04, paragraphs 180 to 196.

⁴⁸² OECD Round Table on Excessive pricing, 2011, DAF/COMP(2011)18.

⁴⁸³ *Harmony Gold Mining Company Ltd and another v Mittal Steel South Africa Ltd and another* [2007] 2 CPLR 271 (CT).

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*the Act – e.g. you may not fix prices with a competitor – or where there is no clear rule in the Act, as is the case with the contraventions listed in section 59(1)(b), where prior case law created such a rule.*⁴⁸⁴

518 The Tribunal found that any requirement of *mens rea* had in any event been established on the facts of Mittal. It ultimately concluded that *“the facts of this case clearly establish the presence of a mental element”*⁴⁸⁵ since *“Mittal SA fully appreciated that this was conduct by a dominant firm designed to exploit consumers. This places Mittal SA in the position of a firm with knowledge of a prior rule and hence a firm liable to a penalty for a first contravention.”*⁴⁸⁶ The Tribunal further said *“the conduct of Mittal SA is so manifestly aimed at securing its excessive price that it unambiguously appreciated the economic effect of its conduct. The fact that it may not have considered its conduct had a mirror image in the language of the sections of the Act does not mean that it could not appreciate that its conduct had anti-competitive consequences. Section 8(a) is about an exploitative form of an abuse of dominance and Mittal SA’s conduct was about constructing an administrative edifice and engaging in conduct to fix its prices at a level higher than they would be, if the conduct had not been perpetrated and that it appreciated that this was to the detriment of consumers.”*⁴⁸⁷ The Tribunal further held that *“... to the extent that issues of intent and negligence are relevant they will be considered in determining the size of the penalty, that is they will mitigate or aggravate the penalty, but they have no relevance in determining our ability to impose an administrative penalty.”*⁴⁸⁸

519 From a conceptual perspective we find that SCI’s contravention of section 8(a) is no different to the above. But even if for argument’s sake it was assumed that an element of *mens rea* was necessary for the imposition of an administrative penalty – and we do not agree that this is so – the facts of this case nevertheless clearly establish the presence of a mental element.

⁴⁸⁴ See paragraph 41 of the Tribunal’s remedies decision.

⁴⁸⁵ See paragraph 45 of the Tribunal’s remedies decision.

⁴⁸⁶ See paragraph 43 of the Tribunal’s remedies decision.

⁴⁸⁷ See paragraph 43 of the Tribunal’s remedies decision.

⁴⁸⁸ See paragraph 44 of the Tribunal’s remedies decision.

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520 SCI's conduct clearly demonstrates a conscious exercise of market power. Just like Mittal, SCI set out to segment the polypropylene market and prevented arbitrage in the domestic market from its cheaper export product by selling it on a delivered basis. It sold purified propylene to Safripol, its downstream rival, at a price that increased rather than decreased for higher volumes and placed restrictions on the volume of purified propylene that Safripol could, on a monthly basis, purchase at the cheaper "Tier 1" price. Moreover, SCI had knowledge of the substantive effect of this pricing conduct and it could appreciate that its conduct had anti-competitive consequences. SCI was blatantly aware that government considered its high prices in the sector to be of concern; it could not have been under any illusions that its pricing was not questioned by both the State (*inter alia* the DTI that brought the complaint) and the Commission. Moreover, in two separate State of the Nation addresses the State President expressly identified high prices in the chemical sector as obvious market failures and as an ongoing challenge. Behrens confirmed that SCI did not revise its pricing practices in the purified propylene and polypropylene markets after:

520.1 the State of the Nation address by the President on 11 February 2005, in which he expressly described pricing in the steel and chemical industries at import parity as reflecting "*obvious market failures*",⁴⁸⁹

520.2 the State of the Nation address by the President on 03 February 2006 in which he specifically stated that government regarded import parity pricing in relation to chemicals as an ongoing challenge;⁴⁹⁰ and

520.3 The CAC's decision in *Mittal*.

521 In *Federal Mogul*, the CAC explained that section 59 of the Act "*involves the exercise of its discretion by the Tribunal*" and that "*the Tribunal is expected to exercise its discretion judiciously having regard to the factors listed in section 59(3) of the Act*".⁴⁹¹ In terms of section 59(3) in determining the appropriate penalty, the Tribunal is mandated to consider the following factors: (i) the nature, duration,

⁴⁸⁹ Behrens' cross examination, page 3995, line 20, to page 3997, line 16.

⁴⁹⁰ Behrens' cross examination, page 3998, lines 1 to 17.

