COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM164Aug18

In the matter between:

GLOBELEQ SOUTH AFRICA HOLDINGS (PTY) LTD	Primary Acquiring Firm
And	
SA SPRINGBOK HOLDINGS (PTY) LTD, SUNEDISON FIREFLY HOLDING (PTY) LTD, SUNEDISON RENEWABLE ENERGY HOLDING (PTY) LTD AND TERRAFORM GLOBAL AFRICA OPERATING (PTY) LTD	Primary Target Firms

Panel	: Enver Daniels (Presiding Member)
	: Fiona Tregenna (Tribunal Member)
Heard on	: 07 November 2018
Last Submission on	: 09 November 2018
Order Issued on	: 09 November 2018
Reasons Issued on	: 03 December 2018

REASONS FOR DECISION

INTRODUCTION

[1] On 07 November 2018, the Competition Tribunal (Tribunal) heard submissions in the proposed transaction whereby Globeleq South Africa Holdings (Pty) Ltd (Globeleq SA) intends to acquire SA Springbok Holdings (Pty) Ltd (SA Springbok), SunEdison Firefly Holding (Pty) Ltd (SunEdison Firefly), SunEdison Renewable Energy Holding (Pty) Ltd (SunEdison Renewable) and TerraForm Global Africa Operating (Pty) Ltd (TGAO) (collectively referred to as the 'Target firms'). Hereunder, Globeleq SA and the Target firms are collectively referred to as the 'merging parties'.

[2] Prior to the parties placing themselves on record, we informed them that our third Tribunal Member on the panel, Mrs Medi Mokuena (Mrs Mokuena) was conflicted as she once sat on the Board of one of the companies to the proposed transaction. I, Enver Daniels, as the Presiding Member and Deputy Chairperson of the Tribunal, in the absence of the Tribunal Chairperson, stepped into the Chair's role and excused Mrs Mokuena. I explained to the parties that we could either postpone the hearing to a later date or continue with only two panel members. No objections were raised by the parties and thus we continued with only two members sitting on the panel.

[3] At the commencement of the hearing, Mr Andrew Mahonono (Mr Mahonono) the Chief Financial Officer of Nehawu Investment Holdings (Pty) Ltd (NIH) wished to object to the approval of the proposed transaction. The grounds of Mr Mahonono's objections are later set out in our reasons.

[4] We, the Competition Commission (Commission) and the merging parties did not have prior knowledge of Mr Mahonono's intention to object and make oral submissions before us. Nonetheless, we afforded Mr Mahonono the opportunity to make oral submissions and to later furnish us with his written submissions. Thereafter, the merging parties made oral submissions and later filed their written submissions in response. The Commission indicated that it had nothing to add to the discussion.

[5] We directed Mr Mahonono to file his written submissions to us by 12 pm, 08 November 2018 and that the merging parties had to respond by no later than 12 pm, 09 November 2018.

[6] The parties duly complied with our direction.

[7] On 09 November 2018, we unconditionally approved the proposed transaction. Our reasons for doing so follow.

PARTIES TO THE TRANSACTION

Primary Acquiring Firm

[8] Globeleq SA is a newly incorporated entity that does not control any firms. Globeleq SA is wholly owned by Globeleq Africa Limited (Globeleq Africa) which is ultimately controlled by CDC and Norfund.

[9] Globeleq Africa has controlling interests in two solar power plants and one wind power plant. In South Africa, Globeleq SA has controlling interests in various power plants, one wind farm and five solar plants.

[10] Globeleq SA and its controllers are hereafter collectively referred to as the 'Acquiring group'.

Primary Target Firms

[11] The Target firms consist of SA Springbok, SunEdison Firefly, SunEdison Renewable and TGAO and are ultimately controlled by TerraForm Global Inc. which is indirectly owned by Brookfield Renewable Partners L.P (Brookfield) together with its institutional partners.

[12] The Target firms have controlling interests in five solar power plants and one wind power plant. Post-merger the Acquiring group will have indirect control over the abovementioned power plants.

