



EUROPEAN COMMISSION
DG Competition

Case M.4494 – Evraz/Highveld

Only the English text is available and authentic.

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

***Decision on the implementation of the commitments -
Waiver of the Commitments***

Date: 24.09.2019



EUROPEAN COMMISSION

Brussels, 24.09.2019
C(2019) 6964 final

PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Dear Sir/Madam,

Subject: Case M.4494 – Evraz/Highveld

Commission decision on Evraz' request of 14 January 2019 under clause 48 of the Commitments annexed to the Commission decision of 20 February 2007 for a partial waiver of the Commitments¹

1. On 14 January 2019, Evraz Group S.A. ("Evraz") requested a waiver of certain undertakings it submitted in the above-mentioned case and consequently the discharge of the Monitoring Trustee.² This Decision presents the Commission's assessment of Evraz' request.

1. BACKGROUND

2. By decision of 20 February 2007 ("the Clearance Decision") pursuant to Article 6(1)(b) and (2) of the Merger Regulation,³ the Commission declared the operation by which Evraz acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the whole of Highveld Steel and Vanadium Corporation Limited ("Highveld") compatible with the internal market and with the EEA Agreement (the "Transaction"), subject to full

¹ All abbreviations and capitalised terms used in this decision have the same meaning as in the Commission's decision of 20 February 2007 in Case M.4494 – *Evraz/Highveld*.

² The original request was amended by Evraz on 13 March 2019.

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22. With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "common market" by "internal market". The terminology of the TFEU will be used in this Decision.

compliance with the commitments submitted by Evraz and annexed to the Clearance Decision (“the Commitments”).⁴

3. The Commitments aimed at preventing anti-competitive horizontal effects in the markets for the supply of high-purity vanadium pentoxide and vanadium chemicals, as well as the foreclosure of downstream competitors on the markets for vanadium oxides and finished vanadium products.
4. In order to address competition concerns identified by the Commission, Evraz submitted remedies⁵ and committed to (i) divest Highveld's vanadium business combined with either an equity interest in or full ownership of a discrete part of Highveld's Mapochs Mine; (ii) to divest Highveld's 50% shareholding in South Africa Japan Vanadium (Proprietary) Limited ("SAJV"); and (iii) to enter into long-term supply agreements with Treibacher,⁶ Vanady Tula⁷ and Chusovskoy⁸ (i.e., the merged entity's three main customers of vanadium feedstock in the medium term). While the long-term agreements vis-à-vis Treibacher and – on the basis of its stake in the Mapochs Mine – with the Divestment Business were not limited in time, vis-à-vis Vanady Tula and Chusovskoy, the Commitments included a supply agreement of “*not less than [...] from the Effective Date.*”
5. The Commission concluded in the Clearance Decision that the proposed remedies were sufficient to remove the competition concerns and to restore effective competition on all affected markets and cleared the Transaction.
6. The Commission approved ING Corporate Finance ("ING") and KPMG LLP as suitable trustees to monitor the implementation of the remedies.⁹ On 20 March 2007, Evraz engaged ING as a monitoring trustee ("the Trustee"), until its discharge on 9 September 2009.
7. On 29 May 2008, the Commission approved Duferco as the purchaser of the Divestment Business, comprising of (i) Highveld's vanadium business; (ii) a 35% equity interest in the Mapochs mine; and (iii) a 50% shareholding in SAJV.
8. On 15 December [...]*, Vanady Tula was acquired by a subsidiary of Evraz, and therefore – to this date – belongs to the Evraz Group.
9. In April 2015, the Divestment Business,¹⁰ informed the Commission of the financial distress of Evraz Highveld Steel & Vanadium Ltd. ("Evraz Highveld") and the Mapochs Mine; therefore the Trustee was re-appointed on 22 May 2015¹¹ in order to assess on a continuous basis the possible consequences of such distress on the implementation of the Commitments.
10. Evraz Highveld has been in business rescue since 14 April 2015 and is still in the process of being wound down by the business rescue practitioner appointed under the South

⁴ OJ C 126, 07.06.2007, p. 3.

⁵ For the sake of completeness, it should be noted that the initial remedy package submitted on 2 February 2007 was revised on 14 February 2007 ("the Commitments").

⁶ Treibacher Industrie AG.

⁷ OAO Vanady Tula.

⁸ OJSC Chusovskoy Steel Works.

⁹ By letter of Director [...] to Evraz on 20 March 2007.

* Should read: 2009

¹⁰ Vanchem Vanadium Products (Proprietary) Limited.

¹¹ By letter of Director [...] to ING on 22 May 2015.

