

***Case No COMP/M.3767 -
BHP / WMC***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 26/04/2005

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Brussels, 26.04.2005

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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party :

Dear Sir/Madam,

**Subject: Case No COMP/M. 3767 - BHP/ WMC
Notification of 21.03.05 pursuant to Article 4 of Council Regulation No 139/2004¹
(Merger Regulation)**

1. On 21 March 2005, the Commission received a notification by which the undertaking BHP Billiton Limited ("BHP", Australia) notified its intention to acquire control of the whole of the undertaking WMC Resources ("WMC", Australia) by way of public bid announced on 08/03/2005².

I. THE PARTIES AND THE CONCENTRATION

2. BHP is an international diversified resources company with operations in aluminium, energy and metallurgical coal, copper, ferro-alloys, iron ore, titanium, minerals, oil, gas, liquefied natural gas, nickel, diamonds, gold and silver.
3. WMC is a diversified resources company with three principal businesses: nickel mining concentrating, smelting, and refining business in Western Australia; copper uranium business in South Australia; and a fertiliser production complex in Queensland, Australia. In addition, it also holds a 90% stake in a titanium dioxide project in Mozambique which has not yet commenced production.
4. If its public offer is successful, BHP will acquire sole control of WMC. Therefore it constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. COMMUNITY DIMENSION

¹ OJ L 24, 29.1.2004 p. 1.

² The bidder statement was lodged on 21/03/2005

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion³ (BHP EUR 19,200 million, WMC EUR 2,264 million). Each of the undertakings have a Community-wide turnover in excess of EUR 250 million (BHP EUR [...], WMC EUR [...]), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

III. COMPETITIVE ASSESSMENT

A. Relevant Product Market

Product market definition

6. The notifying party submits that the principal areas of overlap between the operations of BHP and WMC relate to nickel and copper. The proposed concentration also gives rise to smaller overlaps relating to co-produced products of the nickel and copper operations such as cobalt, gold and silver, and a possible future overlap in relation to mineral sands. According to the parties in respect to uranium oxide there was an historic but no current overlap.

Nickel

7. The Commission has previously identified a distinct product market for refined nickel⁴, noting that, according to its levels of purity, it could be further divided into class I and II. BHP submits that this further subdivision is not relevant and that a single market for the production of primary nickel should be considered. There are also possible markets for the intermediate nickel products. These are nickel-in-concentrate derived from nickel sulphide (10-25% nickel), laterite (nickel oxide) ores and nickel-in-matte (c. 70% of nickel); all are traded as separate products, although BHP submits that there is limited third party trade in these products with most production being used internally and as such this should not be considered as a separate market. As the operation does not raise competition concerns on any reasonable product market the market definition can be left open.

Copper

8. The Commission has in a previous decision identified a separate market for copper but did not consider whether the various stages in the production of refined copper were to be regarded as constituting separate markets⁵. In a later decision the Commission concluded that there appeared to be a separate market for the sale of the intermediate product, copper concentrate, to third parties and also identified a distinct market for the sale of refined copper (copper cathode)⁶. BHP agrees that there are separate markets for the sale of copper concentrate to third parties and for the sale of refined copper.

Cobalt, Gold, Silver

9. The Commission has in previous decisions identified distinct product markets for gold and silver⁷ and BHP submits that there is also a distinct market for cobalt, which is a metal produced as a co-

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

⁴ Case N° IV/M.470 Gencor/ Shell

⁵ Case N° IV/M.470 Gencor/ Shell

⁶ Case N° COMP/M.2413 BHP/ Billiton

⁷ Case N° IV/M.470 Gencor/ Shell

product in the refining of nickel. As the operation does not raise competition concerns on any reasonable product market the market definition can be left open.

Mineral sands

10. Mineral sands is a generic description covering several different minerals found in combination in the same deposit and mined jointly. The Commission has in previous decisions looked at titanium dioxide feedstocks and zircon⁸ as comprising separate markets. As the operation does not raise competition concerns on any reasonable product market the market definition can be left open.

Uranium oxide

11. Uranium oxide in the form U₃O₈, or “yellowcake”, is used in the production of fissile materials (enriched natural uranium) in nuclear fuel assemblies. Enriched uranium is used in nuclear reactors to generate electricity. As the operation does not raise competition concerns on any reasonable product market the market definition can be left open.