PROPOSED TRANSACTION

[13] Globeleq SA intends to acquire the Target firms. Upon completion of the proposed transaction, Globeleq SA will exercise ownership and control over the Target firms.

[14] In essence, the Acquiring group submitted that the proposed transaction will diversify Globeleq Africa's portfolio of renewable energy technology and resource exposure. The Sellers were of the view that the merger will allow for the divestment of non-core assets in the business.

COMPETITION ASSESSMENT

[15] The merging parties are renewable energy producers under the Renewable Energy Independent Power Programme (REIPP) which allows Independent Power Producers (IPP) (such as the merging parties) an opportunity to bid for tenders for the provision of electricity generated by renewable energy projects through power purchase agreements (PPA) and implementation agreements (IA). Eskom is the only customer of the energy produced by IPPs and enters into PPAs with the IPPs subsequent to their appointment as preferred bidders.

[16] The Commission found that competition between IPPs occurs at the bidding stage when IPPs bid to be appointed as the preferred renewable energy services supplier.

[17] The Commission considered the activities of the merging parties and found a horizontal overlap regarding the provision of renewable energy in South Africa. It however narrowed its analysis to i) the national market for the generation of electricity by using solar plants; and ii) the national market for the generation of electricity by using wind farms.

[18] In terms of wind technology, the Commission found that the merging parties will have a post-merger market share of less than 5%. In the market for the provision of solar power, the merging parties will have a combined post-merger market share of less than 18%.

[19] The Commission was of the view that the merging parties' post-merger market shares are relatively low. The merging parties are not large enough to control the market for renewable energy as market shares are less than 20% in each market.

[20] Eskom submitted that the proposed transaction will not result in any changes in the market because once the bidding process has been completed and the PPAs are signed, the agreements remain unchanged. Eskom did however submit that mergers of this nature may cause an issue in the future bidding stages as there could be a likelihood that at the next bidding stage, the level of concentration will be higher and the fewer number of firms will bid at higher prices as there will be

less competition. The Commission considered Eskom's submissions and was of the view that in this case, the merging parties' post-merger market shares in each market are low and therefore the merging parties are unlikely to control the market for renewable energy or control prices at the next bidding phase.

[21] From the above the Commission concluded that the proposed transaction is unlikely to result in any competition concerns.

OBJECTION TO THE PROPOSED TRANSACTION

[22] Mr Mahonono primarily argued that the NIH, as an existing minority shareholder in one of the assets that is to be acquired by Globeleq, was not consulted on the proposed transaction or provided with an opportunity to make an offer on the shares as an existing shareholder. The NIH only became aware of the proposed transaction once Globeleq announced that it had reached an agreement with Brookfield for the acquisition of the assets which form the subject to this merger. Moreover, the NIH as co-shareholders with Brookfield should have been given right of first refusal. As such, it would be impermissible for the transaction to continue without the NIH being given an opportunity to bid for the assets. The NIH considered that the matter should be remitted to the Commission for further investigation.

[23] The merging parties contended that the concerns raised by NIH are of a commercial nature, in other words, a dispute between shareholders. These concerns are not raised in terms of the Competition Act 89 of 1998, as amended (the Act) and did not set out whether a substantial lessening of competition or negative impacts on any grounds of public interest had occurred. Ms Wagener, on behalf of the Sellers, submitted that the issues raised are non-competition related as there was nothing before the merging parties, the Commission or the Tribunal that spoke to adverse impacts on competition or the public interest. It is therefore not competent for the Tribunal to entertain the issues raised. Mr MacKenzie, on behalf of Globeleq, shared the same views as Ms Wagener. He submitted that NIH's concerns pertain to a theoretical transaction and the issue of whether or not a pre-emptive right exists is of a commercial nature.

[24] The Commission did not submit anything further.

