

When does Import Parity Pricing constitute an abuse,
and where it does how can the abuse be remedied?

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1. Overview

Recent developments in South African competition policy have led firms and their advisors to become increasingly concerned that decisions to set prices at import parity may be interpreted as constituting an abuse of a dominant position, namely that of excessive pricing. The underlying rationale for this concern stems from the possibility that import parity pricing may result from firms increasing prices above competitive levels, and hence pricing excessively. However, economic theory tells us that there are many situations in which domestic market prices will sit at import parity and yet this may be entirely consistent with competitive behaviour, and hence the mere existence of import parity pricing is likely to be an extremely poor indicator of excessive pricing.

Although identifying excessive pricing is in and of itself extremely difficult, as reflected by how seldom excessive pricing rulings are made, where excessive pricing abuses are identified, the issue then becomes how these may be effectively remedied. While in some situations effective remedies may be readily accessible, in many others they may be either undesirable from a public policy or even a jurisdictional perspective (e.g. price regulation) or simply unattainable.

This paper draws upon economic theory and relevant jurisprudence in an attempt to provide clarity as to the circumstances under which import parity pricing might conceivably reflect excessive pricing. It then considers how and indeed if, where an abuse is found, it may be effectively remedied, drawing upon relevant examples where authorities have experienced precisely this problem.

2. Introduction

Import parity pricing (“IPP”) essentially describes the situation where a domestic supplier of a particular good sets the price of that good at a level which is equivalent to the cost its potential customers would incur if they were to import the good from elsewhere. For example, where transport costs are associated with importing a good but not sourcing it domestically, IPP would entail the domestic supplier setting a factory gate price equivalent to the price of the import plus the transport cost associated with bringing that import to the domestic market. It is of course important to recognise that while abstract discussions surrounding IPP typically centre around importing from a “world” market into a domestic market, the core concepts apply irrespective of the scope of the geographic markets concerned.

Competition concerns relating to IPP stem from more general concerns surrounding the potential for firms in dominant positions to abuse their dominance by engaging in excessive pricing. Excessive pricing itself is outlined in the South African Competition Act as being pricing in a way that does not reflect the underlying economic value of the product or service in question and is in excess of that value.¹ The underlying cause for concern behind IPP is therefore that it may be indicative of firms having been able to increase prices to the extent to which they no longer bear relation to the economic value of the product in question.

¹ The Competition Act No. 89 of 1998, Section 1(1) (ix).

This line of reasoning is readily apparent in the South African Competition Tribunal (“the Tribunal”) decision in the matter between Harmony Gold Fields (“Harmony”) and Mittal South Africa (“Mittal”).² Mittal priced domestic sales of flat steel at import parity, while pricing product for export at the much lower price of export parity. Harmony argued that in effect the export parity price constituted the economic value of the product, and hence the price on domestic sales was excessive.³ The Tribunal ultimately found that Mittal had engaged in excessive pricing. In particular, the Tribunal noted that Mittal’s use of an import parity price was not likely to reflect competitive market conditions, but rather those of monopoly:

“The point is that both the import parity price or the basket of international commodities are targeted because of their close approximation to the monopolist’s profit maximising price.”⁴

Although successfully appealed by Mittal, the Tribunal’s decision may lead firms and their advisors to be concerned that decisions to set prices at import parity may be interpreted as excessive pricing. This concern is not without economic foundation in so much as IPP may result from firms engaging in excessive pricing, since in effect excessive pricing entails firms increasing prices above competitive levels to the point at which it is no longer profitable to do so. The import parity price will naturally provide a limit to the extent to which firms can increase prices above competitive levels since if prices were increased beyond import parity customers would simply purchase imports for all of their requirements instead. Import parity pricing may thus conceivably reflect firms having raised prices above competitive levels, such that even though imports would not have been a viable alternative for customers at competitive price levels, they become a viable alternative at prevailing levels.

However, it is important to recognise that the mere existence of IPP cannot be considered a sufficient condition for a finding of excessive pricing.⁵ Rather what matters is how the situation of IPP has been arrived at, which in turn relates to the underlying economics of the matter at hand. Put another way, while IPP may reflect excessive pricing in certain circumstances, the two are not intrinsically linked. Moreover, differentiating between situations of IPP as a result of competitive behaviour and IPP as a result of excessive pricing may often be extremely difficult, rendered so by the fact that identifying the competitive levels of prices or output may itself be extremely difficult. This may explain why so few examples where firms have been found guilty of excessive pricing exist, although case precedent, albeit limited in terms of volume, does provide some guidance in this regard.

