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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 60/LM/Jun12
(015172)

In the large merger between:

Industrial Development Corporation of SA Limited **Acquiring Firm**

and

Scaw South Africa (Pty) Ltd **Target Firms**

Consolidated Wire Industries (Pty) Ltd

Panel	:	Yasmin Carrim (Presiding Member) Andreas Wessels (Tribunal Member) Andiswa Ndoni (Tribunal Member)
Heard on	:	01 and 02 October 2012
Order issued on	:	09 October 2012
Reasons issued on	:	05 November 2012

Reasons for Decision

Conditional approval

1. On 09 October 2012 the Competition Tribunal ("Tribunal") conditionally approved the large merger involving the Industrial Development Corporation of SA Limited ("IDC"), the primary acquiring firm, and Scaw South Africa (Pty) Ltd ("Scaw") and Consolidated Wire Industries (Pty) Ltd ("CWI"), the primary target firms (collectively referred to hereinafter as "the merging parties").

2. The reasons for conditionally approving the proposed transaction follow below.

Background

3. The Competition Commission ("Commission") received notice of this merger on 24 May 2012 and referred it to the Tribunal on 08 August 2012 recommending that the proposed transaction should be approved subject to certain behavioural conditions to address likely post-merger information exchange via the IDC as common shareholder in two producers of so-called long steel products[1], namely Scaw and ArcelorMittal South Africa Limited ("AMSA") (this theory of harm is explained in detail below). The Commission and the merging parties however agreed on certain conditions to address these competition concerns.[2] Although the IDC submitted that its internal practices do not permit of the exchange of commercial non-public information and furthermore that the investment in Scaw will be managed by an entirely different department to the department which is responsible for the IDC's investment in AMSA, it agreed to the Commission's (initial) conditions (see paragraphs 52 and 53 below).

4. At a Tribunal hearing of this matter on 22 August 2012 Allens Meshco (Pty) Ltd ("Allens Meshco") informed the Tribunal that it had raised an objection to the proposed transaction with the Commission on 29 May 2012, that the Commission acknowledged receipt of this objection, but that the Commission unfortunately had no further contact with Allens Meshco during its investigation of the proposed merger.[3]

5. The Tribunal felt that it was important to hear Allens Meshco's objections to the proposed deal and granted it a postponement in order to make written submissions to the Tribunal on or before 29 August 2012.[4] The Tribunal however directed that such submissions were to be limited to the concerns raised in Allens Meshco's letter of 29 May 2012 to the Commission and further could only relate to issues that are merger-specific, i.e. concerns that arise as

[1] See paragraphs 39 and 40 below.
[2] Also see paragraph 53 below regarding an additional condition proposed by the Commission at the Tribunal hearing which the merging parties opposed.
[3] See transcript of hearing of 22 August 2012, pages 2 to 4.
[4] Tribunal directive of 23 August 2012.

a result of the proposed merger. The Tribunal set the matter down for hearing on 30 August 2012.

6. Allens Meshco subsequently, as directed by the Tribunal, on 29 August 2012 made written submissions to the Tribunal with regards to its objections to the proposed transaction. It submitted that the proposed merger should not be approved and that "*[n]o amount of behavioural conditions will avoid the consequences posed by higher levels of vertical integration and facilitating collusion between the merger parties.*"[5]

7. At the Tribunal hearing of 30 August 2012 Allens Meshco requested a further postponement of the matter in order for it to properly prepare and make further submissions to the Tribunal. The Tribunal granted the further postponement of the hearing.

8. The matter was ultimately set down for hearing on 01 and 02 October 2012.

9. Pursuant to the above, the Tribunal issued a directive to Allens Meshco, the IDC and the Commission respectively.[6]

10. The Tribunal ordered Allens Meshco to file a witness statement from a witness with direct business experience in the steel industry, specifically experience of any alleged past or ongoing anti-competitive conduct in the industry. The Tribunal however made it clear that this witness statement could not raise issues outside of the scope of Allens Meshco's submission to the Tribunal of 29 August 2012. Furthermore, the witness statement to be filed had to be limited to potential merger-specific concerns brought about by this merger.

11. Allens Meshco subsequently filed the witness statement of Mr Richard Brian Allen ("Allen"), the Chief Executive Officer of Allens Meshco, who testified at the Tribunal hearing. Allens Meshco was therefore provided with ample opportunity to express its views to the Tribunal regarding its concerns in relation to the alleged anti-competitive effects of the proposed transaction.

[5] See paragraphs 11.1 and 11.2 of Allen Meshco's submission of 29 August 2012.
[6] See Tribunal directive of 30 August 2012.

12. The Tribunal ordered the IDC to file a witness statement from a person who could speak to the short- and longer-term strategy of the IDC in the broader South African steel industry, and specifically its strategy in relation to the proposed transaction and its effect on the steel industry, including the public interest benefits of the proposed transaction, if any. The IDC was further ordered to file all strategic documents relating to the proposed transaction, including all strategy documents, board minutes and presentations relating to the proposed transaction. It further had to submit information regarding other planned or concluded transactions in the broader steel industry and its shareholding at different levels of the steel industry supply chain.

13. The IDC subsequently filed the witness statement of Mr Mbuyazwe Sebenza Magagula ("Magagula"), the head of the Mining and Minerals Beneficiation SBU[7] of the IDC. Magagula testified at the Tribunal hearing on behalf of the IDC.

14. The Tribunal ordered the Commission to file a supplementary report addressing both Allens Meshco and the IDC's submissions. The Commission was also requested that its report should comment on the market players in the relevant markets affected by the proposed deal and assess the level of market concentration post the proposed merger. In addition, the Commission was ordered to submit a witness statement from a person in its Enforcement and Exemptions or its Policy and Research division who has knowledge of the broader steel industry and able to provide the Tribunal with an understanding of the structure of the steel industry and any competition concerns therein.

15. The Commission subsequently filed a supplementary report and Dr Simon Jon Roberts ("Roberts"), the Chief Economist and Manager of the Policy and Research division of the Commission, testified at the Tribunal hearing.

