

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 016428

In the matter between:

Pacorini Metals Europe (B.V.) (Pty) Ltd

and

Access Freight Group (Pty) Ltd

Panel: N Manoim (Presiding Member), Y Carrim
(Tribunal Member) and A Wessels (Tribunal
Member)

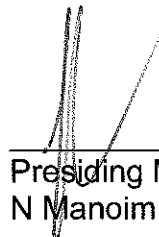
Heard on: 19 June 2013

Decided on: 19 June 2013

ORDER

Further to the recommendation of the Competition Commission in terms of section 14A(1)(b) of the Competition Act, 1998 ("the Act") the Competition Tribunal orders that –

1. the merger between Pacorini Metals Europe (B.V.) (Pty) Ltd and Access Freight Group (Pty) Ltd be approved in terms of section 16(2)(b) of the Act subject to the conditions in Annexure A; and
2. a Merger Clearance Certificate be issued in terms of Competition Tribunal Rule 35(5)(a).



Presiding Member
N Manoim

Concurring: Y Carrim and A Wessels

Annexure A

Pacorini Metals Europe B.V. (Netherlands) / Access Freight Group Proprietary Limited

CC CASE NUMBER: 2013Mar0113

NON-CONFIDENTIAL CONDITIONS

1. Definitions

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

- 1.1 **“Acquiring Firm”** means Pacorini;
- 1.2 **“Affected Party”** means a company which competes with Glencore in the production and/or supply of commodities, and procures logistic services for those commodity products from the Target Firms;
- 1.3 **“AFG”** means Access Freight Group Proprietary Limited, a company incorporated in accordance with the laws of the Republic of South Africa with its principal place of business at 401 Solomon Mahlangu Drive, Rosburgh, Durban, Kwa-Zulu Natal, South Africa;
- 1.4 **“Approval Date”** means the date referred to in the Competition Tribunal’s merger clearance certificate (Form CT 10);
- 1.5 **“Commission”** means the Competition Commission of South Africa;
- 1.6 **“Competition Act”** means the Competition Act 89 of 1998, as amended;
- 1.7 **“Conditions”** means these conditions;
- 1.8 **“Confidential Information”** means information belonging to an Affected Party which is disclosed to, or otherwise obtained or received by, the Target Firms as a result of the provision by the Target Firms, or their agents, of logistics services to an Affected Party and which relates to –
 - (i) stock volumes or figures for actual or proposed storage, handling and/or transportation services;
 - (ii) information relating to proposed or actual shipments to be made by

the Target Firms, given by the shipper, his agent or the recipient of that shipment;

(iii) the contractual terms dealing with freight bookings, storage, handling and/or transportation services;

(iv) commodity volumes, prices or pricing formula, stock levels, financing, quality and nature (grade) of commodities handled or transported;

(v) information relating to the end customers of an Affected Party (where disclosed to the Target Firms) and customs information;

(vi) Notwithstanding anything to the contrary in these Conditions, Confidential Information does not include information which -

a) at the time of the first such disclosure to, or receipt by, the Target Firms, the information was already known by the Target Firms or is in the public domain or which after such disclosure to, or receipt by, the Target Firms subsequently becomes public (other than through a breach by the Target Firms of any confidentiality obligation in terms of these Conditions or any other contractual undertaking by the Target Firms to an Affected Party);

b) is independently developed by the Target Firms without reference to the Confidential Information;

c) is obtained by the Target Firms from a third party which represents that it is lawfully entitled to disclose the same to the Target Firms;

d) is required to be disclosed under a binding order of any court or other competent authority; or

e) is historic information (at least twenty four months old) and is in aggregated form;

1.9 **“Designated Individuals”** means non-trading personnel of Glencore contemplated in terms of paragraph 3.2;

1.10 **“Finges”** means Finges Investment BV a company incorporated in

accordance with the laws of the Netherlands which ultimately controls the Acquiring Firm;

- 1.11 **"Glencore"** means Glencore Xstrata Plc., a listed public company in accordance with the laws of Switzerland, and all its subsidiaries, which, for the purposes of Glencore's obligations in terms of these Conditions, excludes the Pacorini Group and, after implementation of the Merger, excludes the Target Firms;
- 1.12 **"Implementation Date"** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties. This date is subject to compulsory notification to the Commission;
- 1.13 **"Merger"** means the acquisition of control of the Target Firms by Pacorini;
- 1.14 **"Merging Parties"** means Pacorini and the Target Firms;
- 1.15 **"Pacorini"** means Pacorini Metals Europe B.V. a company incorporated in accordance with the laws of the Netherlands which is ultimately controlled by Finges;
- 1.16 **"Pacorini Group"** means Pacorini Metals AG, its associated entities within the Pacorini Metals group of companies, as per the draft organogram attached as Appendix 1¹, and including Firefly Investments 247 Proprietary Limited (which is to be renamed Pacorini Metals Africa Proprietary Limited, which will be a subsidiary of Pacorini Metals Europe B.V.);
- 1.17 **"Pacorini Metals AG"** means a company incorporated in accordance with the laws of Switzerland and which acts as head office for the Pacorini Group.
- 1.18 **"Target Firms"** means AFG and its subsidiaries; and
- 1.19 **"Tribunal"** means the Competition Tribunal of South Africa.