African Business Rescue Act. As part of the wind-down procedure, the business rescue practitioner entered into a contract manufacturing and option to buy agreement with AcelorMittal South Africa (“AMSA”). Following the refurbishment of Evraz Highveld’s structural steel mill in April 2017, this part of the site is now operational but remains under management of the business rescue practitioner.¹² It should be noted, however, that no vanadium slag production has resulted from the re-activation of the structural mill. Other assets of Evraz Highveld have been already sold¹³ or are on sale.¹⁴

11. The Mapochs Mine has been in business rescue since 20 April 2015. Despite several attempts of the business rescue practitioner to re-start mining and the sale of ore fines in 2015, the Mapochs Mine entered into provisional liquidation since the South African High Court’s appointment of liquidators in May 2016. In September 2017, the liquidator sold the mine assets to International Resources Ltd. (“IRL”). In May 2018, IRL stated that it was its intention to bring the Mapochs Mine back into operation and that the application process with the South African Department of Mineral Resources to transfer the mining license was under way. At the time, IRL indicated a willingness to sell ore fines to the Divestment Business once operational again.
12. However, the liquidators of the Mapochs Mine informed the Trustee that the timing of the finalisation of the liquidation of the Mapochs Mine is dependent on IRL receiving consent from the South African Department of Mineral Resources for the transfer of mining rights to IRL, a process which can apparently take a number of years. Without this, IRL would be unable to mine at Mapochs. Furthermore, the Competition Commission of South Africa (“CCSA”) prohibited on 20 July 2018 the operation of the Mapochs Mine by IRL. IRL appealed this initial prohibition decision.

2. EVRAZ' REQUEST FOR A PARTIAL WAIVER OF THE COMMITMENTS

13. On 14 January 2019, Evraz requested, pursuant to clause 48 lit. (b) of the Commitments to “waive the undertakings given by Evraz” in the Commitments and to discharge the Trustee from its obligations under the Commitments pursuant to clause 47 of the Commitments, based on Evraz’ permanent loss of control over Highveld and its assets. In its letter of 13 March 2019, Evraz clarified that it requested a waiver for the entirety of the undertakings given by Evraz in the Commitments to the extent they remain applicable to date, including the supply commitments to Treibacher, Vanady Tula and Chusovskoy.

3. THIRD PARTIES

14. The Commission contacted Treibacher and the Divestment Business in order to gather their views on the potential impact of the partial waiver of the Commitments. Treibacher and the Divestment Business submitted their comments on 20 May and 24 May 2019, respectively. In view of the fact that Vanady Tula now belongs to Evraz and that Evraz’ commitment to supply Vanady Tula and Chusovskoy was limited in time and thus elapsed by now, these two undertakings were not contacted with regard to the partial waiver request of Evraz.
15. In its letter of 20 May 2019, Treibacher submitted that it cannot comment on the level of control Evraz still exercises over Evraz Highveld or on Evraz’ strategic considerations

¹² AMSA has still the option to buy the mill in March 2020.

¹³ Iron, titanium, vanadium and lime ore stockpiles have been sold with the purchase price to be received in tranches.

¹⁴ Two iron plants and the plate mill are still up for sale with indications that they would be sold on auction as scrap.

concerning the business rescue or liquidation proceedings the assets in question are currently subject to. Therefore, Treibacher considers that it cannot predict what the result of a waiver would be and whether/how this could affect Treibacher's position on the market.

16. In its letter of 24 May 2019, the Divestment Business stresses that the right to obtain a proportion of the output of the Mapochs Mine pursuant to the Commitments is essential for its activities. It further submitted that it does not agree to Evraz' request of waiver as it considers that (i) Evraz is still the main shareholder of Evraz Highveld, (ii) the acquisition of Mapochs Mine by IRL is not yet concluded, (iii) its right to claim for damages due to the suspension of the supply of fines and/or non-supply of substitute sources of vanadium input remains reserved and (iv) the Divestment Business at present remains in business rescue and incapable of operating at capacity as a result of non-supply of fines from Mapochs Mine and Evraz's failure to meet its commitments.

