

# COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No: 79/FN/Sep11

In the matter between:

**THE COMPETITION COMMISSION OF SOUTH AFRICA      APPLICANT**

and

**PHELPS DODGE NATIONAL CABLES CORPORATION      1<sup>ST</sup> RESPONDENT**

**PHELPS DODGE CORPORATION      2<sup>ND</sup> RESPONDENT**

**FREEPORT MCMORAN COPPER AND GOLD INC      3<sup>RD</sup> RESPONDENT**

**NATIONAL CABLES (PTY) LTD      4<sup>TH</sup> RESPONDENT**

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Panel : N Manoim (Presiding Member)

: Y Carrim (Tribunal Member)

: A Wessels (Tribunal Member)

Heard on : 12 October 2011

Last submissions from the Commission: 25 October 2012

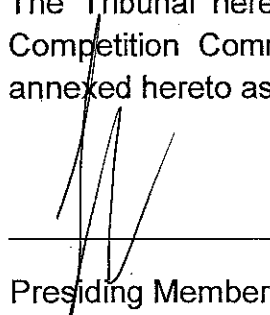
Decided on : 13 December 2012

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## ORDER

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The Tribunal hereby confirms the consent agreement as agreed to between the Competition Commission and the Respondents, dated 07 September 2011 and annexed hereto as "**Annexure A**".



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Presiding Member

N Manoim

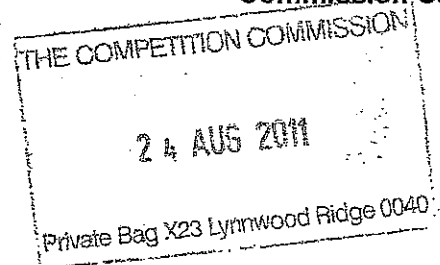
**Concurring:** Y Carrim and A Wessels

"Annexure A"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Commission Case No:

In the matter between:



THE COMPETITION COMMISSION

APPLICANT

And

PHELPS DODGE NATIONAL CABLES CORPORATION

1<sup>st</sup> RESPONDENT

PHELPS DODGE CORPORATION

2<sup>nd</sup> RESPONDENT

FREEPORT MCMORAN COPPER AND GOLD INC

3<sup>rd</sup> RESPONDENT

NATIONAL CABLES (PTY) LTD

4<sup>th</sup> RESPONDENT

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CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION AND PHELPS DODGE NATIONAL CABLES CORPORATION, PHELPS DODGE CORPORATION, NATIONAL CABLES (PTY) LTD AND FREEPORT MCMORAN COPPER AND GOLD INC IN REGARD TO A CONTRAVENTION OF SECTION 13A OF THE COMPETITION ACT 89 OF 1998 (AS AMENDED)

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The Competition Commission and Phelps Dodge National Cables Corporation, Phelps Dodge Corporation and Freeport-McMoran Copper and Gold Inc and National Cables (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for confirmation of the Consent

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Agreement as an order of the Competition Tribunal in terms of Sections 49D as read with Sections 58(1)(b) and 59(1)(d)(i) of the Competition Act 89 of 1998, as amended, on the terms set out below:

## 1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

- 1.1. "Act" means the Competition Act 89 of 1998 (as amended).
- 1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of Section 19 of the Act, with its principal place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng.
- 1.3. "Consent Agreement" means this written consent agreement duly signed by the Commission, PDNCC, PDC and Freeport.
- 1.4. "Freeport" means Freeport-McMoran Copper and Gold Inc, a public company listed on the New York Stock Exchange and with its principal executive offices at One North Central Avenue, Phoenix, Arizona, United States of America.
- 1.5. "National Cables" means National Cables (Pty) Ltd, a private company with its principal place of business at Suite 7, Denavo House, 15 York St, Kensington B, 2194.
- 1.6. "PDC" means Phelps Dodge Corporation, a company which has its principal executive offices at 333 North Central Avenue, Phoenix, Arizona, United States of America. PDC has been ultimately controlled by Freeport, since March 2007, and today is referred to as Freeport-McMoRan Corporation.
- 1.7. "PDNCC" means Phelps Dodge National Cables Corporation, a company which has its headquarters at 9850 NW 41st Street, Suite 200, Doral, Florida 33178, United States of America. PDNCC was, at the relevant time, a subsidiary of PDC.
- 1.8. "Respondents" means PDC, PDNCC, National Cables and Freeport collectively.
- 1.9. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of Section 26 of the Act with its principal place of business at Building C, Mulayo Building, dti Campus, cnr Meintjies & Esselen Streets, Pretoria, Gauteng.

