

## II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

## DECISIONS

## COMMISSION

## COMMISSION DECISION

of 10 July 2006

**declaring a concentration compatible with the common market and the functioning of the EEA Agreement**

**(Case COMP/M.4000 — Inco/Falconbridge)**

(notified under document number C(2006) 3052)

**(Only the English version is authentic)**

**(Text with EEA relevance)**

(2007/163/EC)

On 4 July 2006 the Commission adopted a Decision in a merger case pursuant to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(1)</sup>, and in particular Article 8(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: [http://ec.europa.eu/comm/competition/index\\_en.html](http://ec.europa.eu/comm/competition/index_en.html)

## I. SUMMARY

- (1) This case concerns the acquisition by Inco Ltd (Inco, Canada) of Falconbridge Ltd (Falconbridge, Canada). Both companies are active worldwide in the mining, processing, refining and sale of various nickel products, copper, cobalt and precious metals.
- (2) Inco is an international mining company principally active in the mining, processing, refining and sale of various nickel products, copper, cobalt and precious metals as well as sulphur products. Inco's worldwide sales in 2004 were EUR 3 439 million. Inco's activities are mainly focused on nickel, which accounted for 83 % of its total sales while copper accounted for 9 %, cobalt for 1 % and precious metals for 5 %.
- (3) Falconbridge is an international mining company principally active in the mining, processing, refining and sale of various nickel products, copper, cobalt, lead, zinc, aluminium and precious metals as well as sulphur

products. Falconbridge generated in 2004 worldwide sales of EUR 5 610 million. Half of its sales related to copper, 26 % to nickel, 14 % to aluminium, 6 % to zinc and 2 % to cobalt.

- (4) On 11 October 2005, Inco announced its intention to acquire, by way of a public bid, all of the outstanding shares of Falconbridge. Under the proposed transaction, Inco will acquire sole control over Falconbridge. It therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation. The notified operation is therefore a concentration.
- (5) The market investigation has revealed that the transaction, as notified, would significantly impede effective competition on the market for the supply of nickel to the plating and electroforming industry in the EEA, and on the global markets for the supply of high-purity nickel for the production of super alloys/super alloys used in safety critical parts and for the supply of high-purity cobalt for the production of super alloys used in safety critical parts. Post merger, the new entity would have become by far the largest supplier in the EEA of

<sup>(1)</sup> OJ L 24, 29.1.2004, p. 1.

nickel products to the plating and electroforming industry and the almost monopolistic supplier of high-purity nickel used in super alloys and of high-purity cobalt for super alloys used in safety-critical applications. The investigation has indicated that the new entity would have had the ability and incentive to increase prices on these markets in the absence of any significant competitive constraint. It was also discovered that the efficiency gains brought about by the proposed transaction would most likely not benefit directly consumers and would thus not counteract the adverse effects on competition.

- (6) In order to remove the competition concerns identified during the procedure, the parties submitted on 16 March 2006 a package of commitments. After extensive discussions with the Commission, the parties subsequently submitted a revised remedy package on 5 April 2006. The revised remedy package was the subject of a market test with third parties. On 7 June 2006, the parties submitted a revised remedy package. These commitments were slightly amended thereafter. A final version was submitted by the parties on 26 June 2006.
- (7) In the final commitments submitted by the parties, the parties undertake to divest the Falconbridge's Nikkelverk refinery in Norway together with related assets (divested business) to a company active in metal mining and/or processing with sufficient nickel resources to sustain the viability of the refinery. In addition, on 7 June 2006, Falconbridge entered into a binding agreement with LionOre Mining International Ltd (LionOre) for the sale of the divested business. On 7 June 2006, the parties requested the Commission to approve LionOre as a suitable purchaser for the divested business. The Commission believes that the undertakings are sufficient to remove the anticompetitive concerns stemming from the transaction and that LionOre is a suitable purchaser for the divested business.
- (8) A clearance decision with conditions and obligations pursuant to Article 8(2) of the Merger Regulation is therefore proposed for adoption.

