



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM152Dec22

In the matter between:

Cape Town Biogas Proprietary Limited

Acquiring Firm

and

New Horizons Waste to Energy (RF) Proprietary Limited

Target Firm

Panel : Jerome Wilson (Presiding Member)
: Tregenna Fiona (Tribunal Panel Member)
: Imraan Valodia (Tribunal Panel Member)

Heard on : 28 February 2023
Order issued on : 02 March 2023
Reasons issued on : 31 March 2023

REASONS FOR DECISION

Approval

- [1] On 02 March 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger wherein Cape Town Biogas Proprietary Limited intends to acquire all claims on loan accounts held by the Industrial Development Corporation of South Africa Limited against New Horizons Waste to Energy (RF) Proprietary Limited, as well as all of the ordinary shares in New Horizons Waste to Energy (RF) Proprietary Limited. Post implementation of the proposed transaction, Cape Town Biogas Proprietary Limited will solely control New Horizons Waste to Energy (RF) Proprietary Limited.

[12] NHE is a currently dormant firm and has not traded since 2018.

Proposed transaction and rationale

Transaction

[13] In terms of the proposed transaction, CTB intends to acquire all claims on loan accounts held by the IDC against NHE as well as all of the ordinary shares in NHE. Post implementation of the proposed transaction, CTB will solely control NHE.

Rationale

[14] The Acquiring Group submits that the proposed transaction presents a unique and attractive opportunity to venture into a potentially successful and profitable enterprise. Also, the proposed transaction is in line with the Acquiring Group's mandate to invest in businesses that are engaged in clean and renewable energy projects in Africa.

[15] The Target Firm submits that the IDC, as the investor in NHE, wishes to recoup its initial investment in the project which gave rise to the establishment of NHE. The proposed transaction also facilitates the completion and refurbishment of the NHE plant in line with the IDC's primary objectives to contribute to the generation of balanced, sustainable economic growth in Africa, and to the economic empowerment of the South African population.

Relevant markets and impact on competition

[16] The Competition Commission ("the Commission") considered the activities of the merger parties and found that the proposed transaction does not result in a horizontal overlap as none of the firms in the Acquiring Group compete with the target firm.

[17] However, the Commission found that the proposed transaction may give rise to a potential vertical overlap post-merger as the parties are active in different levels of the organic waste and related waste streams.

[18] The merging parties submitted that the value chain for organic waste and related waste streams includes the following elements:

18.1. Collection (on-site management; cleaning; and collection);

18.2. Logistics (transportation);

- 18.3. Pre-treatment/sorting (de-packaging; source separation; and chemical treatment); and
- 18.4. Disposal (landfill; product destruction; anaerobic digestion; animal feed; recycling; incineration; and composting).
- [19] The Commission found that Oricol, part of the Acquiring Group, falls under the collection and pre-treatment/ sorting levels of the value chain. Oricol is a national provider of recycling and waste management services, whose business involves collecting, sorting and de-packaging various waste streams.
- [20] On the other hand, the primary target firm, NHE, falls under the disposal level of the value chain because it is an anaerobic digestion plant that utilises technology to transform treated/ de-packaged nonhazardous municipal and household waste (received from firms operating at the pre-treatment/ sorting level of the supply chain such as Oricol) into environmentally sustainable fuel and useful by-products.
- [21] The Commission found that the transaction is unlikely to give rise to vertical foreclosure concerns because NHE is dormant and has not operated since 2018. As such, the Commission found that NHE is unlikely to be a significant customer to any of the upstream competitors of Oricol in the provision of waste treatment services.
- [22] Based on the above, the Commission concluded that the proposed transaction is unlikely to result in a substantial prevention or lessening of competition in any market.
- [23] The Tribunal was concerned that there was not any substantive analysis by the merging parties or the Commission of the relevant downstream and upstream markets in which the merging parties will operate post-merger. In our view, the mere fact that NHE is currently dormant is not in itself a sufficient basis on which to conclude, without any market analysis, that the merger will not give rise to any vertical foreclosure effects.
- [24] The Tribunal also noted that (as set out in the Public Interest section below) a firm called [REDACTED] will be one of the suppliers of waste to, and will become a minority shareholder in, NHE post-merger. It appeared to us that this might also potentially impact on the foreclosure analysis in this matter.