Geographic market definition

12. The Commission has previously determined that the scope of the relevant geographic market for nickel is worldwide due to the fact that metals are traded on a global basis under long term contracts with prices tied to the prices quoted on the London Metal Exchange⁹.
13. In the same case, the Commission also considered the market for copper to be worldwide and in a later case¹⁰ it also considered that the market for the supply of copper concentrates should also be considered worldwide.
14. The relevant geographic market for gold and silver was considered to be worldwide in a previous Commission decision¹¹. BHP submits that the market for cobalt should also be considered as worldwide and in view of the fact that the concentration would not significantly impede effective competition in the common market or in a substantial part of it the exact geographic market definition can be left open.
15. The Commission has previously determined that the scope of the relevant geographic market for titanium dioxide feedstocks¹² and zircon¹³ is worldwide. However in the more recent decision¹⁴ the issue of geographic dimension of markets for titanium dioxide feedstocks and zircon was left open. BHP submits that the relevant product markets should be considered as global. As the operation does not raise competition concerns on any reasonable geographic market the market definition can be left open.

⁸ Case N° COMP/M.3276 Anglo American/Kumba

⁹ Case N° IV/M.470 Gencor/ Shell

¹⁰ Case N° COMP/M.2413 BHP/ Billiton

¹¹ Case N° COMP/M.2413 BHP/ Billiton

¹² Case N° IV/M.470 Gencor/ Shell

¹³ Case N° IV/M.660 RTZ-CRA

¹⁴ Case N° COMP/M.3276 Anglo American/Kumba

16. The parties claim that the relevant geographic market for uranium oxides is worldwide. As the operation does not raise competition concerns on any reasonable geographic market the market definition can be left open.

B. Competitive Assessment

17. The parties to the concentration are both active in the production of refined nickel. The transaction will result in a combined worldwide market share of production in 2003 of [10 to 15]% (BHP [5 to 10]% and WMC [0 to 5]%). There would be no overlap of activities if the market were to be further subdivided into Class I and Class II refined nickel, as BHP only produces Class II nickel and WMC only produces Class I nickel.

18. In relation to possible markets of upstream products only WMC is active in the sale to third parties of nickel concentrate from sulphide ores with 2003 worldwide market shares of sales of [20 to 25]%. There is no overlap in this activity with BHP, and therefore the transaction does not present any competition concerns. Only BHP purchases laterite (nickel oxide ores) and there is no overlap with WMC's activities as further refining of oxide ores requires a different processing methods than in respect of sulphide ores. In any case, as there is no overlap, therefore the transaction does not present any competition concerns. Furthermore, WMC's share of nickel-in-matte (approximately 70% of nickel) in 2003 represents only [30 to 35]% of third party sales which constitutes [0 to 5]% of world production. Given that nickel metal prices are determined on international exchanges and that there are many alternative suppliers (including those producers not currently selling to the third parties) no significant effect on competition is expected. Moreover, there is no overlap with BHP's activities as BHP is not active in third party sales of nickel-in-matte, and therefore the transaction does not present any competition concerns.

19. The parties are both active in the production of refined copper but their combined 2003 worldwide market shares concerning third party sales and production would be less than [0 to 5]% which would not lead to any competition concerns. BHP is active in the upstream market for copper concentrate with a worldwide market share in 2003 of [10 to 15]% in terms of third party sales, however WMC is not active in this market and uses its own copper concentrate production in the production of refined copper.

20. The parties to the concentration are active in the markets for gold, silver and cobalt with combined 2003 worldwide market shares in the production of these products of less than [0 to 5]% for gold, [5 to 10]% for silver and [5 to 10]% for cobalt. The transaction would therefore not result in any competition concerns in these markets.

21. Only BHP is currently active in the production of titanium dioxide feedstocks and zircon with corresponding 2003 worldwide market shares of less than [5 to 10]% and [10 to 15]%. WMC is not currently involved in production of mineral sands, however it holds a 90% stake in the Corridor Sands deposit in Mozambique which has not yet commenced production. Currently planned production of titanium dioxide feedstocks will constitute around [0 to 5] % of world production and in terms of zircon around [0 to 5]% of world production. Due to uncertainties of planned activities and existence of other significant players in both product markets as well as comparatively low future combined market shares ([10 to 15]% for titanium dioxide feedstocks, [10 to 15]% for zircon), the transaction would therefore not result in any competition concerns in these markets.

22. Only WMC is currently active in the production of uranium oxide with 2003 worldwide market share of [5 to 10]%. It is worth noting that WMC's Olympic Dam is considered the largest uranium deposit in the world (reportedly around 38% of global reserves). However, currently WMC faces competition from a number of large established players including Cameco, Rio Tinto and Cogema. It also faces competition from alternative sources of uranium for nuclear power generation, mainly dismantled nuclear weapons under agreed programs between the USA and Russia. BHP has no current interests in the mining or sale of uranium oxide. It has interests in two former uranium

mines in the United States. These mines are closed and the sites are being reclaimed. There is no overlap between WMC and BHP in the production and sale of uranium oxide.

IV. CONCLUSION

23. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission

[signed]

Neelie KROES

Member of the Commission