## II. EXPLANATORY MEMORANDUM

### 1. The relevant product markets

- (9) The proposed transaction concerns the nickel and cobalt sectors. The parties claim that the relevant product markets are the supply of nickel and the supply of cobalt. However, the market investigation has clearly shown that it is appropriate to define the relevant nickel and cobalt product markets according to end

applications. First, demand patterns differ significantly between end applications, in particular in terms of purity, size and shape of the products, delivery requirements and structure of the demand; secondly, nickel producers are to a large extent specialised in supplying certain end applications; and thirdly, finished nickel product prices appear to differ according to the application.

- (10) The market investigation confirmed that relevant product markets are the following:
- (i) the supply of nickel to the plating and electroforming industry;
  - (ii) the supply of high-purity nickel for the production of super alloys/super alloys used in safety critical parts;
  - (iii) the supply of high-purity cobalt for the production of super alloys used in safety-critical parts.
- A. *The supply of nickel to the plating and electroforming industry*
- (11) The plating process is used to coat an object in the desired metal by passing electric current through a suitable solution (the electrolyte). Electroforming allows covering various types of moulds with shapes or thin metal deposits.
- (12) The market investigation has shown that only specific finished nickel products can be used for plating and electroforming. Plating customers have specific requirements in terms of purity, shape, size and packaging. Sales of nickel products for plating and electroforming are usually made via distributors. The market investigation has shown that the fragmented structure of the demand implies the need for a nickel supplier to develop and maintain a sales network of distributors.
- (13) From the supply-side perspective, not all nickel suppliers are capable of supplying nickel products to the plating and electroforming industry and certain producers, in particular the parties, have developed specific products for this end application. A nickel supplier not yet active in the business would need to make significant investments to be able to supply the wide range of nickel products used in the plating and electroforming applications.

- (14) In addition, the parties' internal documents also point to the existence of a distinct product market with distinct pricing and marketing policies from other applications of nickel.

*B. The supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts*

- (15) Super alloys are used in applications requiring operation in high-temperature and high-stress environments. Such applications include, in particular, the aerospace, power generation and medical industries. A specific category of super alloys are super alloys used in safety-critical rotating parts, for example turbine engine blades and discs for jet aircrafts.
- (16) The market investigation has shown that not all finished nickel products from any supplier can be used interchangeably for the production of super alloys, and even less so as regards super alloys used in safety critical parts due to the high purity of nickel required (very low level of impurities and trace elements) and the need for certification and traceability.

- (17) As regards supply-side substitutability, not all nickel producers can produce high-purity nickel suitable to manufacture super alloys/super alloys used in safety-critical parts. The comparison of the specifications of the finished nickel products of a range of nickel suppliers and the specifications required by a range of super alloy producers shows that only very few suppliers, including the parties, are able to produce finished nickel products with a sufficient purity to meet the specifications of super alloy producers. The market investigation has also revealed that there were high barriers to entry in this product market.

*C. The supply of high-purity cobalt for the production of super alloys used in safety critical parts*

- (18) A particular end application of cobalt is the production of super alloys, a specific category of which are super alloys used in safety-critical applications. Super alloys are one of the major end-use applications of cobalt, accounting for 20 % to 25 % of total cobalt demand.
- (19) The market investigation has indicated that not all cobalt products suitable for use in super alloys meet the specifications for high-purity cobalt for super alloys used in safety-critical applications. There is a very specific demand for high-purity cobalt — defined by its precise chemical composition and low impurity levels — used

for the production of super alloys used in critical applications. Producers of super alloys used in critical applications cannot substitute any other cobalt product with a lower quality and/or different chemical composition.

## 2. The relevant geographic markets

- (20) The market investigation confirmed that relevant geographic markets are the following:
- (i) the market for the supply of nickel products to the plating and electroforming industry has a regional geographic dimension (EEA wide);
  - (ii) the market for the supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts has a worldwide geographic dimension;
  - (iii) the market for the supply of high-purity cobalt for the production of super alloys used in safety critical parts has a worldwide geographic dimension.