4. OPINION OF THE MONITORING TRUSTEE

17. On 25 January 2019 the Trustee submitted its opinion on Evraz' request. In the opinion, the Trustee stated that Evraz does not have control over Highveld and therefore it is not in a position to comply with the Commitments with regard to the long-term supply agreements relating to the Mapochs Mine. Furthermore, the Trustee stated that under the current exceptional circumstances it appears to be effectively impossible for Evraz to continue to fulfil its relevant obligations under the Commitments relating to the Mapochs Mine. In its second opinion of 21 March 2019, the Trustee further submitted that twelve years after the adoption of the Clearance Decision, it is now well past the minimum period ([...]) required by the Commitments for Evraz to supply Vanady Tula and Chusovskoy. In its reply to the Commission's questions submitted on 3 May 2019, the Trustee further explained that it is of the view that the Commitments vis-à-vis Chusovskoy expired in [...], that is [...] after the Effective Date.¹⁵ Therefore, the Trustee does not oppose to the request of Evraz

5. ASSESSMENT OF THE REQUEST FOR A PARTIAL WAIVER OF THE COMMITMENTS

18. For the reasons explained below, the Commission considers that the arguments and evidence provided by Evraz in its request for the partial waiver of the Commitments meet the conditions set out in paragraph 48 of the Commitments and therefore justify granting the requested complete waiver of the Commitments.

5.1. Legal Test

19. As regards the conditions under which such a waiver may be granted, under clause 48 lit (b) of the Commitments (the "review clause"), *"the Commission may, where appropriate, in response to a request from Evraz showing good cause and accompanied by a report from the Monitoring Trustee [...] waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in [the] Commitments."*
20. Thus, unlike extensions of divestment periods, which, pursuant to clause 48 lit. (a) of the Commitments, can be granted on the basis of the mere "good cause" shown by Evraz, a waiver of Commitments under the review clause can only be granted in cases where there are also "exceptional circumstances".

¹⁵ As defined in the Commitments as the date of adoption of the [Clearance] Decision, i.e. 20 February 2007.

21. In this respect, paragraph 74 of the Remedies Notice¹⁶ states that “[a] waiver, modification or substitution of commitments may be more relevant for non-divestiture commitments, such as access commitments, which may be on-going for a number of years and for which not all contingencies can be predicted at the time of the adoption of the Commission decision. Exceptional circumstances justifying a waiver, modification or substitution may, first, be accepted for such commitments if parties show that market circumstances have changed significantly and on a permanent basis. For showing this, a sufficient long time-span, normally at least several years, between the Commission decision and a request by the parties is required.”
22. The Remedies Notice¹⁷ also stipulates that “[f]or any waiver, modification or substitution of commitments, the Commission will also take into account the view of third parties and the impact a modification may have on the position of third parties and thereby on the overall effectiveness of the remedy. In this regard, the Commission will also consider whether modifications affect the right already acquired by third parties after implementation of the remedy.”
23. Within this framework, a waiver of the commitments can be justified when the requesting party demonstrates that the changes in the market (i) are significant, permanent and unforeseeable, and (ii) ensure that the competition concerns laid out in the clearance decision no longer arise and are not likely to arise again.¹⁸

5.2. Application to the present case

24. In the following paragraphs the Commission assesses Evraz’s waiver request against the above criteria in order to determine whether exceptional circumstances exist, that is to say, it assesses (i) whether the circumstances put forward by Evraz constitute a significant, permanent and unforeseeable change in market circumstances, (ii) whether those circumstances ensure that the competition concerns laid out in the Clearance Decision no longer arise and are not likely to arise again, and (iii) the impact of the waiver on third parties.

5.2.1. Significant, permanent and unforeseeable change in the market

25. The Commission considers that the circumstances put forward by Evraz in the present case could be qualified as a significant, permanent and unforeseeable change in market circumstances leading either to Evraz inability to procure the implementation of the Commitments or to the loss of cause to continue procuring some of them

a) Significant change in the market circumstances

26. The Commission notes that due to its financial distress, Highveld has been in business rescue since 14 April 2015 and is still in the process of being wound down by the business rescue practitioners appointed under the South African Companies Act. Under the South African business rescue process, management of the company is taken over by officially appointed business rescue practitioners during the rescue period. Therefore, although Evraz

¹⁶ Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27.

¹⁷ Paragraph 74.

¹⁸ Commission decision C(2018) 5887 final of 4 September 2018 in case COMP/M.8465 – Vivendi/Telecom Italia, para. 18; Commission decision C(2016) 4964 final of 25 July 2016 in case COMP/M.3770 – Lufthansa/Swiss, para. 20.

still holds 85.11% of the share capital of Highveld, it effectively exercises no control over Highveld.