Where it is found that prices have genuinely risen to import parity as a result of a firm pricing excessively, attention must then switch to how, and indeed if, this may be remedied effectively. While it is clearly desirable to prevent firms from pricing

² 70/CAC/APR07, available at http://www.comptrib.co.za/list_judgement.asp?jid=1049

³ Export parity is essentially the price that a domestic firm must sell at in order to be competitive in the export market. If transport costs are associated with service to the export market, the export parity price will be the realised market price in the export market less the transport cost incurred.

⁴ Page 12, footnote 35, 13/CR/Feb04, available at <http://www.comptrib.co.za/%5Ccomptrib%5Ccomptribdocs%5C97%5C13CRFeb04reasons.pdf>

⁵ Nor in fact would it constitute a necessary condition. An excessive price could as a matter of theory easily lie below import parity.

excessively, it is nevertheless important to realise that effective welfare enhancing solutions may not be easy to identify and/or implement. This is due not only to the aforementioned problems in identifying the competitive price level in the first place but also because excessive pricing is an exploitative abuse rather than an exclusionary one, and indeed one borne from the rational desire to maximise profits. The abuse itself thus does not provide any guidance as to how it should be remedied, nor is it obvious how a firm might avoid anti-trust scrutiny or, in the absence of an imposed remedy, adjust its behaviour to avoid committing a repeat offence. Moreover, even where a remedy is identified, difficulties in implementation, as well as the potential for knock on effects in other markets, mean that it does not automatically follow that overall consumer welfare will be improved.

3. Reasons for Import Parity Pricing

As discussed above, it is important to recognise that IPP is not synonymous with anti-competitive behaviour but may be indicative of excessive pricing in certain circumstances. This point is demonstrated through a series of examples below.

Example 1: IPP with perfect competition and excess demand

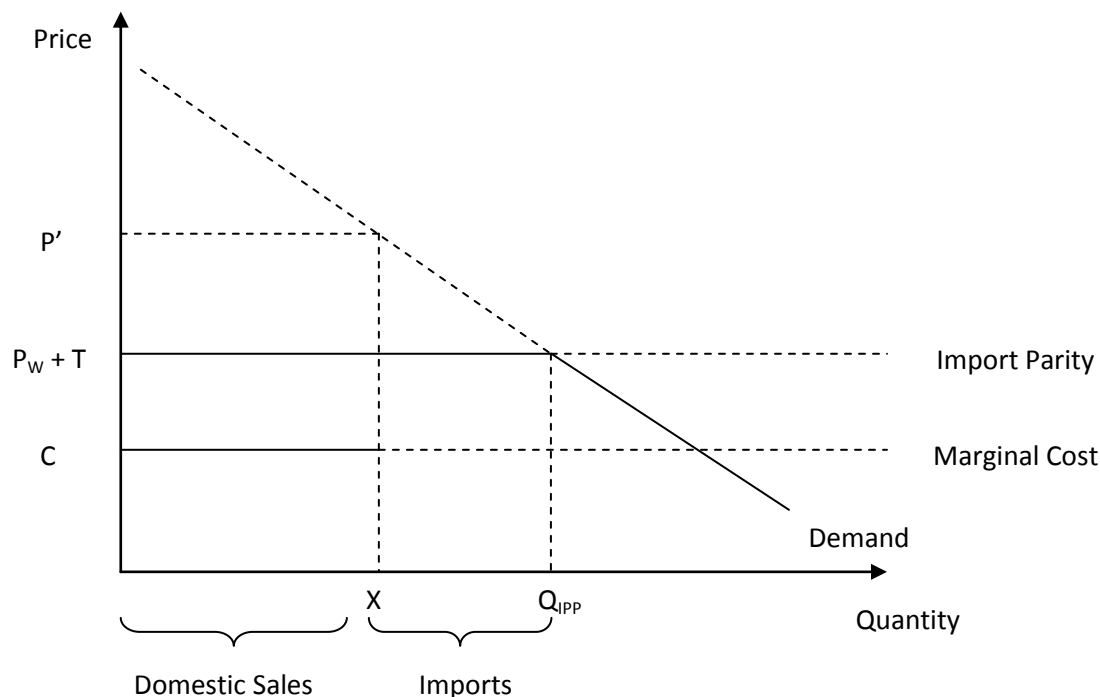
Consider a scenario whereby;

- domestic competition is perfect and atomistic, i.e. there are many small firms that are price takers and do not possess economies of scale;
- total domestic capacity, i.e. the capacities of all domestic firms combined, is X ;
- domestic firms and their customers are both in the same location (i.e. locations are homogeneous) and hence there is no transport cost between them;
- customers can source imported product at the world price, P_w , but have to also pay a transport cost of T in order to do so;
- domestic firms face a marginal cost of C , which is below the import parity price;
- domestic firms are unable to price discriminate on domestic sales (although they may charge a different price for exports); and
- domestic demand exceeds domestic capacity if prices are at import parity, in this case $P_w + T$ (e.g. due to capacity constraints).