2. Recordal

- 2.1 On 14 March 2013, the Merging Parties filed this large merger transaction with the Commission. Following its investigation of this merger transaction,

¹ Appendix 1 is confidential and has been removed from this version of Annexure A.

the Commission is of the view that the proposed transaction is unlikely to lead to a substantial prevention or lessening of competition in the market as there is no geographic overlap and the merged entity is unlikely to have the ability or incentive to foreclose customers.

- 2.2 However, the Commission is concerned about the possible detrimental impact that the merger transaction may have on competition through information exchange.
- 2.3 During the investigation, some Affected Parties raised concerns with the Commission that post-merger, Glencore may have access to Confidential Information deriving from the Affected Parties, which may give rise to a conflict of interest between the Target Firms and Glencore.
- 2.4 The Commission considers the likelihood that Confidential Information may flow from the Target Firms to Glencore may give rise to co-ordinated effects between the Affected Parties and Glencore.
- 2.5 These conditions address the competition harm identified by the Commission.

3. **Conditions**

- 3.1 No person shall be appointed as a director to the Board of Directors of any of the Target Firms for as long as that person is also a director or employee of any Glencore company.
- 3.2 Upon the Approval Date, the Target Firms shall treat as confidential all Confidential Information belonging to Affected Parties and shall not disseminate or disclose the Confidential Information to Glencore. Confidential Information may be disclosed on a need to know basis to Designated Individuals only insofar as required by law or regulatory authority, for internal audit purposes and/or in relation to tax, legal, compliance or corporate governance requirements;
- 3.3 Within 3 (three) months of the Implementation Date, the Pacorini Group shall develop, adopt and implement a policy ("**the Policy**") containing procedures for the implementation and on-going monitoring of the Target Firms' obligations in paragraph 3.2. The Policy shall be submitted to and agreed with the Commission prior to its implementation as provided for in paragraph

4 below. The Merging Parties shall notify the Commission of the Implementation Date

3.4 The Policy referred to in clause 3.3 above shall be implemented for as long as Glencore holds a direct or indirect sole controlling interest in the Target Firms.

3.5 The purpose of the Policy shall be to ensure, *inter alia*,

(i) The physical separation of operating offices (or other operating premises) between the management teams responsible for Glencore and the Target Firms; and

(ii) The control by the Target Firms of the Confidential information, particularly the Confidential Information in electronic format, to ensure that Confidential Information is not disseminated or disclosed in contravention of paragraph 3.2.

(iii) That the Designated Individuals are aware of the need to protect the Confidential Information in terms of paragraph 3.2 and are aware of their heightened position of responsibility for managing any Confidential Information disclosed to them.

3.6 In the interim period between the Approval Date and the implementation of the Policy referred to in paragraph 3.3 above, the Pacorini Group undertakes that no Confidential Information shall be disclosed to Glencore unless such information is disclosed to a Designated Individual as defined in these Conditions.

4. **Monitoring of Conditions**

4.1 With respect to the Policy referred to in 3.3 above –

4.1.1 By no later than 1 (one) month prior to the expiry of the 3 (three) month period, the Pacorini Group shall submit a copy of the proposed Policy to the Commission for its approval. The Commission shall provide the Pacorini Group with its views/recommendations/decision within 10 (ten) business days of such submission; and

4.1.2 Within 10 (ten) business days upon the approval by the Commission and the

implementation of the Policy, the Pacorini Group shall submit an affidavit by a senior executive attesting to the establishment and implementation of the Policy described above. The Pacorini Group shall, at the same time, also submit to the Commission copies of written acknowledgments signed by the management teams responsible for the management of the Target Firms, acknowledging their understanding of the provisions of the Policy document.

- 4.2 The Policy, the affidavit, and copies of the signed acknowledgments must be submitted to the Commission's email address: mergerconditions@compcom.co.za.

5. **General**

- 5.1 In the event that it appears that the Merging Parties have breached the above conditions or if the Commission determines that there has been an apparent breach by the Merging Parties of any of the above conditions, this shall be dealt with in terms of Rule 39 of the Rules for the Conduct of Proceedings in *the Commission*.
- 5.2 The Tribunal may on good cause shown, lift, revise or amend these Conditions upon being approached by the Merging Parties or the Commission.