16. At the request of the parties concerned the Tribunal on 26 September 2012 held a prehearing conference. This conference dealt with various issues, including a request by the Commission for Allens Meshco to discover certain

[7] This division provides financial, technical and other support to the industries which fall under the division's umbrella.

information/data; certain confidential information in the Commission's merger report; certain confidentiality claims in Allen's witness statement; as well as certain further procedural issues pertaining to the scheduled hearing. The Tribunal issued its directive on the same date. This directive speaks for itself and there is no need for us to discuss it in these reasons since nothing turns on it. However, we point out that the Tribunal in its directive noted the ongoing resistance on the part of Allens Meshco to produce information/data requested by the Commission[8] relating to Allens Meshco's allegation that its margins are being squeezed in the (downstream) production of wire rod products by the (upstream) producers and suppliers of steel.[9]

Parties to the proposed transaction and their activities

Acquiring firm

17. The acquiring firm is the IDC. The IDC is a corporation established under section 2 of the Industrial Development Corporation Act 1940.[10] The IDC is wholly-owned by the Government of the Republic of South Africa under the supervision of the Economic Development Department. It is a national development finance institution set up to promote economic growth and industrial development in South Africa. The IDC's investment activities relevant to this transaction are undertaken by its Mining and Manufacturing Industries division.

18. The IDC has a wide range of shareholding interests in entities involved in the mining and minerals sector.[11] Of relevance to the competition assessment of this transaction is the IDC's existing 7.9% non-controlling shareholding interest in AMSA. The IDC has nominated a single director to the board of AMSA, which director holds a non-executive position[12] (the relevance of this shareholding interest is explained in more detail below). The IDC also holds

[8] The Commission sought the following information from Allens Meshco: (i) Allens Meshco's management accounts from 2005 to date; (ii) the cost of Allens Meshco's production per unit disaggregated per month from 2005 to date; and (iii) sales prices and volumes of wire and wire products per month from 2005 to date.
[9] See Commission's letter to Allens Meshco dated 18 September 2012.
[10] Act No. 22 of 1940.
[11] See *inter alia* pages 34 and 35 of the Commission's merger record.
[12] Also see Magagula's testimony at page 30 of the transcript of 02 October 2012.

interests in a number of entities which are broadly involved in the mining and metals sector, many of which constitute downstream customers of long steel products.[13]

19. The IDC's partner in the proposed transaction is Main Street 510 (Pty) Ltd ("Main Street"). Main Street is an existing black economic empowerment shareholder in Scaw (also see paragraph 21 below). The shareholders of Main Street are Izingwe Holdings (Pty) Ltd (33.33%) ("Izingwe"); Southern Palace Holdings (Pty) Ltd (28.571%) ("Southern Palace"); and Shanduka Resources (Pty) Ltd (23.81%) ("Shanduka"). The balance of the Main Street shares is currently warehoused by Anglo South African Capital (Pty) Ltd ("ASAC"), an indirect subsidiary of Anglo American plc ("Anglo").

Target firms

20. The primary target firms are Scaw and CWI. Both these firms are incorporated in terms of the company laws of the Republic of South Africa and premerger both these companies form part of the Anglo American Group.

Scaw

21. Premerger ASAC has a 74% shareholding in Scaw. The other shareholders in Scaw are (i) an employee share trust (the "ESPS Trust") with a 5% interest; and (ii) Main Street with a 21% shareholding (see paragraph 19 above).[14] Scaw controls a number of entities.[15]

22. Scaw is a South Africa based integrated steel maker. It beneficiates iron ore and scrap to produce a wide range of steel products used in the mining, rail, power, offshore oil and gas, construction, commercial and other industrial sectors. One of its divisions is a rolling mill which produces a range of long steel products such as rebar[16], grinding bar sections and wire rod[17]. Of

[13] See paragraph 3.1 of Magagula's witness statement.
[14] Izingwe (7%), Southern Palace (6%) and Shanduka (5%), with a tranche of shares warehoused by ASAC (3%).
[15] See pages 10 to 12 of the Commission's merger record.
[16] Rebar is used to reinforce concrete structures.
[17] Wire rod is a continuous rod of steel in coil and is used *inter alia* for the manufacturing of wire for pre-stressing concrete, galvanised strand for cables, fence wire, mesh and nails. There are

particular relevance to the competition assessment of the proposed transaction is that both Scaw and AMSA (see paragraph 3 above) are active in the (upstream) manufacturing of long steel products, which include rebar and wire rod.

23. Scaw further beneficiates certain of the long steel products which it produces through the production of a number of high quality steel products such as grinding media, steel wire ropes and chain.

24. By way of background, Anglo acquired control of Scaw in 1964. Anglo also acquired joint control of Haggie Limited ("Haggie"), which is active in the (downstream) production of wire rod products, in 1980 when it was listed (at the same time CWI was created as a 50% subsidiary of Haggie). By 1997, Anglo had increased its shareholding in Haggie to approximately 77% and in 1999 Anglo acquired all the minority interests in Haggie, which was then delisted. According to Scaw, Haggie was divisionalised into Scaw in 1999.

CWI

25. CWI is an existing joint venture of Scaw and AMSA.[18] Premerger ASAC holds 50% plus 1 of the shares in CWI, while the remainder of the shares are held by AMSA[19]. According to the merging parties, CWI is currently jointly controlled by Scaw which is responsible for the management of CWI.

26. CWI produces a variety of mild steel wire and wire products, including galvanised process wire and lintel wire used, for example, as farm fencing and fencing for livestock.[20]

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three general categories of wire rod depending on their carbon content: low; medium; and high carbon content.

[18] For historical reasons, Anglo's shareholding in CWI is currently held directly by Anglo South Africa.

[19] AMSA had a pre-emptive right in respect of Anglo's interest in CWI. Magagula, however, during his testimony confirmed that AMSA has since waived this pre-emptive right (see pages 8 and 9 of the transcript of 02 October 2012).

[20] Its manufacturing plant is located in Vanderbijlpark and comprises two wire galvanising plants.

Proposed transaction

27. The proposed transaction entails the acquisition by the IDC consortium from ASAC its interests in the various entities which make up the Scaw Group (including Scaw and CWI). The consortium will also acquire Anglo's interests in a number of foreign entities.