- [25] Therefore, in advance of the merger hearing, the Tribunal requested the Commission and the merging parties to explain (i) what market share NHE is likely to have in the relevant downstream market in the future; (ii) what market share the Acquiring Group and [REDACTED] will have in the relevant upstream market(s) in the future; and (iii) to what extent the Acquiring Group and [REDACTED] [REDACTED] would be able to fulfil all of the inputs required by NHE in the future.
- [26] In response to the Tribunal's queries, CTB explained that, once its plant becomes operational, the market shares for the waste streams produced through its anaerobic digester would be approximately [REDACTED] for biomethane and [REDACTED] for carbon dioxide gas (both in a national relevant market), and approximately [REDACTED] for digestate (in a regional relevant market).
- [27] As regards the procurement of waste, CTB explained that, once its plant becomes operational, it will primarily rely on manure and sludge as its main form of waste, with various other waste stream (such as dairy, food waste etc.) being used to supplement these streams. CTB explained further that organic waste is often a by-product of various value chains (such as agriculture) which provides no real value as an input to any other value chain. As a result there is a huge oversupply of organic waste.
- [28] CTB submitted that the relevant "collection" market is a narrow one because of transport costs and the intrinsically low value of waste. Without coming to a firm conclusion on the exact geographic scope of waste collection, the merging parties estimated that its plant will consume approximately 7 to 11% of waste in the relevant upstream market, that there are a variety of firms that could take up organic waste to make compost and other products.
- [29] CTB estimated that [REDACTED] market share as a transporter of organic waste will be less than [REDACTED]. CTB also submitted that, post-merger, its plant will accept waste streams from various sources and will charge a nondiscriminatory gate fee based on the type and amount of waste brought in.
- [30] CTB's representative, Mr Robert Nell elaborated on these responses in the merger hearing before the Tribunal.
- [31] Although the Tribunal would have benefited from a fuller investigation of the relevant markets by the Commission, we were satisfied on the basis of the further information provided by the merging parties that the transaction is unlikely to give rise to any significant vertical effects.

Public interest

Effect on employment

- [32] The merger parties submitted that the proposed transaction will have a positive effect on employment as the merger will see the revitalization of a currently dormant facility to the benefit of the surrounding areas and is likely to create employment in the process. Essentially, as a result of the merger, the target business's plant that has been under care and maintenance with two employees since 2018 will now be operational and a minimum of 15 new jobs will be created.
- [33] Given the above, the Commission concluded that the proposed transaction is unlikely to have a negative effect on employment. The Tribunal agrees with this conclusion.

Effect on the spread of ownership

- [34] The Commission engaged with the merger parties on the manner in which the proposed transaction promotes a greater spread of ownership within the meaning of section 12A(3)(e) of the Competition Act.
- [35] Pursuant to that engagement, the merger parties undertook to introduce a [REDACTED] HDP shareholding in NHE within 12 months. The parties indicated that this shareholder would be [REDACTED], a 100% HDP-owned firm. They also undertook that the HDP shareholder would be entitled to appoint a director to the board of CTB.
- [36] The merger parties also submitted that, since [REDACTED] is a waste supplier located adjacent to NHE's plant, it will benefit from being able to supply waste to the plant post-merger.
- [37] The Commission requested the merging parties to consider increasing the proposed [REDACTED] HDP shareholding in CTB to [REDACTED]. In response to this request, the merging parties agreed to give the prospective HDP shareholder the option to increase its shareholding in the Acquiring Firm up to [REDACTED].
- [38] In addition, the merger parties indicated that they intend to introduce a worker incentives scheme to all employees of the merged entity. The merging parties explained that this scheme will not operate as an employee share ownership plan (as requested by the Commission), but that the benefits flowing from scheme will be equity-like in nature and will be linked to the financial performance of NHE's plant. The merging parties also confirmed that there will be no cost attributable to workers to participate in and benefit from the scheme.

[39] The merging parties furthermore agreed to make these undertakings conditions to the approval of the merger, and the Commission recommended the approval of the merger subject to the conditions agreed with the merging parties.

[40] The Tribunal sought clarification on various aspects of the proposed conditions. Whilst the Tribunal was of the view that the proposed conditions were clearly beneficial from a public interest perspective, it was concerned about the lack of clarity of certain provisions contained in the proposed conditions. These included what price the HDP shareholder would have to pay for the extra shares in CTB if it elected to exercise the [REDACTED] option offered by the merging parties; whether contract workers would benefit from the worker incentive scheme; and what provisions the scheme would have in respect of exiting workers.

[41] Based on the responses received from the merging parties and the Commission, the proposed conditions were amended in a manner that sufficiently addressed the concerns of the Tribunal, as reflected in the final conditions referred to below.

Conclusion

[42] The Tribunal concludes, having regard to the conditions annexed hereto as **Annexure A**, that the proposed transaction is unlikely to give rise any significant negative competition or public interest effects. Accordingly, the Tribunal approves the proposed transaction subject to the conditions annexed hereto as **Annexure A**.

Signed by: Jerome Wilson
Signed at: 2023-03-31 16:21:06 +02:00
Reason: Witnessing Jerome Wilson

Jerome Wilson

Adv. Jerome Wilson SC

31 March 2023

Date

Concurring: Prof. Tregenna Fiona and Prof. Imraan Valodia

Tribunal case manager : Baneng Naape

For the merging parties : Albert Aukema and Reece May of Cliffe Dekker Hofmeyr Inc.

For the Commission : Zintle Siyo and Themba Mahlangu