

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1822

4 March 2022

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

BRIGHT MINERALS PROPRIETARY LIMITED**AND****AFARAK MOGALE PROPRIETARY LIMITED****CASE NUMBER: 2021MAY0021**

The Competition Commission hereby gives notice, in terms of Rule 38 (3)(c) of the 'Rules for the Conduct of Proceedings in the Competition Commission', that it has approved the transaction involving the abovementioned firms subject to conditions set out below:

1. On 12 May 2021, the Competition Commission ("the Commission") received a notice of an intermediate merger whereby Bright Minerals SA Proprietary Limited ("Bright Minerals") intends to acquire all the shares in Afarak Mogale Proprietary Limited (in business rescue) ("Mogale"). Upon implementation of the proposed transaction, Bright Minerals will have sole control over Mogale.
2. The primary acquiring firm is Bright Minerals, a firm incorporated in accordance with the company laws of South Africa. Bright Minerals controls Cheetah Chrome South Africa Proprietary Limited ("Cheetah"). Bright Minerals and all the firms directly or indirectly controlling it as well as all the firms that it controls, shall be referred to as the "Acquiring Group".
3. The Acquiring Group, through Cheetah, owns a chrome ore mine in South Africa that has been in care and maintenance for many years. Cheetah mine is formally out of care and maintenance and is in the process of implementing start-up plans. Cheetah has not mined

any chrome ore since 2016, when it went into business rescue. The Acquiring Group does not manufacture ferrochrome in South Africa, nor does it supply ferrochrome to South African customers.

4. The primary target firm is Mogale, a firm incorporated in accordance with the company laws of South Africa. Mogale does not control any firms. The shares of Mogale are currently held by Afarak South Africa Proprietary Limited ("Afarak SA") as to 93.17% and by the Mogale Alloys Trust (the "Trust") as to 6.83%. Afarak SA is ultimately controlled by Afarak Global ("Afarak"). Afarak is listed on the NASDAQ OMX Helsinki Stock Exchange and the London Stock Exchange. Afarak does not have any BEE rating or ownership by historically disadvantaged individuals. The Trust is a workers' trust for the benefit of former employees of Mogale.
5. Mogale is a producer of ferrochrome in South Africa. Mogale has four furnaces capable of producing ferrochrome. However, Mogale has been in business rescue since May 2020. Mogale's operations were placed into care and maintenance in September 2020.

Relationship between the parties/ products (horizontal / vertical)

6. The Commission considered the activities of the merging parties and found that the transaction raises both a horizontal and a vertical overlap. The horizontal overlap occurs in that the merging parties are both active in the production and supply of ferrochrome (though the Acquirer is only active in this market outside of South Africa).
 7. The vertical overlap occurs in that the chrome ore produced by the Acquiring Group (through Cheetah) is an input in the production of ferrochrome which is produced by Mogale.
 8. The Commission assessed the effect of the proposed merger on the following markets:
 - 8.1. The upstream national market for the production and supply of chrome ore; and
 - 8.2. The downstream global/international market for the production and supply of ferrochrome.
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Competition analysis

9. In calculating the market shares of the merging parties, the Commission relied on data from the Ferrochrome Market and Industry Report, Roskill Consulting Group Limited, 26 February 2021 ("Roskill Report").

Market share relating to the upstream market for the production and supply of chrome ore

10. In the upstream national market for the production and supply of chrome ore, the Acquiring Group (Cheetah) has a low market share. Since Cheetah is currently not mining or producing chrome ore, the estimated market share is based on its 2016 production volumes. In this market, the Acquiring Group faces competition from several other players such as Samancor, Glencore, Kazchrome, Tharisa and others.

Market share relating to the downstream market for the production and supply of ferrochrome

11. In the international ferrochrome market, the merged entity will have a low market share. The merged entity will continue to compete with other players in the market such as ERG/ENRC, Samancor, Glencore, Outokumpu and Mintal.
12. In South Africa, Mogale's market share remains low. The Acquiring Group does not produce or supply ferrochrome in South Africa. Therefore, the Acquiring Group has no ferrochrome market share in South Africa. Mogale will continue to face competition from other established players in the market such as Samancor, Glencore, Richard's Bay Alloys and ARM. Samancor and Glencore are the biggest producers of ferrochrome in South Africa.