28. The proposed transaction will take place by way of two separate but linked share purchase agreements, namely the *Scaw Share Purchase Agreement* and the *CWI Share Purchase Agreement*.

29. In terms of the *Scaw Share Purchase Agreement* the IDC and Main Street will acquire Scaw, as well as a number of foreign entities over which Scaw has management control. The IDC will acquire approximately 65% of the shares in Scaw and Main Street intends to increase its current 21% shareholding in Scaw to 30%.

30. In terms of the *CWI Share Purchase Agreement* the IDC and Main Street will collectively acquire shares in CWI. The IDC will acquire approximately 44% of the shares in CWI and Main Street intends to acquire approximately 6% of the shares in CWI. The merging parties submitted that collectively this will amount to 50% plus 1 of the shares in CWI. The parties however further stated that it is not clear at this stage whether or not Main Street will acquire a 6% stake in CWI. However, should Main Street not acquire this shareholding, the IDC will acquire 50% plus 1 of the shares in CWI itself. The balance of the issued share capital in CWI will remain with AMSA.

31. With regards to the IDC's shareholding in Scaw, Magagula however in his witness statement[21] and at the hearing indicated that the IDC in time intends to reduce its shareholding in Scaw. According to Magagula this will however only be done once the IDC has brought a technical partner into the Scaw business. He explained that the IDC's aim is to take up anything between 15% and 35% interest in projects where it is involved in equity and that it does not generally

[21] Paragraph 5.2.3.7 of Magagula's witness statement.

take a majority shareholding interest in firms.[22] He went on to state that "*typically in the investments that we have, we have technical partners that are responsible for the operations of the business, and in SCAW that is the intention as well, to find (you know) technical partners that can operate it.*"[23] He further confirmed that these "*discussions with technical partners are at an advanced stage.*"[24] He also explained that although the identification of the partners will happen in the short term, "*consummating that relationship and finalising ... that transaction may take long.*"[25]

32. Given the above, we have approved the proposed transaction subject to certain conditions that relate to the IDC's future intentions regarding its shareholding in Scaw. These conditions, more specifically, relate to (i) a disposal of the IDC's interest in Scaw or AMSA (see paragraph 78.5 below); and (ii) the acquisition by a third party of Scaw (see paragraph 78.6 below).

Rationale for proposed transaction

33. From an IDC perspective, Magagula submitted that the IDC believes that the proposed acquisition of Scaw is in line with its strategic objectives as it may, possibly, result in more competitively priced steel in the short term.[26] He further testified that the instant transaction allows the IDC *inter alia* (i) access to an existing distribution network and therefore reduces market entry risk; (ii) quicker entry into the market; and (iii) to support Scaw as a significant beneficiator of raw materials locally.[27]

34. We however note that it is uncertain at this stage if the IDC's anticipated benefits of this transaction would indeed be achieved. Magagula made it clear that although the IDC has firm intentions "*[t]he studies that we currently have, and the ideas that we have around process announcements at SCAW are still at conceptual stage, so we're unable to give (you know), a firm undertaking*

[22] Transcript of 02 October 2012, page 13.
[23] Transcript of 02 October 2012, page 32.
[24] Transcript of 02 October 2012, page 44.
[25] Transcript of 02 October 2012, page 78.
[26] Paragraph 5.2.3.2 of Magagula's witness statement. Also see page 17 of transcript of 02 October 2012.
[27] Transcript of 02 October 2012, pages 18 and 19.

that the results will be achieved, because there is still a process to be done in terms of going through the scoping study which we're closing off now, then we have to go through a pre-feasibility study where you try to do as much work as possible to get a better level of accuracy. And then to then go through a detailed feasibility study. So there's probably another 18 months to 20 months of work that we need to do before we can (you know) definitively say that (you know), this is what, what can be achieved and what can be done at SCAW."[28]

35. From Anglo's perspective the transaction arose from an announcement by Anglo that it wished to dispose of its interests in Scaw, which as an industrial company is no longer regarded as being core to the Anglo Group.

Overlap of activities and relevant markets

36. There is no direct horizontal overlap between the activities of the IDC and the products sold by either Scaw or CWI. In our competition analysis we however assessed the various activities of the undertakings wherein the IDC has a shareholding interest to determine if there are any potential competition risks which may arise from the IDC's investment in other entities.

37. As stated in paragraph 22 above, of importance to the competition assessment of this transaction is the IDC's minority shareholding of 7.9% in AMSA. AMSA is the only entity in which the IDC holds a shareholding which overlaps with the activities of Scaw. The proposed transaction therefore presents an indirect horizontal overlap since the activities of Scaw and AMSA overlap with respect to the (upstream) manufacturing and distribution of long steel products.

38. From a vertical perspective, Scaw does not supply any products to the IDC itself but does supply some products to certain entities in which the IDC has a shareholding, as well as to other State owned enterprises such as Transnet and Eskom. We however note that none of these supply relationships are exclusive in nature.

[28] Transcript of 02 October 2012, page 35.

39. As background to the competition assessment we note that commodity carbon steel products are classified as being either "long" (profile) or "flat"[29] products. It is common cause that the manufacturing of these two groups of products, i.e. (i) long (profile) and (ii) flat products, constitute separate relevant product markets.

40. The competition assessment of this transaction is concerned with long steel products as produced by rolling mills. The rolling mills generally use scrap metal as the primary charge for their electric arc furnaces. The electric arc furnaces melt the scrap in order to produce steel billets, which are then transported to the rolling mills for further processing. Long products include *inter alia* reinforcing bar (rebar), wire rod, billets and blooms, round ingots, grinding media steels, light, medium and heavy structural sections, round bar, flat bar, fencing and poles, railway sleepers, hot and cold work tool steels, hollow drill steels and automotive spring steels. These long steel products are used extensively for structural purposes in construction.

41. We further note that AMSA's blast furnace at its Newcastle mill is able to use both iron ore and scrap as inputs. According to the Commission, this gives AMSA the ability to modify the input ratio depending on prevailing market prices for scrap and iron ore and for this reason AMSA has a cost advantage over other market participants such as Scaw and Cape Gate and certain emerging mini-mills.