27. Similarly, the Mapochs Mine – due to the financial distress of its parent, Highveld – is in the business rescue process and is inoperative since 20 April 2015¹⁹ and entered into provisional liquidation since the South African High Court’s appointment of liquidators in May 2016. Therefore, Evraz has effectively no control over the Mapochs Mine either.
28. Furthermore, regarding the long-term supply agreement with Vanady Tula, the Commission notes that Vanady Tula was acquired by a subsidiary of Evraz on 15 December 2009. Consequently, as both undertakings belong to the same corporate group, no foreclosure can be envisaged.
29. Finally, with regard to the long-term supply agreement with Chusovskoy, the Commission notes that the Commitments expired on [...] (see point 17 above).

b) Change of the market circumstances on a permanent basis

30. While the Commission notes that, as confirmed by the Trustee, the business rescue proceedings have not yet been terminated, it is unlikely that Evraz will ever regain control over Highveld (and thus the Mapochs Mine). On the contrary, the expectation according to the business rescue procedure is that, following the sale of its final assets, Evraz Highveld – being at that stage a mere shell company - will be liquidated. Therefore, the loss of Evraz’ ability to influence Highveld’s strategic decisions is stable and not merely temporary.

c) Unforeseeability of the change in the market circumstances

31. The Commitments for which a waiver is requested were long-term remedies for which not all contingencies could be predicted at the time of the adoption of the merger decision that made the Commitments binding and, in particular, the fact that Evraz would be unable to implement its Commitments due to the effective loss of control over Highveld (and thus the Mapochs Mine) as a result of the financial difficulties experienced by this business.
32. Consequently, Evraz is no longer able to comply with the Commitments regarding the supply of the Divestment Business and Treibacher as it has no longer control over Highveld and its Mapochs Mine from which – pursuant to the Commitments – such supply should be sourced.

5.2.2. The competition concerns laid out in the Clearance Decision no longer arise and are no longer likely to arise.

33. The Commission also considers that the described changes ensure that the competition concerns laid out in the Clearance Decision no longer arise and are no longer likely to arise (i.e. horizontal non-coordinated effects as well as vertical competition concerns linked to the upstream market for the supply of vanadium feedstock). As explained in Section 5.2.1, Evraz – due to the ongoing business rescue and liquidation processes - is no longer able to exercise decisive influence over Highveld or the Mapochs Mine and is highly unlikely to regain control over them in the future, which means that the horizontal and vertical non-coordinated anti-competitive effects linked to the merger are no longer likely to arise. In this regard the Commission notes that the fact that the acquisition of the Mapochs Mine by IRL is not yet

¹⁹ For the sake of completeness, the Commission notes that due to its loss of access to input materials (slag from Highveld and ore fines from the Mapochs Mine), the Divestment Business also entered into business rescue process on 17 November 2015.

implemented has no effect on Evraz' loss of control as the latter occurred as a consequence of the business rescue/liquidation processes.

5.2.3. The partial waiver of the Commitments would have no merger-specific effect on third parties

34. The Commission considers that the partial waiver of the Commitments as requested by Evraz would have no merger-specific effect on third parties for the following reasons.
35. First, regarding the supply agreements with the Divestment Business and Treibacher, Evraz is no longer in a position to continue implementing the supply agreements in view of its loss of control over Highveld. As explained in paragraph 30, it is highly unlikely that Evraz will ever regain control over Highveld in the future. Therefore, the waiver of the Commitments will have no merger-specific effect for the Divestment Business and Treibacher since Evraz has already lost its ability to influence Highveld's strategic decisions.²⁰
36. Second, with regard to the long-term supply agreements with Vanady Tula and Chusovskoy, the Commitments elapsed based on the internalisation of Vanady Tula and the expiration of the [...] -year period after the Effective Date regarding Chusovskoy.

6. CONCLUSION

37. In the light of the foregoing, the Commission considers that Evraz has shown that the market conditions since the adoption of the Clearance Decision have significantly and permanently changed, in a way which was not reasonably foreseeable at the time of the adoption of such decision.
38. The Commission also considers that these changes ensure that the competition concerns outlined in the Clearance Decision no longer arise during the period when the Commitments should remain in place. With regard to the supply agreements with the Divestment Business and Treibacher, these changes lead to Evraz' inability to procure the implementation of the Commitments, and regarding the long-term supply agreements with Vanady Tula and Chusovskoy, the Commitments have elapsed.
39. The Commission concludes that Evraz' arguments satisfy the requirements of "exceptional circumstances" laid down in clause 48 of the Commitments. The Commission therefore accepts Evraz' request to grant a partial waiver from its obligation to comply with the Commitments with regard to its supply obligations towards the Divestment Business and Treibacher.

For the Commission

(Signed)
Cecilio MADERO VILLAREJO
Acting Director-General

²⁰ The Commission notes however that the present partial waiver has no effect on any potential right of third parties to claim damages on a contractual basis, which should be dealt with in the business rescue/liquidation processes. Furthermore, it should be noted that the inability of the Mapochs Mine to supply fines is due to the business rescue process and not the partial waiver of the Commitments.