

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 1833

4 March 2022

NOTIFICATION TO APPROVE WITH CONDITIONS THE TRANSACTION INVOLVING:

SOUTH AFRICA INDUSTRIAL GROUP PROPRIETARY LIMITED

AND

PAUL BAYVEL EYETHU SALES PROPRIETARY LIMITED

CASE NUMBER: 2021JUL0023

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 as set out below:

1. On 12 July 2021, the Competition Commission ("Commission") received notice of an intermediate merger in terms of which South African Industries Group Proprietary Limited ("SAIG") intends to acquire **[Confidential]** % of the shareholding in Paul Bayvel Eyethu Sales Proprietary Limited ("PBES").

The parties and their activities

2. The primary acquiring firm is SAIG, which is incorporated in South Africa. SAIG is ultimately controlled by Messrs Nhlanganiso Mkwanazi ("Mkwanazi") and Ernest January ("January"). Mkwanazi and January are historically disadvantaged persons ("HDPs") as defined in section 3(2) of the Competition act No. 89 of 1998 (as amended) (the "Act"). SAIG, all firms controlled by SAIG, and all firms controlled by Mkwanazi and January, will be referred to as the "Acquiring Group".

3. The Acquiring Group conducts private equity activities. Of relevance to the merger are the Acquiring Group's local manufacture of copper tubing/pipes through Copper Tubing Africa Proprietary Limited ("CTA") which manufactures and wholesales copper tubing, plumbing fittings, and allied products for distribution primarily in South Africa.
4. The primary target firm is PBES, a private company incorporated in South Africa. The shares in PBES are held by Norman Bayvel (60%) and Stephanie Moonsammy (40%), who is an HDP.
5. PBES wholesales various products including copper tubes, underground plastic piping, plastic fittings, HDPE piping, UPCV & MPVC pressure piping, polycop pipe, electric cableflex, sanitaryware, galvanised fittings, cast iron gate valves, and a whole range of other complementary products that are sold to the hardware and building material retail market, as well as civil and engineering contractors.

Overlaps

6. The Commission found that the proposed transaction results in horizontal overlaps in the wholesale of copper tubes and polypropylene pipes in South Africa. The Commission also found that the transaction also raises a vertical aspect, as PBES purchases copper tubes from CTA.
 7. The Commission did not definitively conclude on the relevant markets but assessed the following:
 - 7.1. the upstream market for the national manufacture and supply of copper tubes (the "Upstream Market");
 - 7.2. the downstream market for the national wholesale of copper tubes (the "Downstream Market"); and
 - 7.3. the downstream market for the national wholesale of polypropylene pipes (the "Polypropylene Market").
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Competition assessment

Horizontal assessment

8. In the Downstream Market the Commission estimated that the merged entity will have an estimated combined market share ranging between 25% and 35% with an accretion of less than 10%. In addition, the Commission found that the merged entity will continue to be competitively constrained by other credible alternatives such as Maksal, MacNeil, Eurocool, Arkham Plumbing, Halsted, Plumblink, Metraclark and others.
9. As regards the Polypropylene Market, the Commission found that PBES (the Target Firm) supplies a product called "polycop" which is a trademarked polypropylene pipe manufactured by Eurocelt Plastics (Pty) Ltd. The Commission considered the effects of the transaction in the narrowest Polypropylene Market, which only consists of polycop. In this narrow market, the Commission found that the merged entity would have an estimated market share of less than 35% with an accretion of less than 10%. The Commission also found that there remain ample credible alternative suppliers such as, MacNeil Plastics (Pty) Ltd; Cachet; Bugger Investments CC; Atlas Plastics; Unitwist; and Inkulu Plastics amongst others.

Vertical assessment

Input foreclosure

10. The Commission found that there are only 2 local manufacturers of copper tubes active in the Upstream Market. In that market, the Acquiring Group accounts for market shares ranging between 15% and 25%. The Commission also found that copper tubes are also currently imported into South Africa and are not subject to any import duties, making imports of copper tubes a possible alternative.
 11. In addition, pre-merger, PBES accounts for an insignificant market share in the Downstream Market.
 12. Considering the above, the Commission concluded that input foreclosure is unlikely to arise post-merger.
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Customer foreclosure

13. As indicated above, the Commission found that PBES has a market share of less than 10% in the Downstream Market. Moreover, the Commission found that PBES last procured copper tubes from the Acquiring Group in 2018 and that this accounted for an insignificant amount of the Acquiring Group's copper tube sales.
14. Furthermore, the Commission found that post-merger, there are ample prospective downstream customers for copper tubes for the merged entity's Upstream rival/s, such as MacNeil, Saffer Plumbing, K Carrim, Splashworks and Arkham.
15. Considering the above, the Commission concluded that anticompetitive customer foreclosure is unlikely to arise post-merger.

Restraint of trade

16. The Commission found that the merging parties intended on concluding a restraint of trade in terms of which PBES's current shareholders would be restrained from conducting any business in competition with PBES in Africa for a period of 10 years (the "Restraint"). The Restraint would commence upon the expiry of the lock-in period (approximately 2 years from the merger implementation date, during which time the Sellers would be employees of the merged entity).
17. Based on international and local jurisprudence, the Commission found that the duration and scope of the Restraint was likely to raise competition concerns. In view of the Commission's concerns, the parties have agreed to the conditions attached as **Annexure A** to these reasons.