42. The manufacture of wire and wire products, using wire rod as an input, takes place downstream to the manufacturing of long steel products. The players active in this downstream market include CWI, Haggie and Allens Meshco. Wire and wire products are mostly used in the civil construction industry, for railway lines, transmission towers and other engineering services.

[29] Flat steel products include hot rolled coil, hot rolled sheet, hot rolled plate, hot rolled strip, cold rolled sheet, hot dip galvanized sheet, electrolytic galvanised sheet, colour coated sheet and electrolytic steel plate. Effectively, flat steel (particularly in the form of hot rolled coil) is the base product that is used to make a variety of steel products for the downstream industry, including for mining, roofing, ship building, automotive and appliance industries. Flat steel products could also be in stainless steel form.

43. The Commission defined the following two relevant product markets: (i) the (upstream) market for the manufacturing of long steel products, which include rebar and wire rod; and (ii) the (downstream) market for the manufacturing of wire and wire products.

44. Although the producers of long steel products do not all produce the same range of products, the Commission concluded that there is supply-side substitution between the manufacture of various types of wire rod with the only significant difference being the volume of carbon used in manufacturing the wire rod and the need for better quality carbon in high carbon wire rod. According to the Commission's market investigation there is however very limited demand-side substitutability concerning these products.

45. With regards to the geographic market delineation there is no need for us, in the context of this transaction, to definitively conclude on the exact parameters of the geographic scope of the above-mentioned relevant products markets since it does not alter our ultimate conclusion on the merits. We however note that Allen gave the following testimony that may be relevant to the geographic market delineation of the above-mentioned (downstream) market for the supply of wire and wire products: he testified that "*although there is certain overlap of products and geographical markets, we [Allen Meshco] also operate in various other areas where CWI are not active*"[30]; "*the transport from Vanderbijlpark to Cape Town, can be in some cases as much as 10% of the value of the product ...*"[31]; "*... the transport costs of bringing finished product from Gauteng to Cape Town, in the case of low cost products, can be as much as 10% of the total value*";[32] and "*Allens Meshco Cape Town competes with CWI, essentially that would be in the Western Cape and, to a lesser extent, through the companies that we distribute through in Upington and Port Elizabeth. Certainly in that region we would be competing with them.*"[33]

[30] Transcript of 01 October 2012, page 218.
[31] Transcript of 01 October 2012, page 218.
[32] Transcript of 01 October 2012, page 220.
[33] Transcript of 01 October 2012, page 220.

Market structure

46. It is common cause that market for the production of long steel products in South Africa is highly concentrated. Prior to 2010, there were five local producers of long steel products, namely AMSA, Scaw, Evraz Highveld Steel and Vanadium ("Highveld"), Cape Gate and Cape Town Iron and Steel Works ("CISCO"). CISCO, however, shut its operations in late 2010.

47. According to the Commission, AMSA is the largest and dominant long steel producer in the local market with a market share of approximately 50%. Scaw, Cape Gate and Highveld have the majority of the remaining market share. The Commission further noted that the IDC has sponsored three new mini-mills in KwaZulu-Natal, the North West and the Eastern Cape, but that these players are likely to have substantially smaller shares than the existing producers.

48. Certain of these upstream steel producers are vertically integrated into the downstream production of wire and wire products. Cape Gate, for example, is fully vertically integrated. Scaw is also already vertically integrated premerger since it supplies long steel products to both its wire division, Haggie, and its CWI joint venture. We note that Allens Meshco is a non-vertically integrated producer of wire and wire products.

Cartel conduct and complaints relating to the steel industry

49. The Commission has conducted numerous investigations in the steel industry involving firms at different levels of the value chain. Some of the complaints investigated have led to proceedings being initiated in the Tribunal against firms found to have acted in contravention of the Competition Act of 1998,[34] whilst a number of complaints are still under investigation. The firms that have been the subject of the Commission's investigations include Scaw, AMSA, CWI and the Allens Meshco Group of companies. We further note that Allan submitted that information sharing, directly or indirectly, is rife on all levels of

[34] Act No. 89 of 1998, as amended.

the steel industry. He said that this is facilitated by the market structure, high levels of concentration and vertical integration.[35]

50. The matters referred by the Commission to the Tribunal include cartel referrals relating to the supply of long steel products, mesh[36], rebar[37] and wire and wire products. We shall not discuss all the above-mentioned referrals in these reasons, but below highlight two of these referrals that are of direct relevance to the markets affected by this transaction. The one referral relates to the (upstream) long steel products market and the other to the (downstream) wire and wire products market.

51. The background to these two cartel referrals are the following:

    51.1. The Competition Commissioner in April 2008 initiated a complaint against various producers of long steel products including Scaw and AMSA, as well as steel merchants such as Macsteel Service Centres SA (Pty) Ltd and Trident (Pty) Ltd.[38] This complaint was initiated following a scoping exercise conducted by the Commission in 2007 which revealed signs of anti-competitive practices in the market for long steel products, particularly reinforcing steel. Following a search and seizure operation by the Commission in June 2008, Scaw filed for and was granted conditional leniency for its involvement in the conduct of price fixing, market allocation and collusive tendering in the long steel products and scrap markets. In its application for leniency, Scaw implicated CISCO, Cape Gate and AMSA as its co-conspirators. In the Commission's complaint referral,[39] it made various allegations[40] against Scaw, AMSA, CISCO and Cape Gate. No ruling has however been made by the Tribunal given interlocutory applications filed by AMSA and Cape Gate.

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[35] See paragraph 12.10 of Allen's witness statement.
[36] Commission case number 2009Jan4247; and Tribunal case number 84/CR/Dec09.
[37] Tribunal case number 08/CR/Feb11.
[38] Commission case number 2008Apr3696.
[39] Tribunal case number 61/CR/Sep09.
[40] These include that (i) the respondents reached agreements regarding the selling prices of long steel products; (ii) the respondents reached agreements regarding the nature and levels of discounts to offer to customers; (iii) the respondents had an understanding to follow AMSA's pricing or costing with regards to the transportation of long steel products; and (iv) the respondents had a general understanding that certain customers belonged to certain of them and that targeting such customers would result in retaliation.