The equilibrium outcome of this scenario is illustrated in Figure 1 below. The figure indicates that if domestic firms supply into the market at a price equal to marginal cost, C , there will be excess demand irrespective of their level of capacity utilisation. For example, even if domestic firms operate at full capacity the price customers will be willing to pay, P' , is far in excess of marginal cost. This excess demand places upwards pressure upon prices, which cannot be alleviated by an expansion in domestic supply since suppliers are already operating at full capacity, until imports become a viable alternative for customers, i.e. customers become indifferent between sourcing domestically (if output were available) or from imports. This gives rise to a market price

equal to import parity and total market demand of Q_{IPP} , of which X is be met by domestic production and the remainder met by imports.⁶

Figure 1: IPP with excess demand and perfect competition



In the above scenario we therefore have market price at import parity even in the situation where firms are price takers. As such, this clearly does not equate to excessive pricing.

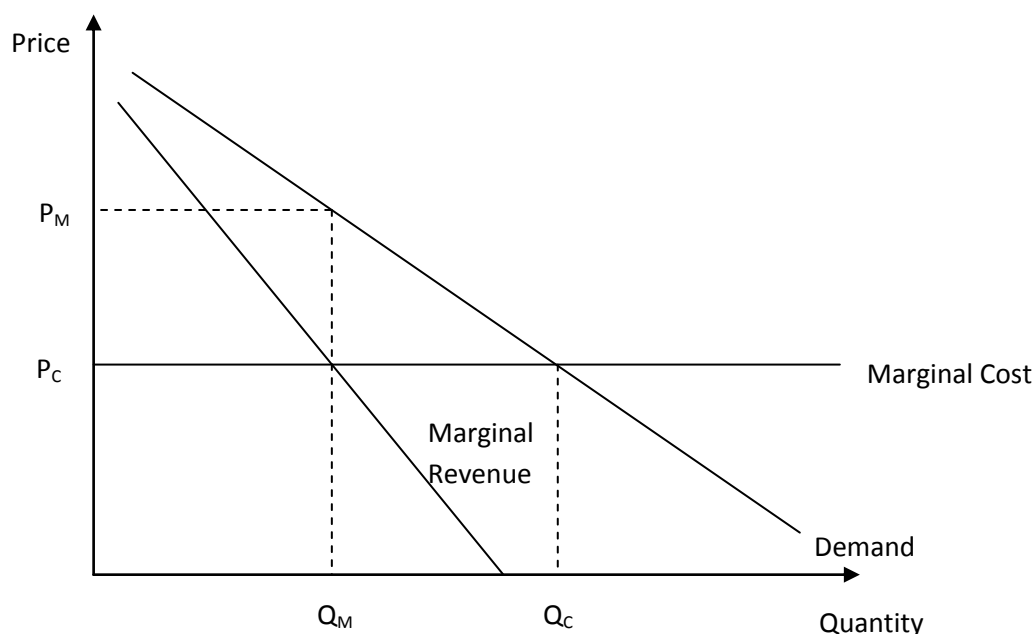
This result is of course hardly surprising since one would not normally associate competition concerns with markets that comprise a large number of small price taking firms and thus lean towards the text book perfect competition paradigm. Indeed, competition concerns are typically reserved for those markets comprising of either one firm or a small number of large firms. The underlying rationale for this is that large firms may not be price takers (although structural indicators are often a poor measure of this), but rather appreciate that their own actions may affect market prices. Consider for example the situation where an increase in market supply by a single unit will result in a market price reduction. A price taking firm will supply that additional unit of output provided the price it will obtain for that unit is above the marginal cost of producing that unit, in other words if that additional unit is in and of itself profitable. Divergently, a firm that is not a price taker will only supply an additional unit of output if the profit made on that additional unit is sufficient to offset the reduced revenues earned on its existing sales base resulting from a lower market price. Firms that are not price takers may thus

⁶ This constitutes an equilibrium since if the price were higher than IPP the consumer with the highest valuation of the product currently not purchasing that product would be willing to pay the import parity price for an additional unit, thus expanding market output and reducing price. Similarly if the price were lower then there would be a shortage since imports would not be viable at this price.

find it rational to produce a lower level of output compared to the case if they were a price taker.

Put more technically, in a perfectly competitive market the market price and corresponding level of output will be determined according to where the market supply/marginal cost curve intersects with the demand curve, while, for example, under monopoly the market price and corresponding level of output will be determined by where the supply/marginal cost curve intersects with the monopolist's marginal revenue curve, which may in turn result in a higher market price and lower market output. This is essentially the "standard" monopoly pricing problem, and is illustrated in Figure 2 below. Note that while under perfect competition the market price will be P_C and correspond to the level of output Q_C , under monopoly output will be restricted to Q_M , thus inflating the market price to P_M .

