



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 016428

In the matter between:

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

Acquiring Firm

And

Access Freight Group (Pty) Ltd

Target Firm

Panel: Norman Manoim (Presiding Member)
Yasmin Carrim (Tribunal Member)
Andreas Wessels (Tribunal Member)

Heard on: 19 June 2013

Order issued on: 19 June 2013

Reasons issued on: 21 June 2013

REASONS FOR THE DECISION

Approval

[1] On 19 June 2013 the Competition Tribunal (the "Tribunal") conditionally approved the acquisition by Pacorini Metals Europe (B.V.) (Pty) Ltd ("Pacorini") of Access Freight Group (Pty) Ltd ("AFG")

[2] The reasons for the conditional approval of the proposed transaction follow.

The parties and their activities

[3] Pacorini is the acquiring party and is ultimately controlled by Glencore International while AFG, the target firm, is independently owned in South Africa.

[4] Both Pacorini and AFG are full-service providers of logistical and transport services, including warehousing, for a diverse range of commodities. Pacorini operates in North America, Europe, and Asia (Middle East and Far East) and AFG operates in Sub-Saharan Africa.

Proposed transaction and rationale

[5] The proposed transaction sees Pacorini acquiring 70% shareholding and control of AFG. The rationale is to expand Pacorini's global reach into the Sub-Saharan African region where they currently have no presence.

[6] The rationale for selling by AFG's shareholders is to earn a return on their investment.

Market definition and competition analysis

[7] Both the merger parties and the Commission were satisfied with defining the product market broadly for the purposes of this transaction. This broad definition included all warehousing, transport and logistics services for commodities in general despite some minor differences in the way ferrous and non-ferrous metals are stored. We agree that this broad definition is suitable for this transaction.

[8] There was also agreement between the merger parties and the Commission on the geographic market definition. We agree with the geographic market definition being the Republic of South Africa for the purposes of this merger.

[9] There is potential for a unilateral concern in this merger because both parties provide very similar offerings. They, however, operate in different geographic

markets. A lessening in competition due to increased unilateral market power is thus unlikely in this merger.

[10] While Pacorini operates in a different geographic market to AFG, its parent company, Glencore, operates in South Africa. Indeed, AFG is the main provider of warehousing, transport and logistics to Glencore in South Africa. This introduces a vertical aspect to the merger that warranted address.

[11] Glencore, even after the Xstrata merger, is not a sufficiently large customer of warehousing, transport and logistics services to make a customer foreclosure strategy likely to be successful. It is unlikely that the merger will give AFG the ability to exclude its rivals in South Africa.

[12] Secondly, because there are a large number of firms in competition with AFG, they are unlikely to be able to exclude Glencore's competitors from the market through an input foreclosure strategy. Furthermore, given the proportion of revenues AFG derives from third party customers, it is also not incentivised to embark on such a strategy.

[13] We thus conclude that the merger is unlikely to give rise to either customer or input foreclosure concerns.

[14] Despite lack of foreclosure concerns, Glencore would now have access to its rivals' strategically sensitive information. This information exchange has the potential to contribute to a coordinated outcome between competitors in the market. For similar reasons, the London Metals Exchange in Europe has enforced an Internal Barriers Policy with Pacorini which prevents Glencore from accessing confidential information about its competitors through Pacorini.

[15] The conditions of the merger approval address the potential coordination concerns that arise should Glencore have access to their competitors' strategically sensitive information. The conditions, Appendix A in the attached order of the Tribunal on 19 June 2013, thus address the issues of cross-


directorships, treatment of confidential information and a compliance programme.

Public interest

[16] The merger parties confirmed that the proposed transaction will have no adverse effect on employment and will not result in any retrenchments in South Africa. The proposed transaction raises no other public interest concerns.

Conclusion

[17] For the reasons mentioned above, we approve the proposed transaction subject to the conditions in Annexure A of our order of 19 June 2013 in this matter.



NORMAN MANOIM

21 June 2013

DATE

Yasmin Carrim and Andreas Wessels concurring

Tribunal Researcher: Andrew Sylvester

For the Commission: Grashum Mutizwa and Thelani Luthuli

For Pacorini and AFG: Paul Cleland of Werksmans

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, Rossburgh, 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.