51.2. On 07 January 2009 the Commission referred a complaint to the Tribunal against the suppliers of wire and wire products in South Africa for contravening sections 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Act.[41] These suppliers include Allens Meshco, Hendok (Pty) Ltd, Wire Force (Pty) Ltd, Forest Wire (Pty) Ltd, Agri Wire (Pty) Ltd, Independent Galvanising (Pty) Ltd, Associated Wire Industries (Pty) Ltd, CWI and Cape Gate. The Commission's referral was based on the outcomes of its investigation which was launched as a result of, among other things, an application for leniency filed by Scaw on behalf of CWI. The Commission stated that its investigation revealed that between 2001 and 2008, the respondents held meetings and exchanged correspondence for various cartelisation purposes.[42] The Tribunal has however not made a ruling on the merits since the matter was before the Supreme Court of Appeal (SCA) where Agri Wire (Pty) Ltd and Agri Wire Upington (Pty) Ltd challenged the validity of the Commission's Corporate Leniency Policy (CLP). However, the SCA on 27 September 2012 dismissed this appeal.[43]

Commission's recommendation following the IDC and Allens Meshco's submissions to the Tribunal

52. The Commission found that there are no likely adverse unilateral effects arising from the proposed transaction. As pointed out in paragraph 3 above, the Commission was however concerned about post-merger information exchange between Scaw and AMSA given the IDC's shareholding in both these firms. The Commission therefore recommended that the proposed transaction should be approved subject to certain behavioural remedies. The IDC agreed to the Commission's (initial) conditions (also see paragraph 3 above).

[41] Commission case number 2008Sep3988; and Tribunal case number 03/CR/Sep09.
[42] These include (i) reaching agreements to fix prices of wire products; (ii) reaching agreements to share certain customers, not to sell to "traditional customers" of competitors and not to sell in geographic areas reserved for each other; and (iii) reaching agreements on prices at which each tender would be submitted in order to ensure that the identified firm would win the specific tender.
[43] *Agri Wire (Pty) Ltd v The Competition Commissioner* [2012] ZASCA 134 (660/2011)(27 September 2012).

53. We note that the Commission in its supplementary report and during oral argument at the Tribunal hearing suggested that an additional condition should be imposed that would require the IDC to "*make available volumes in the local market on non-discriminatory pricing and terms.*"[44] We however found no sound justification for imposing the latter suggested condition. We note that there is no evidence that Scaw is a dominant firm in terms of the Act in any relevant market affected by the proposed transaction. Furthermore, the Commission in relation to alleged price discrimination by Scaw found no evidence from 2008 onwards, based on the current available information, that CWI received any preferential prices from Scaw at the expense of other customers in general or the Allens Meshco Group in particular.[45]

54. The Commission further concluded that the only theoretical foreclosure strategy is one in which Scaw might post-merger attempt to foreclose competitors of undertakings wherein the IDC has a shareholding interest. This is based thereon that the merged entity (via Scaw) may decide to foreclose these competitors and favour the firms in which the IDC has a shareholding interest. This scenario is therefore similar to the traditional input foreclosure strategy where downstream sales are internalised with the difference being that the 'internalisation' of sales takes place between Scaw and firms where the IDC has a shareholding interest. The Commission however concluded that it was unlikely that the proposed merger would give rise to likely foreclosure concerns. We have no reason to doubt this conclusion and do not deal with vertical effects any further in these reasons, with the exception that we briefly discuss Allen's allegations in relation to alleged margin squeeze below (see paragraphs 67 to 70).

55. The Commission, as requested by the Tribunal, in its supplementary report assessed the various objections raised by Allens Meshco using various forms of currently available data/information. After assessing these objections (which we discuss below), the Commission remained of the view that the proposed transaction, given the recommended behavioural conditions, was unlikely to have anti-competitive effects. The Commission was furthermore of the view

[44] See paragraph 157 of the Commission's supplementary report.
[45] See paragraphs 123 to 126 of the Commission's supplementary report.

that certain concerns raised by Allens Meshco were not caused by the proposed merger and therefore were not "merger-specific".

Allens Meshco's objections

56. We below summarise Allens Meshco's main objections to the proposed merger and also provide a brief summary of the Commission's assessment of these allegations. However, before we deal with Allen's various allegations we note a number of concessions that he made during his evidence.

57. Allen stated that his primary objection to the merger was the take-over by the IDC of CWI.[46] He however conceded that the joint ownership of CWI by AMSA and Scaw is a pre-existing state of affairs that is not created by this merger.[47] He, more specifically, confirmed that joint control of CWI "*is a fact of the market pre-merger*";[48] and "*[i]t doesn't make an acceptable situation, but it's an existing situation*".[49]

58. In relation to the IDC's existing shareholding in AMSA, Allen conceded that there is no basis to suggest that the IDC has the ability to control AMSA, notwithstanding its position on the board of AMSA and its shareholding in AMSA (see paragraph 18 above).[50]

59. Under cross-examination Allen further confirmed that Allens Meshco, despite its various allegations of anti-competitive practices in the steel industry as raised in the context of this merger, has not lodged a single complaint in the last few years or at any time with the Commission in relation to any prohibited practice by any player in the steel industry.[51]

60. Below we deal in more detail with Allen's allegations and the Commission's response to each allegation.

[46] Transcript of 01 October 2012, pages 128 to 131.
[47] Transcript of 01 October 2012, page 131.
[48] Transcript of 01 October 2012, page 190.
[49] Transcript of 01 October 2012, page 190.
[50] See transcript of 01 October 2012, page 72.
[51] See transcript of 01 October 2012, page 155.