Figure 2: Output restriction under monopoly



However, while the above provides a theoretical basis for competition concerns in concentrated markets, even where market structures are highly concentrated whether or not IPP is likely to be indicative of excessive pricing will still depend upon the specific characteristics of the market in question. This point is illustrated in Examples 2 and 3.

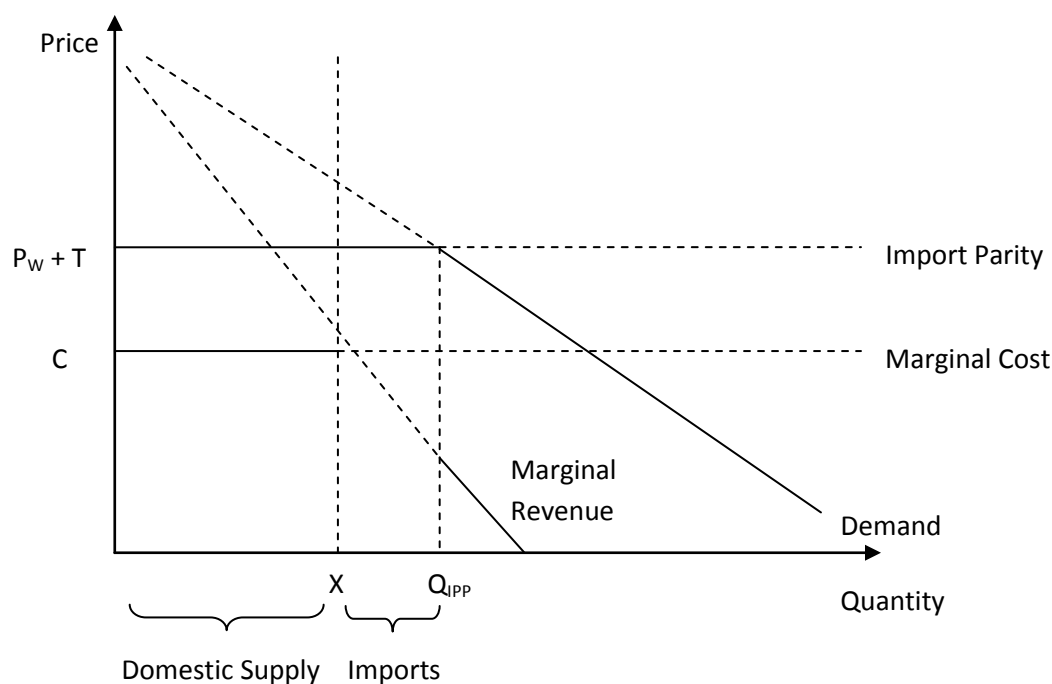
Example 2: IPP with a single domestic supplier and excess demand

Consider a scenario identical to that described in Example 1 above, but where instead of a large number of small domestic suppliers with combined capacity of X , there is one domestic supplier with a capacity of X . However, since the monopolist is unable to meet market demand even when producing at full capacity the market price is set by the marginal supplier to the market, namely imports. At the import parity price the monopolist supplies the entirety of its output, X , with the remainder of demand again being made up of imports.

The key factor driving this result is illustrated in Figure 3. The figure demonstrates that because of the ability of consumers to import at the import parity price, the monopolist does not face the same demand and marginal revenue curves as it did in Figure 2 (marked in dashed lines in the figure below). Instead, the monopolist only faces these curves beyond an output level of Q_{IPP} since at all lower levels of output the monopolist will not face any demand (and hence marginal revenue) at all unless it prices at IPP, i.e. both demand and marginal revenue are zero if the monopolist prices above IPP, while if it prices at IPP these are constant at all levels of output below Q_{IPP} .⁷

Crucially then, since demand exceeds domestic capacity at the import parity price, the domestic monopolist does not possess sufficient capacity for the downward sloping section of its demand curve, which is also at that point the market demand curve, to be relevant. There is thus no scope for the domestic monopolist to affect price through varying its output and hence despite being a domestic monopolist that firm is nevertheless a price taker.⁸

Figure 3: IPP with excess demand and domestic monopoly



Despite being a local monopolist, the firm has no role in setting the market price and hence IPP is thus again borne from entirely competitive market behaviour. As an aside, this also highlights how structural indicators are often not useful when seeking to identify competition concerns.

⁷ Note that the “kinked” nature of the demand curve results in a discontinuity in the marginal revenue curve at the output level corresponding to the import parity price.

⁸ One could argue in this case that since prices are already at import parity a hypothetical monopolist domestic supplier could not profitably increase prices by 5%-10%, and thus the market is in fact a broad one including both domestic supply and imports, in which case the firm in question would not in fact be a monopolist. However, the potential for Cellophane Fallacy problems may negate such a line of argument.