Assessment of the horizontal overlap in the production and supply of ferrochrome

13. The Commission is of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in the market for the production and supply of ferrochrome as the merging parties have a relatively low post-merger market share and there are alternative players that will continue to constrain the merged entity post-merger.
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Vertical assessment**Input foreclosure**

14. The Commission is of the view that the proposed merger is unlikely to result in significant input foreclosure concerns relating to the supply of chrome ore as the Acquiring Group is not a dominant supplier of chrome ore. The other suppliers in this market include Samancor, Glencore, Tharisa, Kazchrome, and others.
15. Furthermore, the Commission finds that the two major competitors of Mogale, namely Samancor and Glencore, are already vertically integrated with their own input supply of chrome ore. In addition, the Commission finds that in South Africa, there is excess supply of chrome ore. This was confirmed by the other local chrome ore producers.
16. Lastly, the Commission notes that Cheetah has not supplied chrome ore to any ferrochrome producer in the past 5 years after it halted its operations in 2016. Therefore, Cheetah has not been a supplier of chrome ore to any third party for many years, meaning that no third party is reliant on Cheetah for input supply.

Customer foreclosure

17. The Commission is of the view that the proposed transaction is unlikely to result in significant customer foreclosure concerns as Mogale is a small player in the market for the production of ferrochrome.
18. Considering the above, the Commission concludes that it is unlikely that the proposed merger will raise any significant foreclosure concerns. Taken as a whole, the proposed merger is unlikely to substantially prevent or lessen competition in any market.

Public interest**Effect of employment**

19. The merging parties provided an unequivocal statement that the proposed transaction will not have any adverse effect on employment and no retrenchments are contemplated as a result
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of the proposed transaction. The Commission contacted the employee representatives of both the Acquiring Group and Mogale and no concerns were raised.

23. The Department of Trade Industry and Competition (the “DTIC”) raised concerns about the retrenchments recently undertaken by Mogale. In this regard, the DTIC requested that the merging parties institute as a commitment / condition to the merger that for a period of 36 months following the merger implementation date, the merged entity will employ suitably qualified Affected Employees of Mogale, if employment opportunities become available. The merging parties agreed to a condition that it will establish a database with all the contact details of the affected employees and for a period of 24 (twenty-four) months from the Implementation Date will notify the affected employees of any positions arising, the requirements and the location of such positions.

Effect of the merger on the promotion of a greater spread of ownership, in particular to increase the levels of ownership of historically disadvantaged persons and workers in firms in the market

24. The Commission and the DTIC raised concerns about the effect of the proposed merger on the promotion of greater spread of ownership, in particular to increase the levels of ownership of historically disadvantaged persons and workers in firms in the market. This is because Mogale’s current shareholders include a workers’ trust and the Acquiring Group is not owned or controlled by a member of a historically disadvantaged group/person and does not have any BEE shareholding.
25. The Commission’s investigations revealed that on 23 December 2016 the Trust Beneficiaries (former employees of Mogale) concluded a Sale Agreement with Mogale wherein the Trust Beneficiaries disposed of their 6.83% shareholding to Mogale. The merging parties indicate that the 6.83% shareholding would have been disposed even absent the merger as the agreement was concluded in December 2016.
26. The Commission is of the view that because the Trust Beneficiaries had concluded the Sale Agreement for the sale of the shares in 2016, the merger is unlikely to have a significant negative effect on the promotion of a greater spread of ownership as contemplated in Section 12A(3)(e) of the Act.
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Effect of the merger on the South African ferrochrome industry and the local consumption of ferrochrome in South Africa

27. The Commission assessed if the merger will result in the increased exportation of ferrochrome and affect local beneficiation of ferrochrome or steel production.
28. The Commission found that prior to being put under care and maintenance, Mogale produced ferrochrome for both local consumption and for the export market. Mogale does not further beneficiate ferrochrome into any final products. Mogale exports most of its local production. This appears to be a trend in the market and other local producers of chrome ore have confirmed that most of their local production is exported.
29. Considering the above and the fact that Mogale is a small player in the production and supply of ferrochrome, the Commission is of the view that the merger is unlikely to negatively affect the ferrochrome industry in South Africa or to have a substantial negative effect on the local steel industry.

Conclusion and recommendations

30. Taken as a whole, the Commission is of the view that the proposed transaction is unlikely to substantially lessen or prevent competition in any market.
31. With respect to the effect of the merger on the public interest, the merging parties agreed to an employment condition, that is, to consider the retrenched employees when new employment opportunities become available in Mogale.
32. The Commission therefore approves the proposed transaction with conditions. The conditions are attached hereto as **Annexure A**.
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ANNEXURE A
BRIGHT MINERALS SA PROPRIETARY LIMITED
AND
AFARAK MOGALE PROPRIETARY LIMITED
CASE NO: 2021MAY0021