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## **2. Background facts**

### *PDNCC Transaction*

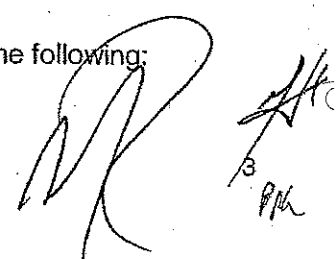
- 2.1. In October 2006, PDNCC acquired 60% of the issued share capital in National Cables, obtaining direct control and giving PDC indirect control of National Cables. This constituted the implementation of a merger under the Act.
- 2.2. The merging parties indicate that they did seek South African legal advice on the transaction from South African attorneys, but were not advised by them of the need to seek competition approval, albeit that this was within their implied mandate.
- 2.3. The need to notify this transaction became apparent in the course of the due diligence investigation conducted in relation to the acquisition by General Cable Corporation of Phelps Dodge Wire and Cable (the latter transaction was filed with the Commission on the 25 September 2010 and was approved by the Commission on 29 October 2010).
- 2.4. This merger was only formally notified to the Commission on or about the 20<sup>th</sup> of February 2008.

### *Freeport Transaction*

- 2.5. On or about the 19 March 2007, Freeport acquired PDC, which, in the view of the Commission constituted the implementation of a merger, given the indirect change of control in respect of National Cables.
- 2.6. The parties were advised by their attorneys that the transaction did not need to be notified. The parties and their attorneys are still of this view, indicating that they do not see this as a transaction having an effect within South Africa for the purposes of section 3(1).
- 2.7. When preparing the merger notification in the General Cable Corporation merger, it came to the parties' attention that the Commission had previously taken the view that similar transactions fell within their jurisdiction. The parties indicate that, out of abundance of caution and to avoid a jurisdictional dispute with the Commission, they then notified the matter on or about the 20<sup>th</sup> of February 2008.

## **3. Commission's investigation and findings**

- 3.1 The Commission investigated the alleged contravention and found the following:

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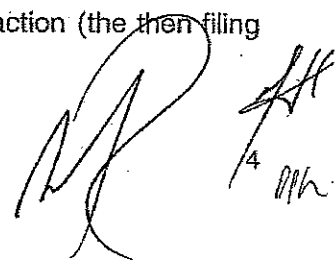
- 3.1.1. Both transactions resulted in changes of control (whether direct or indirect) in respect of National Cables, which change of control constituted a merger in terms of section 12(1) of the Act.
- 3.1.2. Further, the Commission found that the threshold for an intermediate merger was met in respect of both transactions.
- 3.1.3. Further, the Commission found that the Respondents implemented the mergers prior to the notification of and approval by the Commission in contravention of section 13A(3) of the Act.
- 3.1.4. Nevertheless, due to extenuating circumstances, being the legal advice furnished in the Freeport transaction and the failure of South African attorneys to provide proper advice in accordance with their mandate, the Commission has merely required the parties to pay the equivalent of the filing fees for these transactions (which, although the parties tendered payment, were not paid at the time).

#### **4. Admissions**

- 4.1. The Respondents admit that the PDNCC transaction constituted a notifiable intermediate merger as defined in Section 11(5)(c) of the Act. The Respondents do not admit that the Freeport transaction constituted a notifiable merger, but have compromised with the Commission on the payment of filing fees as a nominal fine in respect of this.
- 4.2. The Respondents admit that the PDNCC merger was implemented prior to notification and approval of the Competition Commission in contravention of Section 13A(3) of the Act.
- 4.3. The Respondents further admit that PDNCC and National Cables were responsible for notifying the Commission of the PDNCC Transaction and that PDC and Freeport would have been responsible for such notification had this, in their view, constituted a notifiable merger.

#### **5. Administrative penalty**

- 5.1. The Respondents consent to pay an administrative penalty in terms of section 58(1)(a)(iii) read with section 59(1)(d)(iv), 59(2) and (3) of the Act.
- 5.2. Freeport agrees to pay an administrative penalty of R150 000 (One Hundred and Fifty Thousand Rand), being the equivalent of R75 000 per each transaction (the then filing fee) on behalf of all the parties.

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5.3. The penalty shall be payable within 7 (seven) days of the confirmation of this Consent Agreement as an order of the Tribunal.

5.4. The administrative penalty is payable into the bank account of the Commission whose banking details are:

Bank: ABSA Bank  
Name of account: Competition Commission  
Account Number: 4050778576  
Branch Code: 323345

5.5. Proof of payment of the administrative penalty amounts will be emailed to the Commission marked for the attention of the Manager of Mergers & Acquisitions.

5.6. The Commission will pay over the penalty amount to the National Revenue Fund referred to in section 59(4) of the Act.

#### 6. Full and final settlement

6.1. This Consent Agreement, upon confirmation thereof as a consent order by the Tribunal, concludes all proceedings between the Commission and the Respondents in relation to the contravention of section 13A(3) of the Act, investigated by the Commission.

Date and signed at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 2011

  
\_\_\_\_\_  
PHELPS DODGE NATIONAL CABLES CORPORATION

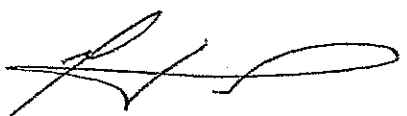

Date and signed at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 2011

  
PHELPS DODGE CORPORATION  
(Freeport-McMoRan Corporation)


Date and signed at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 2011

  
FREEPORT MCMORAN COPPER AND GOLD INC

Date and signed at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 2011

  
NATIONAL CABLES (PTY) LTD  


Date and signed at Pretoria on this the 2 day of September 2011



COMPETITION COMMISSION