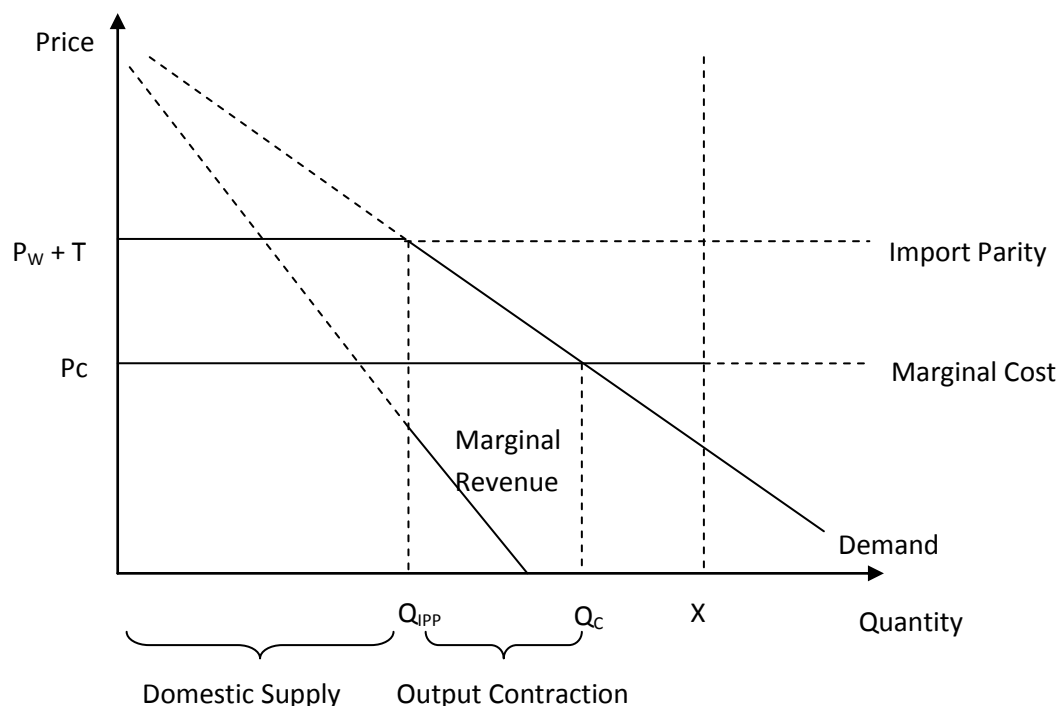
Example 3: IPP with a single domestic supplier and excess domestic capacity

Now consider a situation identical in every way to that described in Example 2, save for the fact that instead of demand exceeding domestic capacity when prices are at import parity, the domestic monopolist possesses more than enough capacity to meet domestic demand when prices are at import parity.

In this situation, as illustrated in Figure 4, the range of output over which the domestic monopolist can produce now includes the downwards sloping section of its, and the market's, demand curve, and hence the domestic monopolist possesses the ability to affect the market price over a subset of its total output range. The domestic monopolist will thus produce up to the point where marginal revenue earned on an additional unit of output is equal to the marginal cost of producing that unit. In this case, since the marginal cost curve intersects the marginal revenue curve at the discontinuity in the curve, this results in an output of Q_{IPP} and a market price of import parity. Consumers are thus clearly worse off compared to the case of perfect competition where domestic firms would supply up to the point where marginal cost curve cuts the demand curve (price equals marginal cost), and one would observe a higher output of Q_C and a lower price of P_C .⁹ In short, since the firm appreciates the effect of its output decision on the market price, it restricts output below the level that would prevail under perfect competition.

⁹ If the firm were to possess a sufficiently low marginal cost such that marginal cost curve intersected the marginal revenue curve at a point to the right of the discontinuity this would result in a market price lower than IPP but nevertheless inflated relative to the competitive price.

Figure 4: IPP with excess capacity and domestic monopoly



The above example embodies the key distinction between situations whereby domestic pricing at import parity has arisen simply as a result of competitive conditions, and where domestic pricing at import parity has arisen because of behaviour that could be deemed anti-competitive, namely whether or not domestic output has been actively restricted to push prices up to import parity. In other words, whether the firm has market power, and whether it has used that market power to reduce output and thus increase prices. A firm may achieve such a reduction either through an outright restriction of output, as highlighted above, or by refraining from selling its entire output domestically, in its primary market, and instead selling some of its output in a secondary market (often described as “shorting”).¹⁰ This naturally limits the range of scenarios where IPP may be associated with excessive pricing, although as will be discussed below, a more nuanced approach is still required in order to identify those instances within that range where prices are genuinely excessive.