OUR ANALYSIS

[25] After considering all the parties' oral and written submissions, we decided in favour of the merging parties. When considering merger transactions, the Tribunal must initially determine whether the proposed transaction is likely to lead to any substantial lessening of competition in the relevant market and take into account various factors set out in section 12A(1) and (2) of the Act. Thereafter, the Tribunal must then assess the public interest grounds and determine whether any adverse effects will occur as a result of the merger. In doing so, the Tribunal must have regard to a number of factors set out in section 12A(3) of the Act.

[26] As correctly submitted by the merging parties, the concerns raised by Mr Mahonono did not raise any issues that would fall within the strictures of section 12A(1), (2) or (3) of the Act. Whether or not NIH was notified about the transaction between Globeleq and Brookfield or whether it had pre-emptive rights to exercise are issues that were not properly brought before us and go beyond our competence. The concerns did not raise concrete competition or public interest issues in terms of the Act that would have allowed us to properly explore those concerns fully.

[27] According, we are of the view that the proposed transaction is unlikely to raise any substantial prevention or lessening of competition in any market. The concerns raised by NIH were non-competition related and therefore we did not need to entertain them any further. NIH is, of course, free to pursue its concerns in any other appropriate forum.

PUBLIC INTEREST

[28] The merging parties submitted that it was not envisaged that the proposed transaction would have any adverse impacts on its employees in South Africa as no retrenchments would take place.

[29] The employees of the merging parties were not represented by any trade unions. Nonetheless, the employee representatives of the Acquiring group and the Target

firms were served with the merger filing. The employees of the Acquiring group did not raise any concerns.

[30] The Commission however received concerns from the employees of the Target firms. The employees were concerned that post-merger, there would be a restructuring of the Target firms that could lead to retrenchments and that some employees would be relocated from the Johannesburg offices to the offices of Globeleq in Cape Town. The employees stipulated that they would need some sort of comfort from the merging parties that no retrenchments would occur and that a condition to that effect would provide them with such comfort.

[31] The Commission relayed these concerns to the merging parties for their consideration. Firstly, the merging parties confirmed that the proposed transaction will not result in any retrenchments. The Commission further assured the employees that the merging parties' undertaking is legally binding and if they were to renege on such undertaking, the Commission could revoke the merger approval. Secondly, the merging parties submitted that all the employee contracts have clauses that deal specifically with relocation. Accordingly, absent the merger, the employees of the Target firms could be relocated when required. The Commission was therefore of the view that such a relocation of employees would be justified given the nature of the activities of the Target firms.

[32] We enquired from the Commission whether their findings were communicated to the Target firms' employees as we could not find any documentation illustrating that they were satisfied with the Commission's submissions. The Commission submitted that they had subsequently contacted the employee representatives and that the e-mails were erroneously omitted from the merger record. We subsequently received the e-mails and confirmed that the employee representative was made aware of the Commission's submissions. In addition, we enquired whether there would be any negative effects on blue collar workers. Mr MacKenzie submitted that the Acquiring group had a few blue-collar workers, but they would remain unaffected by the proposed transaction. Ms Wagener submitted that the Target firms did not have any blue-collar workers. In fact, they operate their plants using external contractors or operational maintenance companies at all of their sites.

[33] In light of the above, we concurred with the Commission and the merging parties that the proposed transaction will not result in any retrenchments or have any adverse effects on other public interest grounds.

CONCLUSION

[34] In view of the above, we concluded that the proposed transaction will not lead to a substantial lessening or prevention of competition in any market. Furthermore, no negative effects on employment are envisaged and no other public interest issues arise. As such, we approved the proposed transaction without conditions.

Mr Enver Daniels

03 December 2018
Date

Prof. Fiona Tregenna concurring.

Tribunal Case Manager	: Ndumiso Ndlovu
For the Primary Acquiring Firm	: N MacKenzie & S Strachan of Fasken
For the Primary Target Firms	: M Wagener & C Upfold of Norton Rose Fulbright
For the Commission	: R Maphwanya & N Myoli