Concentrated markets and ongoing cartel activity

61. Allen submitted that both the (upstream) market for the production of long steel products (including wire rod) and the (downstream) market for the production of wire and wire products are highly concentrated and that these markets are characterised by ongoing cartels and anti-competitive conduct. He was also of the view that given the cross shareholding held by the IDC in AMSA and Scaw, with effective control of Scaw, the objectives and outcomes of these two market players can be effectively aligned, thereby denying the market the benefit of an effective competitor, leading to an increase in market concentration to an extent whereby it resembles monopolistic tendencies.[52]

62. Allen also alleged that there continues to be concerted pricing practices amongst the manufacturers of long steel products, particularly in wire rod, between Scaw, AMSA and Cape Gate. This allegation was based on certain price changes which were similar in timing and extent. He stated that even in cases of late notification by AMSA of a price change, Scaw and Cape Gate will give notice with retrospective effect to align their price changes with that of AMSA. He further stated that AMSA normally takes the lead as far as price changes are concerned which is then meticulously followed by Scaw and Cape Gate.[53] Allen further alleged that the effective date for certain recent (i.e. August 2012) price decreases is the same for everyone and if regard be had to the difference in discount structures applied by each of these firms, the effective prices are virtually the same.[54] He further stated that since the cancellation of Allen Meshco's Wire Rod Supply Contract with AMSA - at the behest of the Commission - and Mittal's introduction of transparent horizontal pricing coupled with the Scaw wire rod CLP application, AMSA, Scaw and Cape Gate have published wire rod price lists and announced price changes in concert.[55]

63. The Commission in its assessment of these allegations as a point of departure pointed out that issues such as alleged continued cartel outcomes in the

[52] See paragraph 10.10 of Allen's witness statement.
[53] See paragraph 11.10 of Allen's witness statement.
[54] See paragraph 11.11 of Allen's witness statement.
[55] See paragraph 11.11 of Allen's witness statement.

(upstream) wire production market and margin squeeze (see allegation discussed below) in the (downstream) wire products market, are ordinarily the subject of comprehensive cartel or enforcement investigations.

64. With regards to the allegation of continued price fixing amongst the steel mills, the Commission, using the currently available data/information, assessed *inter alia* the pricing trends in the wire rod and rebar markets post unearthing of the upstream cartel. It, more specifically, investigated if the relevant players are 'shorting' the domestic market and analysed the premerger margins and prices and compared that with what the competitive price might be.[56] However, based on the available supply volume, price and other data, the Commission found that Scaw exports minimal volumes of wire rod and sells exported wire rod at similar margins to those earned in the domestic market. As such the Commission concluded that Scaw does not appear to be shorting the domestic market for wire rod in order to achieve supra-normal profits. The Commission furthermore found no other current evidence that Scaw is acting to constrain supply to the domestic market of wire rod or rebar.

65. The Commission further indicated that it found no evidence, based on the current available data - that coordination has persisted subsequent to Scaw's leniency application in mid-2008 - despite the fact that domestic prices have approached IPP at certain times. The Commission's view rested on the fact that Scaw did not appear to be acting as a firm that is coordinating (explicitly or tacitly). More specifically, the Commission found no current evidence that Scaw is manipulating supply in order to elevate prices.

66. Although the Commission concurred with Allen that the relevant firms have an incentive to cooperate, it pointed out that that a leader-follower price relationship, as alleged by Allen, is not necessarily indicative of persistent collusion. The Commission stated that while such price leadership is consistent with certain forms of collusion, it is important to note that it may also be consistent with competitive outcomes. This point was ultimately conceded

[56] In this analysis the Commission considered that colluding firms can constrain supply to particular markets *inter alia* through "shorting" the market through, for example, exporting greater volumes. Alternatively firms could reduce production, either by producing below capacity or by holding back on capacity expansions.

by Allen; he namely conceded that the alleged pricing conduct was equally plausibly associated with a non-collusive price leadership model as opposed to collusive conduct.[57] Indeed Allen's evidence was consistent with a plausible theory of non-collusive price leadership. In his submissions he stated that "*the smaller mills simply follow AMSA leadership ... In reality AMSA sets steel prices such as wire rod – the smaller mills follow. What else should they do?*";[58] and "*[t]here is no reason for the smaller mills to undercut AMSA and why should they.*"[59]

Margin squeeze in the downstream market

67. Allen alleged that it faces a margin squeeze from vertically integrated companies, such as Scaw, who are able to and can afford to accept losses in their downstream divisions (where Allens Meshco competes), whilst making profits at the upstream long steel production level. To this end, Allen suggested that CWI engaged in predatory pricing practices.

68. The Commission noted that the fact that Scaw does not offer preferential prices to CWI does not preclude the possibility of margin squeeze on the downstream wire products manufacturers. If upstream suppliers charge high prices to all customers, but price below cost in their downstream operation, independent wire products manufacturers could be unable to compete. To test the theory that Scaw could be taking profits upstream and that CWI could be making losses downstream with the consequence of squeezing independent players' margins, the Commission analysed the margins earned by CWI. However the Commission found no evidence, in its preliminary assessment, to suggest that CWI is being used to conduct a margin squeeze against independent downstream wire products manufacturers.[60]

69. Furthermore, Allen abandoned his allegations relating to the risk of a potential margin squeeze under cross-examination. He conceded that there was no

[57] See transcript of 01 October 2012, pages 182 to 185.
[58] See page 789 of the bundle (Allens Meshco's objection to the merger). Also see transcript of 01 October 2012, page 186.
[59] See page 821 of the bundle (*Brief historic perspective of the steel industry South Africa* submitted by Allen). Also see transcript of 01 October 2012, page 186.
[60] See paragraphs 130 to 134 of the Commission's supplementary report.

evidence for this theory. We quote the following exchange that took place between Allen and the Commission's counsel in this regard:

"MR BHANA: You come to the Tribunal with a completely theoretical case, devoid of any detail, devoid of any proper analysis, devoid of this detailed and sophisticated analysis, which you, yourself, say you have to undertake to show a margin squeeze. Do you accept that?

MR ALLEN: We accept that."[61]

70. We further note that Allens Meshco resisted providing certain data/information which would have permitted the Commission to test its theories relating to an alleged margin squeeze (see paragraph 16 above).