## 3. Affected markets

### A. Supply of nickel to the plating and electroforming industry

- (21) After the transaction, New Inco will become by far the largest supplier of nickel products to the plating and electroforming industry, with a combined EEA-wide market share of 70 % to 80 % and sales more than five times as high as its closest competitor <sup>(1)</sup>.
- (22) The market investigation has shown that the other producers of nickel for plating and electroforming cannot exercise competitive constraints on New Inco, either because they lack sufficient capacity and suitable technology, or either because they are not active in the EEA. Distributors and customers have confirmed that OMG would be the only real alternative supplier to New Inco. However, OMG's difficulties in sourcing intermediate products (feed) and its tolling agreement with Inco considerably reduce the competitive constraint that OMG could exercise on New Inco.
- (23) Internal documents provided by the parties also indicate that Inco and Falconbridge are the closest competitors for the supply of nickel products used in the plating and electroforming industry. Furthermore, these documents also confirm that the parties are the market drivers, having the greatest range of nickel products for plating and electroforming (different shapes and sizes) and brands with exceptional reputation in the market ('must have' brands).

<sup>(1)</sup> In the EEA, the parties currently face very limited competition from OMG (14 %), Eramet (5 %) and to a lesser extent Anglo American (2 %).

(24) New Inco will thus become the only supplier capable of offering a unique range of products to the plating and electroforming industry. Following the transaction, New Inco will therefore have the power to increase unilaterally prices for nickel products, while facing limited competitive pressure from any other existing or potential suppliers of nickel products to the plating and electroforming industry.

*B. Supply of high-purity nickel for the production of super alloys/super alloys used in safety-critical parts*

(25) New Inco will become by far the largest and almost monopolistic supplier of high-purity nickel used in super alloys, with a market share of 80 % to 95 % globally. Competition in the super alloy market has been basically driven by the rivalry between Inco and Falconbridge. The position of New Inco will be very strong as no other nickel supplier is or will be able to match the unique strengths of New Inco in terms of product quality, production capacity and reputation on the market for the supply of high-purity nickel used for the production of super alloys/super alloys used in safety-critical parts. Most super alloy manufacturers and customers expressed concerns about the transaction, which will reduce the number of suppliers of high-purity nickel from three to two, leaving New Inco facing mostly Eramet only.

(26) Given the significance of barriers to entry in the high-purity nickel market (notably borne out by the absence of entry at least during the past 10 years), constraints on the future behaviour of New Inco by potential competition are likely to be minimal. As a result of the merger, New Inco will be able to increase unilaterally prices for high-purity nickel. This is particularly so in a context where the demand for high-purity nickel is strongly increasing and high-purity nickel supply is extremely tight, due to capacity constraints faced by other suppliers.

*C. Supply of high-purity cobalt for the production of super alloys used in safety-critical parts*

(27) New Inco will become the almost monopolistic supplier of high-purity cobalt for super alloys used in safety-critical applications. As in the market of the supply of high-purity nickel, competition on the market for the supply of high-purity cobalt used in super alloys for safety-critical parts is driven by the rivalry between Inco and Falconbridge.

(28) New Inco's position will be very strong as very few suppliers produce high-purity cobalt meeting the strict specifications of manufacturers of super alloys used in

safety-critical applications. The market investigation has revealed that no other cobalt producer is and will be able to match the unique strengths of New Inco in terms of high purity and consistent quality of its cobalt production, its production capacity, and excellent reputation on the market for the supply of high-purity cobalt for the production of super alloys used in safety-critical parts. Therefore, no other cobalt producer will be able to exercise any significant competitive constraint on New Inco.

(29) There are significant barriers to entry into the market for the supply of high-purity cobalt suitable for the production of super alloys used in critical applications. Given the importance of these barriers, constraints on the future behaviour of New Inco by potential competition are likely to be minimal. Thus, as a result of the merger, New Inco will be able to increase unilaterally prices for high-purity cobalt products required for super alloys used in critical applications.

*D. Restriction of global nickel supply*

(30) Certain third parties contended that New Inco would have the ability and incentive to delay part of its nickel-mining projects, in particular the Koniambo project and that this would have an impact on nickel LME prices. However, the market investigation has shown that New Inco would neither have an economic interest in delaying a mining project at an advanced stage of development (ramp up or committed) due to the significant financial cost incurred nor to delay an early stage mining project (potential) as the benefits of such announcement, in terms of higher LME prices, are highly speculative and certainly very limited in time.