4. Understanding and Identifying Excessive Pricing

As described above, the existence of IPP is in and of itself unlikely to provide a reliable indicator of whether or not a firm is charging excessive prices, and that IPP can only be indicative of excessive pricing where it has resulted from firms, by virtue of the market power they enjoy, having increased prices significantly in excess of competitive levels by restricting output. However, identifying whether an output restriction has occurred

¹⁰ In more dynamic settings a third way may be possible where, in the face of growing demand, a firm does not invest in additional productive capacity to the extent to which a firm behaving competitively would do, thus restricting future output indirectly.

directly is likely to be extremely difficult, in particular since the competitive price level or corresponding level of output is extremely unlikely to be readily observable, and hence an alternative approach must be adopted.

The most economically tractable means of establishing whether prices are likely to be excessive is to gain a thorough understanding of the prevailing competitive conditions of the market in question and hence determine whether conditions are likely to be conducive to such behaviour.¹¹ In particular, the extent of barriers to entry is likely to play a key role since if barriers to entry are low then it is highly implausible that a firm would be able to profitably sustain prices above competitive levels. Rather such behaviour would be expected to encourage new entrants to undercut the firm's prices, thus driving prices back to competitive levels. Other factors that may be expected to diminish a firm's ability/incentive to charge excessive prices would include the existence of strong buyers or suppliers, or any other factors that might lessen the market power enjoyed by the firm in question.

In the absence of such mitigating factors, case precedent identifies two main approaches to establishing empirically whether output has been restricted and hence corresponding prices may be excessive. Firstly, it may be possible to estimate what a competitive price for the product would be using "comparators", such as the price of the product in alternative geographic markets, the price charged in the same geographic market but to different customers, or cost metrics such as production costs.

This approach possesses some intuitive appeal, and indeed has been adopted in a number of prominent competition matters (see for example *United Brands*).¹² However, it is important to remember that the use of comparators will only be valid to the extent to which appropriate comparators can be identified. Any analysis that uses cost as an indicator of the competitive price level, for example, will necessarily be sensitive to which cost elements are included, which may prove a point of contention. While in some markets it may be relevant to focus on variable costs only, in others it may be relevant to also consider semi-variable or fixed costs, or even opportunity costs. Where such an analysis does seek to include all costs relevant to a firm when setting its prices, it may become increasingly similar to a profitability analysis, which is addressed separately below. Similarly, there may be good reasons as to why prices charged by a firm in two different markets or to different customers in the same market may be different. An obvious reason is that the costs of serving the different markets or customers may be different, although even if the underlying cost of serving two markets/customers is similar, comparisons may be rendered problematic because demand conditions may be fundamentally different.

Moreover, and perhaps most fundamentally, comparators, particularly when based on alternative prices, may fail to identify if the firm in question is making excess profits, which is important as one could conceivably believe a firm to be charging prices deemed excessive on the basis of a comparator analysis, but at the same time find the firm to be only just breaking even. Expecting that firm to lower prices to a level at which it is loss making will be ultimately self-defeating since in the long term that firm

¹¹ Note that care must be taken to distinguish between constraints that would exist at competitive prices and constraints that only exist by virtue of the firm having already increased prices above competitive levels (i.e. those prone to the Cellophane Fallacy).

¹² Case 27/76 *United Brands v Commission* [1978] ECR 207.

will exit the market, most likely harming consumer welfare or at best leaving it unchanged.¹³ This shares some common ground with the arguments put forward by Mittal, which argued that the only way it was able to make normal profits was to price discriminate by selling domestically at IPP and exporting at EPP.¹⁴ Indeed, the theoretical basis for this point holds more generally in so much as firms that incur significant ongoing fixed costs may need to price discriminate in order to produce sufficient output to cover them. Assuming Mittal was only earning normal profits in this situation, if, for instance, Mittal was then required to price its domestic output at EPP as well, then it is highly unlikely, given the large difference between IPP and EPP, that Mittal would be able to continue to make normal profits. Similarly, if Mittal were forced to charge a single non-discriminatory price above EPP, this would prevent Mittal making export sales and again likely prevent Mittal from earning normal profits.

As such, an alternative approach to the use of comparators is to attempt to infer whether an excessive price is being charged by identifying whether the firm in question is able to earn “excess” profits, i.e. profits in excess of what a firm must be able to earn for it to remain in business in the long term, referred to by economists as “normal” profits.¹⁵ This approach essentially requires a detailed accounting exercise, although it is important to note that the concept of normal profit is an economic one that reflects opportunity costs and varying degrees of cost recovery, and is thus often distinct from standard measures of accounting profit.¹⁶ The exercise thus typically requires a comparison of a measure of actual return with a measure of what might be regarded as a “normal” return, for example by comparing return on capital employed against weighted average cost of capital.