1 DEFINITIONS

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

- 1.1 **“Acquiring Firm”** means Bright Minerals SA Proprietary Limited;
 - 1.2 **“Affected Employees”** means, primarily, the 42 employees of the Target Firm who were retrenched and, secondarily, the 85 employees of the Target Firm who concluded voluntary separation packages with the Target Firm, during the period between August and October 2020;
 - 1.3 **“Approval Date”** means the date on which the Merger is approved by the Commission as set out in the Commission’s clearance certificate;
 - 1.4 **“Commission”** means the Competition Commission of South Africa;
 - 1.5 **“Competition Act”** means the Competition Act, No. 89 of 1998, as amended;
 - 1.6 **“Days”** means any calendar day which is not a Saturday, a Sunday or an official public holiday in South Africa. A public holiday shall also include such days as may be declared by the President of the Republic of South in terms of the Public Holidays Act, 36 of 1994;
 - 1.7 **“DTIC”** means the Department of Trade, Industry and Competition;
 - 1.8 **“Implementation Date”** means the date, occurring after the Approval Date, on which the Merger is implemented by the Merging Parties;
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- 1.9 **“Merger”** means the acquisition of control by the Acquiring Firm over the Target Firm;
- 1.10 **“Merging Parties”** means the Acquiring Firm and the Target Firm; and
- 1.11 **“Target Firm”** means Afarak Mogale Proprietary Limited (in business rescue).

2 RECORDAL

- 2.1. The Commission found that the proposed transaction is unlikely to result in a substantial lessening or prevention of competition in any relevant market.
- 2.2. Nevertheless, following engagements between the Merging Parties and the Commission, the Merging Parties agreed to the approval of the merger subject to the below employment conditions.

3 CONDITION

- 3.1 The Target Firm will, within 15 (fifteen) days of the Approval Date, establish a database of the Affected Employees and their contact details, and will send a communication to such Affected Employees informing them of the Target Firm's commitments in terms of these conditions, requesting them to update their contact details and offering them to opt out of receiving vacancy communications for the duration of these undertakings.
- 3.2 For a period of 24 (twenty-four) months from the Implementation Date, if any employment opportunity arises within the Target Firm, the Target Firm will, simultaneously with internal notification of such opportunity to existing employees, procure that a batch notification is sent to all Affected Employees informing them of the position, requirements and location.
- 3.3 The provisions of 3.2 will not apply in circumstances where the vacant position is of such a nature that it is evident that no Affected Employee has the requisite skills and/or qualifications for the position.
- 3.4 Under all circumstances, the onus will rest on the Affected Employees to apply for the vacant position. Affected Employees that apply for the vacant position will only be considered if their applications are received within the specified time period and comply with specified requirements, subject to operational requirements at the time, it being
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recorded that there may be circumstances in which vacant positions need to be filled urgently which may require shortened time periods.

- 3.5 The Target Firm's assessment of any such application will be subject to applicable employment and related laws, the Target Firm's recruitment practices at the time and operational requirements. Subject to applicable employment and related laws, applicable recruitment practices and operational requirements, favourable consideration will only be given to suitably qualified Affected Employees, in circumstances where the Affected Employee is equally qualified as an external applicant for that position.
- 3.6 The undertakings in this Annexure "A", exclude the Affected Employees who have found alternative employment and those who will have elected to opt out from receiving vacancy communications during the period of the undertakings' operation.

4 MONITORING OF UNDERTAKINGS

- 4.1 The Acquiring Firm shall inform the Commission in writing of the Implementation Date of the Merger within 5 (five) Days of it becoming effective.
- 4.2 Within 10 (ten) Days of each anniversary of the Implementation Date, the Merging Parties shall provide the Commission with a report regarding their compliance with the undertakings in this Annexure "A" comprising a report on the number of vacancies that became available during the preceding 12 (twelve) month period following the Implementation Date, the number of applications received from Affected Employees and the number of Affected Employees who have been employed within the Target Firm.

5 APPARENT BREACH

- 5.1 If the Commission receives any complaint concerning non-compliance with the Conditions or otherwise determines that there has been an apparent breach by the Merged Entity of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Rules.

6 VARIATION

- 6.1 The Merged Entity may at any time, on good cause shown, apply to the Commission for the Conditions to be lifted, revised or amended. Should a dispute arise concerning the variation of the Conditions, the Merging Parties shall apply to the Competition Tribunal, on good cause shown, for the Conditions to be lifted, revised or amended.

7 GENERAL

- 7.1 All correspondence in relation to these Conditions must be submitted to the following e-mail address: mergerconditions@compcom.co.za and Ministry@thedtic.gov.za.

Enquiries in this regard may be addressed to the Manager: Mergers and Acquisitions Division at Private Bag X23, Lynnwood Ridge, 0040. Telephone: (012) 394 3298