⁴⁹¹ *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and another* [2005] 1 CPLR 50 (CAC), at 71 i - j.

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gravity and extent of the contravention; (ii) any loss or damage suffered as a result of the contravention; (iii) the behaviour of the respondent; (iv) the market circumstances in which the contravention took place; (v) the level of profit derived from the contravention; (vi) the degree to which the respondent has co-operated with the Commission and the Tribunal; and (vii) whether the respondent has previously been found in contravention of this Act.

522 We have considered the following factors in determining an appropriate penalty in relation to SCI's excessive pricing for purified propylene and polypropylene:

522.1 SCI's contraventions are of the most serious kind of abuse of a dominant position.

522.2 SCI has shown no restraint, in circumstances where it was aware that its market positions were acquired by leveraging its position in the fuel industry, a position it derived from significant state support for a protracted period of time rather than any innovation on its part in the purified propylene and polypropylene markets. MacDougall testified that Sasol had used its position in the fuel industry as a platform to grow SCI. He further acknowledged that Sasol used that position to provide SCI with as much assistance or as much competitive advantage as possible to create the business and that thereby SCI was developed as part of what he referred to as the "*Sasol empire*" (see paragraph 117 above).⁴⁹²

522.3 SCI has very low costs in the production of purified propylene and polypropylene because of its low feedstock costs, which are the result of Synfuels' poor alternative uses for the massive amounts of feedstock propylene it produces as a by-product in its fuel operations.

522.4 SCI's conduct lasted for the entire complaint period i.e. from 2004 to 2007, a period of 4 years.

522.5 SCI's excessive pricing of purified propylene has caused material harm to Safripol and has inhibited the ability of Safripol to effectively compete with SCI in the production and sale of polypropylene.

⁴⁹² MacDougall, transcript, pages 3277, 3301, 3302, 3602 and 3603.

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522.6 We have further found significant negative downstream effects, as a result of SCI's excessive pricing, in the supply chain on the plastic converters that use polypropylene in their production processes.

522.7 As indicated by Wainer, SCI earned extremely high returns over the complaint period and for the longer period FY01 – FY08. In relation to purified propylene, over the complaint period, SCI enjoyed an average return on capital of approximately 162% per annum and SCI recovered the full capital invested in this business eight times over. On an integrated basis, over the complaint period the propylene and polypropylene businesses, when considered together, generated an average annual return of 62.8% per annum and SCI recovered the full capital invested in these businesses three times over.

522.8 As stated above, SCI has availed itself fully of its right to defend itself in these proceedings.

522.9 Despite requests made by the Tribunal, SCI did not put up any remedies as alternatives to imposing an administrative penalty.

522.10 SCI has not previously been found guilty of excessive pricing specifically, but Sasol has been found to have committed a number of other competition contraventions including supra-competitive pricing through collusion, specifically on the part of entities within SCI in fertilizer and phosphoric acid.

522.11 In relation to polypropylene, SCI appeared to contend that it was entitled to charge at import parity for polypropylene because of the contents of a Commission Report of 2003⁴⁹³ to the DTI on import parity pricing and the fact that government maintained an import duty in respect of polypropylene.

522.11.1 As far as the import duty is concerned, this was reviewed by government in 1995. The result of that review appears in the Arthur Andersen study. Although it is true that that review did not recommend the abolition of the tariff on polypropylene imports, it is

⁴⁹³ See SCI bundle, commencing at page 2109.

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equally clear that Arthur Andersen laboured under the misapprehension that SCI's domestic polypropylene prices were similar to its export prices, and well below import parity prices.⁴⁹⁴

522.11.2 As for the 2003 Commission report, Roberts made the following points in relation to the report: "*as far as I am aware, [the Commission] did not do an investigation. In other words, it did not have the powers which you have under an investigation to obtain information to find out if this really is a dumped market, for example, which goes to whether the local prices are in line with FOB prices, the big debate we have been having*"⁴⁹⁵ and he expressly denied that there was any evidence that SCI had reviewed its pricing policy in light of the Commission's report. Roberts asked "*Are you asserting in the record there is something that says SCI took the report and continued to price based on the report, because I haven't seen anything that either links in the record, that links their report to their decision to continue pricing on that basis.*"⁴⁹⁶ Adv. Trengove answers "*No*".⁴⁹⁷ Behrens (who testified later) sought to contend otherwise,⁴⁹⁸ but his evidence was not put to Roberts for comment.⁴⁹⁹

522.11.2.1 Furthermore, as stated above, Behrens confirmed that SCI did not alter its pricing practice in relation to polypropylene after the CAC's *Mittal* judgement. From the CAC's *Mittal* judgement SCI knew that, under the Act, IPP for polypropylene is not *per se* excessive, but that the excessive pricing test is based on the actual price in relation to the economic value of polypropylene.⁵⁰⁰

⁴⁹⁴ See Appendix 6 of the Study, SCI's bundle at page 6127.