Two tier pricing

71. Allen alleged that during the monopolistic reign of Iscor it applied a two tier pricing system, with the blessing of Government, whereby it exported approximately 45% of its total production at prices far below domestic prices, whilst it charged import parity prices to domestic customers such as Allens Meshco. It allegedly further charged transfer prices to its own downstream operations at levels below those charged to other competitors in that market. This allegedly put all independent competitors in the downstream market at a serious competitive disadvantage to Iscor and its affiliates. According to Allen, the joint supply agreement between Iscor and Scaw stipulated they would share the supply of wire rod to CWI and that neither of them would supply wire rod to the open market at prices lower than those charged to their joint venture operation, CWI.[62] He went on to suggest that AMSA still applies a two tier pricing system in terms of which the price of export product (wire rod) is significantly lower than the domestic price charged by AMSA to its customers for the same product.[63]

[61] Transcript of 01 October 2012, page 231.
[62] See paragraph 7 of Allen's witness statement.
[63] See paragraph 11.16 of Allen's witness statement.

72. The Commission however found, based on the current available information, that Scaw does not follow AMSA's two tier pricing methodology with relation to export sales.[64]

73. We further note that this concern of Allen exists premerger and therefore is not merger-specific, i.e. this merger is not the cause of this concern. Roberts explained that "*if one sees different prices, local prices versus export prices actually on the Mittal, this can reflect unilateral conduct on the part of Mittal. It can affect unilateral conduct which won't be affected by the merger necessarily and it is not necessarily part of cartel conduct.*"[65]

Alleged enhanced coordinated effects

74. Allen alleged that high levels of market concentration have resulted in high levels of cooperative conduct between participants resulting in the lessening or prevention of competition in the relevant markets, as coordination of activities is easily achieved and will be further facilitated by the streamlining of shareholding and management structures amongst the largest steel producers.[66]

75. The Commission however found no data or other (strategic) evidence that supports Allen's view that the IDC has the intention to act in an anti-competitive manner with respect to its broader anticipated steel strategy and more specifically its strategy in relation to the proposed transaction. Furthermore, given the imposed behavioural conditions, there is no reason to believe that the IDC could post-merger use its non-controlling interest in AMSA as an avenue to facilitate anti-competitive behaviour between Scaw and AMSA.

Conclusion

76. We concur with the Commission's finding that the proposed deal is likely to facilitate the exchange of information between Scaw and AMSA given the IDC's post-merger shareholding in both these companies. We have in principle

[64] See paragraph 129 of the Commission's supplementary report.
[65] See page 145 of the transcript of 02 October 2012.
[66] See paragraph 6.8 of Allen's witness statement.

accepted the tendered conditions of the merging parties in this regard, but have made certain enhancements thereto to improve the clarity thereof. We, for example, have requested that "*competitively sensitive non-public information*" (see paragraph 78.2 below) be defined in the conditions. We have furthermore shortened the time frame in which the IDC must develop and implement a policy to ensure that the sharing of competitively sensitive non-public information in respect of Scaw and AMSA does not take place between the management teams responsible for such interests within the IDC (see paragraphs 78.3 and 78.4 below). We further ordered that the IDC must inform the Commission within a (shortened) period of one month of concluding any final sale agreement relating to its disposal of its interest in Scaw or AMSA (see paragraph 78.5 below).

77. We have found that the IDC's objections to the above-mentioned shortened time lines imposed on it to develop and implement the afore-mentioned policy and to inform the Commission of a sale of its shares in Scaw or AMSA to be without foundation. We note that the IDC confirmed that a separation mechanism already exists in practice (see paragraph 3 above). The only hurdle for the IDC thus is to formulate a formal policy in relation to information management and team separation. Furthermore, the time line that we have imposed is proportionate given the identified real competition risk of post-merger information exchange.

78. Ultimately we approved the proposed deal subject to the following behavioural conditions:

78.1. The IDC shall not appoint the same person(s) to the Board of Directors of Scaw / CWI and AMSA for as long as the IDC has a shareholding in AMSA.

78.2. The IDC shall from the date of the Tribunal order ("the Order"), as confirmed by its legal representatives at the hearing of the matter, ensure that the sharing of competitively sensitive non-public information in respect of Scaw and AMSA does not take place between the management teams responsible for such interests within the IDC.

Competitively sensitive non-public information shall include, but not be limited to, any and all such information relating to:

(i) Pricing – including, but not limited to, pricing of specific products, prices / discounts / rebates offered to specific clients and planned reductions or increases;
(ii) Margin information by product or client;
(iii) Cost information for particular products;
(iv) Information on specific clients and client strategy, including information with respect to the sales volumes of clients;
(v) Marketing strategies;
(vi) Budgets and business plans; and
(vii) Agreements and other (non-standard) terms and conditions relating to the supply and distribution of steel products.

78.3. As soon as possible after the date of the Order and within six months of the date of the Order, the IDC shall develop and adopt/implement a policy to ensure that the sharing of competitively sensitive non-public information in respect of Scaw and AMSA does not take place between the management teams responsible for such interests within the IDC as set out above. The policy shall be implemented for as long as the IDC has a shareholding in AMSA and shall be submitted to and agreed with the Commission prior to its implementation.

78.4. With respect to the above-mentioned contained policy not less than two months prior to the expiry of the six month period referred to above, the IDC shall submit a copy of the policy to be adopted to the Commission for its approval. The Commission shall provide the IDC with its written views / recommendations / decision within twenty business days of such submission; and within ten business days upon the approval by the Commission and the adoption/implementation of the policy by the IDC, the IDC shall submit an affidavit by a senior official attesting to the establishment and implementation of the policy described above. The IDC will at the same time, also submit to the Commission a copy of the

policy document signed by the management teams responsible for the management of the IDC's interests in both Scaw and AMSA respectively, acknowledging their understanding of the provisions of the policy document.

78.5. Should the IDC dispose of its interest in Scaw or AMSA, the IDC shall inform the Commission of the disposal within one month of concluding the final sale agreement relating thereto and shall submit a signed copy of such final sale agreement to the Commission as proof thereof.

78.6. In addition to the foregoing, should any entity acquire control of Scaw, to the extent that it constitutes a notifiable transaction under and in terms of the Act, the IDC undertakes that such acquisition will be notified to the competition authorities under and in terms of the Competition Act.