The underlying rationale behind establishing whether a firm is earning profits in excess of normal profits is reasonably straightforward. If a firm is able to earn excess profits, this will encourage entry or intensified competition from actual or potential competitors, such that firm’s excess profits will be competed away over time, leaving only normal profit. Where excess profits persist over time this may suggest that conventional competitive pressures are not present and that firms may therefore be able to charge excessive prices.¹⁷ Profitability analysis thus provides a natural complement to the more qualitative analysis advocated at the start of this section.

However, while it would seem to make sense for the earning of excess profits to be a necessary condition for the finding of excessive pricing, there may be alternative explanations for a firm earning excess profits other than excessive pricing. Potential sources of excess profits include:

¹³ If a domestic monopolist went out of business and there was not subsequent entry the entirety of market demand would need to be met via imports. Hence the market price would remain at import parity.

¹⁴ In fact Mittal argued that not even normal profits were being earned.

¹⁵ It is important to note that the earning of excess profits does not therefore relate to simply earning a positive profit in an accounting sense.

¹⁶ For example, firms that in an accounting sense may appear profitable may in fact be earning no more than normal profits. Firms may earn high gross profit margins, and thus clearly be profitable in an accounting sense, despite only just being able to cover recurring fixed costs. Implicit here is also therefore the need to value assets in economic terms, which again may differ from accounting terms in certain circumstances.

¹⁷ It is important to note that in situations where firms are found to be highly inefficient it may be possible to identify excessive pricing without finding excess profits although clearly this issue is only likely to arise in very specific circumstances.

- rewards to competitive advantage such as superior efficiency or innovation and R&D efforts (before these advantages are competed away);¹⁸
- the existence of intangible assets that cannot be readily incorporated on a firm's balance sheet such as brands;
- transitory market events such as shortages; and
- the exercising of market power, for example by pricing excessively.

In order to establish excessive pricing it is therefore necessary to not only establish the existence of excess profits, but also to establish that these excessive profits are as a result of excessive pricing and not some other pro-competitive or benign reason. Indeed, the first two reasons provided above would appear to be actively pro-competitive and thus clearly should not be discouraged.

Of course, both the approaches outlined above not only possess subjective elements but are likely to require significant economic analysis, and thus are not of much assistance to firms and their advisors as to whether economic analysis is required in the first place. This is ultimately because the underlying economics surrounding excessive pricing and import parity does not lend itself well to *prima facie* indicators. However, we have nevertheless sought to provide a non-exhaustive list of potentially informative indicators, namely:

- Domestic capacity compared to total domestic demand – As demonstrated above, if domestic productive capacity is not sufficient to meet domestic demand at the import parity price then even a domestic monopolist will not be in a position to affect market prices.¹⁹
- Proportion of IPP accounted for by transport costs – Notwithstanding the fact that IPP may result from entirely competitive circumstances where transport costs are high, the lower the transport costs (or indeed other associated costs) incurred to import product as a proportion of the total selling price, the less scope there is for a domestic firm to seek to inflate prices by reducing output. Where transport costs are low therefore, imports may potentially be more likely to provide a constraint at competitive prices as opposed to merely providing a constraint because a domestic firm has increased prices above competitive levels by restricting output.
- Contractual restrictions on the re-importation of product – Where firms do not possess sufficient control over their output to ensure that the domestic market remains short they may make use of contractual restrictions, an example being Mittal's use of restrictions on export sales such that these volumes did not re-enter the domestic market. Absent this restriction a domestic price of import parity would intuitively not have been sustainable since firms purchasing export product at the export parity price would have found it profitable to simply re-sell

¹⁸ Example 1 and Example 2 above for instance show that domestic producer(s) possess a location advantage and are hence able to earn positive profits since the import parity price is greater than their marginal cost.

¹⁹ Note that this abstracts from arguments that may be based around firms having failed to invest and hence indirectly contracted output.

these volumes back into the domestic market, placing downwards pressure on domestic prices. However, as we will discuss below, such restrictions are not indefensible.

5. Remediating Anti-Competitive Outcomes

Notwithstanding the difficulties in differentiating instances of excessive pricing from other competitively benign or even pro-competitive behaviour, once a genuine case of excessive pricing has been identified, attention must then turn to how such behaviour may be effectively remedied. When examining exclusionary abuses of dominance, the finding itself is likely to advocate a remedy for the conduct. For example if a firm is found to be refusing access to an essential facility then the obvious remedy is to require the firm in question to grant access to that facility. In contrast, excessive pricing, which is an exploitative abuse, arises from firms simply setting prices in a way that maximises their profits, i.e. from rational behaviour. As such, it is not straightforward for firms to alter their behaviour to avoid anti-trust scrutiny, nor is a finding of excessive pricing in and of itself often likely to provide guidance as to how it should be remedied.