*E. Efficiencies*

(31) The parties submit that the proposed transaction would generate efficiency gains arising primarily from the close proximity of their respective mines/processing facilities in the Sudbury basin, which would help them to optimise their mining and processing operations. This would allegedly result in increased production at lower cost and would benefit all nickel customers. However, the parties have failed to demonstrate that the efficiencies brought about by the proposed transaction are not attainable with a less anti-competitive alternative and would directly benefit end customers in the three relevant product markets where competition concerns have been identified. For these reasons, the efficiencies presented by the parties cannot be considered to offset the adverse effect of the proposed transaction on competition.

#### F. Conclusion

- (32) The attached Decision, therefore, concludes that the notified concentration is likely to significantly impede effective competition, in particular as a result of the creation of a dominant position, and appears incompatible with the Common Market and the functioning of the EEA Agreement as regards each of the three relevant markets.

#### 4. Commitments offered by the Parties

- (33) In order to address the aforementioned competition concerns in the markets for the supply of nickel to the plating and electroforming industry in the EEA, for the supply of high-purity nickel for super alloys/super alloys used in safety-critical parts worldwide, and for the supply of high-purity cobalt for super alloys used in safety-critical parts worldwide, the Parties have submitted the undertakings described below.
- (34) Under the undertakings, the parties commit to divest Falconbridge's sole refinery, the Nikkelverk refinery in Norway, together with the related feed procurement entity and existing third-party feed supply agreements, related marketing organisations and existing customer contracts, Falconbridge's proprietary refining technology and trademarks (the divested business) to a suitable purchaser, having access to sufficient feed resources to sustain the economic viability of Nikkelverk. In addition, the parties undertake to offer the purchaser to enter into a 10-year flexible feed supply agreement, covering a substantial part of Nikkelverk's feed requirements.
- (35) In addition, Falconbridge entered into a binding agreement with a third party company, LionOre, for the sale of the divested business. The parties requested the Commission to approve LionOre as a suitable purchaser for the divested business.

#### 5. Assessment of the commitments submitted

- (36) Nikkelverk is Falconbridge's only refinery and produces all the nickel products supplied by Falconbridge to the plating and electroforming industry, all the high-purity nickel products sold by Falconbridge for the production of super alloys and all the high-purity cobalt products supplied by Falconbridge for the production of super alloys used in safety-critical parts. In addition, the divested business includes all the Falconbridge entities in charge of the marketing and the sale of these nickel and cobalt products.

- (37) The proposed remedy therefore removes the entire quantitative overlap between Inco and Falconbridge on the three markets where competition concerns have been identified. Provided that the divested business will operate as a viable and competitive entity, it will thus take over Falconbridge's market position in the three relevant markets and restore the effective competition prevailing thereon prior to the proposed transaction.
- (38) The investigation has, however, shown that the essential issue for the assessment of the proposed remedy is the ability of the divested business to secure a long-term source of nickel feed suitable for the production of high-purity nickel on a consistent basis, at economically attractive conditions. If this condition is not satisfied, it is likely that the divested business will be a weak and vulnerable competitor on the relevant markets, unable to effectively compete with New Inco.
- (39) The assessment of the current structure of the nickel industry has shown that the vertical integration of mining, processing and refining facilities was the predominant business model. There is currently no stand-alone refinery in the nickel industry and the few refineries that source third-party feeds also own interests in mining and processing facilities. This situation is not expected to change significantly by 2015 as the vertically integrated business model is an efficient response to the need for refineries to secure stable feed sources in the long term.
- (40) Therefore only a purchaser, with experience in mining and processing of nickel and access to mines and sufficient intermediate nickel products, could bring sufficient comfort as to ability and incentive of a purchaser for the divested business to restore competition in the long term. This is strongly supported by the results from the market investigation on the remedies carried out by the Commission.
- (41) As regards cobalt, contrary to the nickel industry, vertical integration is not the prevailing business model in the cobalt industry, with significant trading of cobalt intermediates. Over 50 % of Nikkelverk's cobalt production is sourced from third parties. Falconbridge refines custom feed, including cobalt contained in the matte purchased from BCL, and cobalt intermediates from Australia and Africa, under both feed-purchase and toll-refining arrangements. In addition, for a period up to 10 years, New Inco has committed to supply the divested business with similar quantities of cobalt feed as those currently supplied by Falconbridge to Nikkelverk.