⁴⁹⁵ Transcript page 1095, line 23, to page 1096, line 5.

⁴⁹⁶ Transcript page 1096, line 22, to page 1097, line 3.

⁴⁹⁷ Transcript page 1097, line 4.

⁴⁹⁸ Behrens' cross examination, page 3989, lines 12 to 15 and page 3991, lines 20 to 23.

⁴⁹⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at [61]; see also *Small v Smith* 1954 (3) SA 434 (SWA) at 438 E – H.

⁵⁰⁰ *Mittal* (CAC) at [44].

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523 We base our calculation of the administrative penalties on the abovementioned six step process:

523.1 Step 1: determine the affected turnover in the relevant year of assessment.

SCI's turnover in the 2007 financial year for domestic third party purified propylene sales i.e. sales to Safripol, excluding export rebate sales, was R684 million.⁵⁰¹ SCI's FY2007 turnover for polypropylene sold to domestic customers, less special rebates (i.e. CEIP sales) was R1096 million (R1, 096 billion).⁵⁰²

523.2 Step 2: calculate the 'base amount,' being that proportion of the relevant turnover relied upon. This is a matter of discretion for the Tribunal.

A base amount of 15% is used in this case given that excessive pricing is exploitative conduct, with a direct effect on prices and consumers/customers. Applying this gives an amount of R102.6 million for purified propylene and R164.4 million for polypropylene.

523.3 Step 3: where the contravention exceeds one year, multiply the amount obtained in step 2 by the duration of the contravention.

The Commission had suggested the use of a period from 1999 to 2007 being the period from the commencement of the Act up until the time or the year before referral. We have, however, limited it to the complaint period, 2004 to 2007, a 4-year period.

This 4-year period produces a figure of R410.4 million for purified propylene and R657.6 million for polypropylene.

523.4 Step 4: rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Act.

There is no need for a rounding off in this case.⁵⁰³

⁵⁰¹ See Commission's submission of 19 February 2014, table on page 6.

⁵⁰² See Commission's submission of 19 February 2014, table on page 6.

⁵⁰³ For SCI's 2013 turnover figure, see email of 03 March 2014 from SCI's attorneys.

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523.5 Step 5: consider factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.

We have, on balance, found no mitigating or aggravating factors to lower or increase the penalty. (We deal with the issue of having imposed behavioural remedies below).

523.6 Step 6: round off this amount - only if it exceeds the cap provided for in section 59(2) of the Act.

We have checked the penalty against the cap and no adjustment is needed.

The penalty amounts thus are R410.4 million for purified propylene and R657.6 million for polypropylene.

524 We note that the Commission recommended administrative penalties of R1094 million and R1754 million for purified propylene and polypropylene respectively. Since we have considered a lower base amount⁵⁰⁴ than the Commission and only the four year infringement period,⁵⁰⁵ our administrative penalties for these contraventions are considerably lower than that suggested by the Commission.

525 We have further considered whether the imposition of an administrative penalty on its own (unaccompanied by a behavioural remedy) would necessarily be appropriate in this case, given the characteristics of the markets and the role of these intermediate products in industrial development. We are persuaded that a reduced penalty together with the imposition of a "forward looking" behavioural remedy in relation to both product markets would provide both relief and certainty to SCI and its customers and would therefore be more appropriate. We therefore have decided to significantly reduce the abovementioned administrative penalties.

⁵⁰⁴ The Commission suggested 20%; we have used 15%.

⁵⁰⁵ The Commission suggested an eight year period; we have used a four year period.

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526 We find that administrative penalties of R205.2 million and R328.8 million are appropriate for SCI's contravention of section 8(a) of the Act in relation to purified propylene and polypropylene respectively sold during the complaint period.

ANDREAS WESSELS

05 June 2014
DATE

Yasmin Carrim and Merle Holden concurring

Tribunal researchers: Ipeleng Selaledi and Nicola Ilgner (until 06 November 2013)

For the Commission: Arnold Subel SC

M A Wesley

M Lekoane - instructed by Knowles Husain Lindsay Inc.

For SCI: Wim Trengove SC

Jerome Wilson

Anthony Gotz

Schalk Willem Burger

Gavin Marriott - instructed by Nortons Inc.