Public Interest***Employment***

18. The merging parties submitted that there will be no job losses in South Africa because of the merger.
 19. The Commission contacted the employee representatives of SAIG, CTA and PBES and no
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employment concerns were raised regarding the merger.

Promotion of a greater spread of ownership (section 12A(3)(e) of the Act

20. The merging parties submitted that the merger promotes public interest in this regard as the level of HDP ownership at PBES will increase from 40% pre-merger to 94% post-merger.
21. The Department of Trade, Industry and Competition (“DTIC”) participated in the merger on 21 July 2021. The DTIC required that the merger is approved subject to a condition that the merged entity establishes an ownership scheme/trust that equates to at least 10% of the merger entity’s share capital, for the benefit of workers.
22. The Commission concluded that the transaction is unlikely to result in a substantial negative effect on the public interest and thus, no further intervention is necessary.

Conclusion

23. Considering the above, the Commission approves the merger subject to the conditions attached as **Annexure A** hereto.

ANNEXURE A
SOUTH AFRICAN INDUSTRIAL GROUP (PTY) LTD
AND
PAUL BAYVEL EYETHU SALES (PTY) LTD
CC CASE NUMBER: 2021JUL0023

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 South African Industrial Group (Pty) Ltd;
 - 1.2. **“Approval Date”** means the date referred to on the Commission’s merger clearance certificate (Form CC15);
 - 1.3. **“Commission”** means the Competition Commission of South Africa;
 - 1.4. **“Commission Rules”** means the Rules for the Conduct of Proceedings in the Commission;
 - 1.5. **“Competition Act”** means the Competition Act 89 of 1998, as amended;
 - 1.6. **“Conditions”** means these conditions;
 - 1.7. **“Days”** means any calendar day which is not a Saturday, Sunday, or an official holiday in South Africa;
 - 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. “**Lock In Period**” means a period immediately after the Implementation Date and ending no later than 28 February 2023;
- 1.10. “**Merger**” means the Acquiring Firm’s proposal to acquire a **[Confidential]**% interest in the Target Firm which constitutes an intermediate merger for the purposes of the Act;
- 1.11. “**Merging Parties**” means the Acquiring Firm and the Target Firm;
- 1.12. “**Merged Entity**” means the merged business operations of the Merging Parties;
- 1.13. “**Restraint**” means a provision to be included in the Sale of Shares Agreement and in terms of which each Restrained Shareholder is precluded from conducting any business in competition with the Target Firm; within SADC, for a period of 5 (five) years commencing immediately upon the expiry of the Lock In Period or immediately upon the earlier termination of the Lock In Period (whichever comes first);
- 1.14. “**Restrained Shareholders**” means Norman Bayvel and Stephanie Moonsammy who will collectively hold a **[Confidential]** % interest in the Target Firm, post-Merger;
- 1.15. “**SADC**” means the Southern African Development Community;
- 1.16. “**Sale of Shares Agreement**” means the agreement to be concluded by the Merging Parties, reflecting inter *alia*, the Lock In Period, the Restraint, and other terms of the sale of the Target Firm to the Acquiring Firm; and
- 1.17. “**Target Firm**” means Paul Bayvel Eyethu Sales (Pty) Ltd.

2. RECORDAL

- 2.1. The Merging Parties filed the Merger on 12 July 2021.
- 2.2. The Commission’s investigation found that the Merging Parties contemplated that the Restrained Shareholders would be restrained from conducting any competing business to the Target Firm within Africa, for up to **[Confidential]** years from the implementation date in the draft sale of shares agreement being 1 March 2021, which date was selected for the sole reason that it aligns with the financial year end of PBES for accounting
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purposes. The Commission found that this proposed restraint was unjustifiable, both in terms of its scope and duration notwithstanding the evidence proffered by the Merging Parties. Consequently, the Commission concluded that the proposed restraint was likely to raise competition concerns.

- 2.3. To address this concern, the merging parties and the Commission have agreed to the Conditions.

3. CONDITIONS

- 3.1. The Restraint to be concluded by the Merging Parties shall be limited to –

3.1.1. the Restrained Shareholders;

3.1.2. any business competing with the Target Firm, namely the wholesale and/or distribution of plumbing equipment and accessories in competition with the Target Firm within SADC; and

3.1.3. shall endure for a period not longer than 5 (five) years, commencing immediately upon the expiry of the Lock in Period or immediately upon the earlier termination of the Lock In Period, whichever comes first.

4. MONITORING OF COMPLIANCE WITH CONDITIONS

- 4.1. The Merged Entity shall notify the Commission of the Implementation Date within 5 (five) Days of its effectiveness.
- 4.2. Within 30 (thirty) Days of the signature of the Sale of Shares Agreement, the Merging Parties shall provide the Commission with a copy of the signed Sale of Shares Agreement reflecting the Restraint as outlined in these Conditions.
- 4.3. For the duration of the Restraint, the Merging Parties shall on each anniversary of the Approval Date, provide the Commission with an affidavit from a director of the Acquiring Firm, attesting to compliance with the Conditions.
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5. APPARENT BREACH

- 5.1. Should the Commission receive any complaint in relation to non-compliance with the above Conditions, or otherwise determines that there has been an apparent breach by the Merging Parties of these Conditions, the breach shall be dealt with in terms of Rule 39 of the Commission Rules.

6. VARIATION

- 6.1. The Merging Parties 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 in relation to the variation of the Conditions, the Merging Parties shall apply to the 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 email addresses: 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