- (42) The final commitments provide that the divested business will be sold only to a company active in metals mining and/or processing with sufficient nickel resources to sustain the economic viability of the divested business upon the expiry of the Matte Supply Agreement with New Inco. The level of 55 000 MT per year, which Falconbridge currently supplies to Nikkelverk, is mentioned by Inco as a relevant benchmark.
- (43) This provision fully addresses the Commission's concerns as regards the viability and the competitiveness of the divested business as it clearly provided for sufficient assurance as to the divested business nickel feed supply. The Commitments are therefore suitable to entirely remove all the competitive concerns identified above.
- (44) In addition, the conditions of the 10-year flexible feed supply and the pricing mechanism proposed in the final version of the Commitments have been found to be sufficient to protect the viability and competitiveness of the divested business if it is sold to a company already active in metal mining.

#### 6. Suitability of the proposed purchaser

- (45) LionOre Mining International Ltd (LionOre) is a mid-sized producer of nickel with operating mines in Botswana, South Africa, and Australia and in several mining projects in these regions. LionOre's current mines and mining projects are all sulphide mines. The company has been in the nickel business since 1996, producing about 29 000 MT of nickel in 2005, and is the 10th largest nickel producer in the world.
- (46) LionOre has ownership interests in four producing nickel mines and one gold mine. In Africa, the company controls an 85 % interest in Tati Nickel in Botswana and a 50 % interest in the Nkomati nickel mine in South Africa. In Western Australia, LionOre has a 100 % interest in the Lake Johnston nickel operations, an 80 % interest in the Black Swan nickel operations, and a 100 % interest in the Thunderbox gold mine. In addition, LionOre has plans to develop the Honeymoon Well deposit in Western Australia. While the company is

working towards becoming a fully integrated nickel producer through its Activox technology, LionOre currently only produces nickel concentrate<sup>(1)</sup>, and does not have any refining capabilities. The total proven nickel resource base of LionOre amounted to 2,3 million MT at the end of 2005.

- (47) In line with general principles and with the criteria set in the commitments, it must be assessed whether, after the acquisition of the divested business, LionOre will become an independent competitive force on the markets where competition concerns have been identified. In particular, an assessment was made of whether LionOre is/will remain independent of Inco/New Inco and has sufficient financial resources to acquire the divested business. This implies focusing on how LionOre could integrate its existing and future-nickel mining operations with Nikkelverk and on whether LionOre could supply sufficient quantities of feed to Nikkelverk to sustain the economic viability of the divested business at the expiry of the Matte Supply Agreement, as provided for in the commitments.
- (48) LionOre meets all the criteria in the commitments for the suitability of the purchaser and the generic conditions set by the Commission for the suitability of the purchaser in a divestiture remedy. It is therefore concluded that LionOre is a suitable purchaser for the divested business and that it will ensure the independence, viability, and competitiveness of the divested business in the long term. LionOre combines a number of characteristics that were identified as crucial to meet these conditions: (i) extensive experience and knowledge of the nickel industry; (ii) ownership of mines and mining projects that already/will produce suitable feed for Nikkelverk, and (iii) knowledge of the Nikkelverk refinery process and output.

#### 7. Conclusion

- (49) For the abovementioned reasons, the commitments submitted by the parties are sufficient to address the competition concerns raised by this concentration.
- (50) The draft decision therefore proposes declaring the notified transaction compatible with the common market and the functioning of the EEA Agreement pursuant to Article 8(2) of the Merger Regulation.

<sup>(1)</sup> LionOre also has a 20 % interest in the Botswana-based BCL smelter (nickel processing).