79. These imposed behavioural conditions are proportionate to the identified competition concern of post-merger information exchange between Scaw and AMSA given the IDC's existing minority, non-controlling 7.9% shareholding in AMSA and its post-merger control of Scaw. The above conditions minimise or dispel potential information exchange through cross-directorship by requiring the IDC to have a formal written policy in order to prevent information sharing amongst directors who sit on the boards of various entities and to prevent cross-directorship occurring. Furthermore, as Roberts correctly pointed out the behavioural conditions in this merger must be seen *"in the context of there not being an increase in concentration or vertical integration ...."*[67]

80. Apart from the above-mentioned competition concerns relating to post-merger information exchange between Scaw and AMSA via the IDC, which is adequately addressed by our imposed behavioural conditions, we have found no evidential foundation that the proposed transaction would further substantially prevent or lessen competition in any relevant market. More specifically, there is no evidence that this proposed transaction would enhance any existing coordination, as alleged by Allen, in the steel markets.

[67] See page 185 of the transcript of 02 October 2012.

Public interest

81. The merging parties confirmed that there will be no negative effect on employment in South Africa as a result of the proposed transaction and that no retrenchments or redundancies are envisaged.[68] Furthermore, there is no evidence that the proposed transaction would have any significant adverse effect on any other public interest consideration.

82. The merging parties however averred that the proposed merger holds certain public interest benefits (also see paragraph 33 above).[69] Magagula namely referred to certain IDC strategic plans in his witness statement which forms the basis of the IDC's rationale for entering the proposed transaction and which identify certain anticipated pro-competitive benefits of the proposed deal. However, as stated in paragraph 34 above, Magagula testified that these strategic plans currently are at a pre-feasibility stage and are dependent on a number of variables that are not certain.

83. However, since we have concluded that the imposed conditions adequately address the competition concerns in this matter there is no need for us to deal with the merging parties' alleged pro-competitive benefits of the proposed transaction.

CONCLUSION

84. We approve the proposed merger subject to the behavioural conditions as highlighted above. The full set of imposed conditions is attached hereto as "**Annexure A**".

ANDREAS WESSELS

05 November 2012
DATE

Yasmin Carrim and Andiswa Ndoni concurring

[68] See *inter alia* pages 14 and 124 of the Commission's merger record. Also see Magagula's testimony at pages 19, 20 and 113 of the transcript of 02 October 2012.
[69] See *inter alia* pages 115 and 124 of the Commission's merger record.

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ANNEXURE A

Proposed merger involving the Industrial Development Corporation of South Africa Limited and the primary target firms, namely Scaw South Africa (Pty) Ltd and Consolidated Wire Industries (Pty) Ltd

Tribunal case no: 60/LM/Jun12 (015172)

CONDITIONS

1. DEFINITIONS

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding means –

1.1. "AMSA" means ArcelorMittal South Africa;

1.2. "the Commission" means the Competition Commission of South Africa;

1.3. "Conditions" means these conditions;

1.4. "CWI" means Consolidated Wire Industries (Pty) Ltd;

1.5. "IDC" means the Industrial Development Corporation of South Africa Limited;

1.6. "Merger" means the acquisition of control over Scaw SA and CWI by the IDC;

1.7. "Merging Parties" means the IDC, Scaw SA and CWI;

1.8. "Scaw SA" means Scaw South Africa (Pty) Ltd;

2. CONDITIONS TO THE APPROVAL OF THE MERGER

2.1. The IDC shall not appoint the same person(s) to the Board of Directors of Scaw SA/ CWI and AMSA for as long as the IDC has a shareholding in AMSA.

2.2. The IDC shall from the date of the order of the Competition Tribunal ("the Order"), as confirmed by its legal representatives at the hearing of the matter, ensure that the sharing of competitively sensitive non-public information in respect of Scaw SA and AMSA does not take place between the management teams responsible for such interests within the IDC. Competitively sensitive non-public information shall include, but not be limited to, any and all such information relating to:

2.2.1. Pricing – including, but not limited to, pricing of specific products, prices/ discounts/ rebates offered to specific clients and planned reductions or increases;
2.2.2. Margin information by product or client;
2.2.3. Cost information for particular products;
2.2.4. Information on specific clients and client strategy, including information with respect to the sales volumes of clients;
2.2.5. Marketing strategies;
2.2.6. Budgets and business plans; and
2.2.7. Agreements and other (non-standard) terms and conditions relating to the supply and distribution of steel products.

2.3. As soon as possible after the date of the Order and within 6 (six) months of the date of the Order, the IDC shall develop and adopt/implement a policy to ensure that the sharing of competitively sensitive non-public information in respect of Scaw SA and AMSA does not take place between the management teams responsible for such interests within the IDC as set out in condition 2.2 above. The policy shall be implemented for as long as the IDC has a shareholding in AMSA and shall be submitted to

and agreed with the Commission prior to its implementation as provided in paragraph 3.1 below.

3. MONITORING OF THE CONDITIONS

3.1. With respect to the contained policy referred to in 2.3 above –

3.1.1. Not less than 2 (two) months prior to the expiry of the 6 (six) month period referred to in paragraph 2.3, the IDC shall submit a copy of the policy to be adopted to the Commission for its approval. The Commission shall provide the IDC with its written views/recommendations/decision within 20 (twenty) business days of such submission; and

3.1.2. Within 10 (ten) business days upon the approval by the Commission and the adoption/implementation of the policy by the IDC, the IDC shall submit an affidavit by a senior official attesting to the establishment and implementation of the policy described above. The IDC will at the same time, also submit to the Commission a copy of the policy document signed by the management teams responsible for the management of the IDC's interests in both Scaw SA and AMSA respectively, acknowledging their understanding of the provisions of the policy document.

3.2. Should the IDC dispose of its interest in Scaw SA or AMSA, the IDC shall inform the Commission of the disposal within 1 (one) month of concluding the final sale agreement relating thereto and shall submit a signed copy of such final sale agreement to the Commission as proof thereof.

3.3. In addition to the foregoing, should any entity acquire control of Scaw SA, to the extent that it constitutes a notifiable transaction under and in terms of the Competition Act 89 of 1998, the IDC undertakes that such acquisition will be notified to the competition authorities under and in terms of the Competition Act.