In particular, a finding of excessive pricing gives rise to two interrelated issues. Firstly, there is the need to devise a remedy that prevents the firm in question from pricing excessively in the future. This may in and of itself be no easy task. Secondly, there is then the need to evaluate whether the remedy will have any knock on effects that are undesirable. These are discussed in further detail below.

5.1. Feasibility of a Remedy

Since an excessive pricing abuse is essentially the result of a firm having restricted its domestic output either outright or by shorting the market, for a remedy to be truly effective it must give rise to an expansion in domestic output. It is therefore important to draw a distinction between situations where the firm in question has achieved a domestic output reduction simply because of its own internal decision making, and those situations where the firm has imposed some external restriction on other market participants in order to do so. For example, in the case of Harmony vs. Mittal, it was clear that Mittal was able to short the domestic market by imposing contractual restrictions on its output for export that prevented that output from re-entering the domestic market. The obvious remedy in this case, if Mittal were found to be excessively pricing that is, would therefore be to simply prohibit the restriction.^{20 21}

Contrastingly, where firms are in a position to control the level and distribution of their own output, and hence ensure that the domestic market remains short without the need for contractual restrictions, the issue of remedies becomes more difficult. It may be

²⁰ Note that there is an implicit presumption here that without the restriction Mittal would not be able to restrict domestic output. However, this does not appear to be unreasonable since if Mittal could do this without the restriction, there would be no need for the restriction.

²¹ It is of course open to debate as to whether contractual restrictions could themselves constitute the abuse, with excessive prices thus merely being a symptom of that abuse.

circumstances where a firm simply cannot be divided up, thus rendering true structural remedies impossible.²³

5.2. Desirability of a Remedy

Notwithstanding the points raised above regarding the lack of appetite amongst competition authorities to become price regulators, there are two other important reasons why in general remedies may not always be desirable.

Firstly, it is important to remember that if a regulated price is imposed upon a market that price must be itself monitored and adjusted over time to reflect changing market conditions and dynamics, while adherence to the regulated price must also be monitored. The need for the chosen regulator to employ individuals to undertake these tasks is thus likely to be costly to society as a whole.

Secondly, where excessive pricing is borne from a firm deliberately shorting the primary market (the domestic market in the example above) by supplying into a secondary market, a remedy that encourages an expansion of output in the primary market may in certain circumstances result in a reduction in supplies to the secondary market. This might occur for example if the firm was already producing at high capacity utilisation. Where the secondary market is an international market with many suppliers this may have a negligible effect on prices, but where the secondary market is smaller with only a limited number of suppliers, the withdrawal of the firm's output may place upwards pressure on prices in the secondary market, and thus make consumers in that market worse off.²⁴

6. Concluding Remarks

This paper highlights that although in theory import parity pricing may result from excessive pricing, it is in isolation likely to be a poor indicator of excessive pricing. Rather it is necessary to understand why IPP has resulted, and specifically whether it has occurred purely as a result of competitive market conditions or from a restriction in output below that which would occur under competitive conditions. Since it is virtually impossible to directly determine whether prices are excessive on the basis *prima facie* evidence, a point which works strongly against an "I know it when I see it approach", this distinction can only ultimately be addressed through gaining a thorough understanding of the industry in question, accompanied by relevant empirical analysis. In particular, in order to advance a theory of harm that a firm is engaged in excessive pricing, it is essential to explain as part of that theory why the firm is not subject to competitive pressures and is thus able to charge excessive prices, and indeed

²³ While remedies that are in a sense structural in terms of control, such as vesting contracts or the creation of "virtual firms", have been applied to cases where physical divestments are not possible, for example in energy markets, these are relatively novel and would appear to work better in some industries than others.

²⁴ Naturally one would only expect a competition authority to be concerned in situations where both the primary market and the secondary market lie under its jurisdiction.

demonstrate empirically that prices are indeed likely to be excessive. For the reasons discussed above, this may be no easy task.

Moreover, even when prices are found to be excessive, substantial hurdles are then likely to be encountered when seeking to remedy such behaviour. For instance, and unlike abuses relating to exclusionary behaviour, the nature of the abuse itself is unlikely to provide effective guidance as to how it may be remedied effectively, or indeed from the firm's perspective guidance as to what it should have done differently. While it may be possible in theory and occasionally in practice to remedy excessive pricing, there are likely to exist a number of real world impediments to doing so effectively. Indeed in certain situations it may simply not be possible to affect the firm's behaviour in a way that is not ultimately self defeating and actually enhances customer welfare. It is thus not entirely surprising that the number of instances where firms have been found to have engaged excessive pricing are few and far between, particularly in recent years.