competitiontribunal
SOUTH AFRICA

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM168Nov20

In the matter between:

ENGIE Global Development BV	Primary Acquiring Firm
And	
Xina CSP South Africa (Pty) Ltd and Xina CSP Operations and Maintenance (Pty) Ltd	Primary Target Firm

Panel:	Ms M Mazwai (Presiding Member) Mr E Daniels (Tribunal Member) Dr T Vilakazi (Tribunal Member)
Heard on:	21 January 2021
Order Issued on:	21 January 2021
Reasons Issued on:	16 March 2021

REASONS FOR DECISION

APPROVAL

[1] On 21 January 2021, the Competition Tribunal ("Tribunal") approved the proposed transaction whereby ENGIE Global Development BV ("ENGIE") intends to acquire (i) sole control of Xina CSP South Africa (Pty) ("Xina CSP") Ltd and (ii) joint control of Xina CSP Operations and Maintenance (Pty) Ltd ("Xina CSP O&M"). Ultimately, ENGIE will exercise sole control of Xina CSP and joint control of Xina CSP O&M.

[2] The reasons for the unconditional approval follow.

PARTIES TO THE TRANSACTION

Primary Acquiring Firm

[3] The primary acquiring firm is ENGIE, a private company incorporated in accordance with the laws of the Netherlands. ENGIE is directly controlled by International Power (Zebra) Limited ("International Power Zebra"). International Power Zebra is wholly owned and controlled by International Power Limited ("International Power").

[4] International Power is wholly owned and controlled by Electrable ("Electrable") which in turn is a wholly owned subsidiary of ENGIE SA. ENGIE SA is a public company listed on the Paris and Brussels Stock Exchanges and thus not controlled by any individual or firm.

[5] In South Africa, ENGIE directly and indirectly controls various firms. More relevant to the transaction is the supply of a mix of renewable energies through its energy projects ("Power Plants") located in the Western Cape, Northern Cape and Eastern Cape.

Primary Target Firms

[6] The first primary target firm is Xina CSP South Africa (Pty) Ltd ("Xina CSP"), a company incorporated in accordance with the laws of the Republic of South Africa. Xina CSP is a special purpose vehicle wholly owned and controlled by South Africa Solar Investments S.L. (SASI), a private company incorporated in accordance with the laws of Spain.

[7] Xina CSP is in turn ultimately controlled by Abengoa, S.A ("Abengoa"), a public company incorporated in accordance with the laws of Spain. In South Africa, Xina CSP controls Xina Solar One RF (Pty) Ltd ("Xina Solar One"), which houses the Xina Solar One Project. Xina Solar One is a private company incorporated in accordance with the laws of South Africa.

[8] The second primary target firm is Xina CSP Operations and Maintenance (Pty) Ltd ("Xina O&M"), a firm incorporated in accordance with the laws of South Africa. Xina O&M is controlled by Abengoa South Africa (Pty) Ltd ("Abengoa South Africa"), a private company incorporated in accordance with the laws of South Africa. Abengoa South Africa is in turn ultimately controlled by Abengoa.

[9] Xina CSP O&M operates and maintains the Xina Solar One plant. The Xina Solar One Project is a concentrated solar power plant with an installed capacity of 100 MW located in the Northern Cape. It sells solar power to Eskom through a 20-year PPA as a successful bidder in Round 3 of the REIPPP. The Xina Solar One Project is involved in the production of renewable energy (electricity) using Solar PV.

PROPOSED TRANSACTION

[10] The proposed transaction is made up of two indivisible parts that constitute parts of a single transaction. The first part of the proposed transaction involves ENGIE purchasing all of the shares in Xina CSP, which holds a [redacted]% shareholding in Xina Solar One, from SASI, that houses the Xina Solar One Solar Plant. Upon implementation of the proposed transaction, ENGIE will indirectly hold [redacted]% of Xina Solar Plant which constitutes joint control, together with the other shareholders - [redacted]

[11] The second part of the proposed transaction involves ENGIE acquiring [redacted]% of the shareholding of shares in Xina CSP O&M, which operates and maintains the Xina Solar One Plant, from Abengoa South Africa. Following the implementation of the proposed transaction, ENGIE will attain joint control over Xina CSP O&M. The other shareholders will be [redacted][1]

[1] ENGIE will acquire *de facto* control over Xina CSP and Xina O&M in terms of section 12(2)(g) of the Competition Act, 89 of 1998 (Competition Act), as no strategic decisions made at a vote at a general meeting may be taken without ENGIE's approval.

[12] In short, the transactions happen at an international level where the French listed entity ENGIE SA is acquiring from Spanish company Abengoa, its South African solar power interests, held through Xina CSP and Xina CSP O&M.

Rationale

[13] According to the acquiring firm, the acquisition of the Xina Solar One Project will allow it to diversify its portfolio of renewable energy technology projects in South Africa. Further, the investment aligns with the ENGIE Group's concentrated solar power expertise and will secure complementarities with its recently commissioned 100 MW concentrated solar plant, Kathu Solar Park.

[14] From the perspective of SASI and Abengoa S.A., the Proposed Transaction will allow for the divestment of non-core assets in their operations in South Africa. As a consequence of the financial difficulties that Abengoa S.A. faced in late 2015, which led to a financial restructuring, the company undertook a strategic review and concluded that Abengoa S.A. should focus on its core business, being Engineering, Procurement and Construction (EPC) of turnkey projects for third parties. All concessional assets became non-core for the company and an asset divestment plan was implemented as part of the revised strategic plan for Abengoa S.A.

BACKGROUND TO THE RENEWABLE ENERGY INDEPENDENT POWER PRODUCER PROCUREMENT PROGRAMME ("REIPPP")

[15] According to the Competition Commission ("Commission"), the REIPPPP was established in 2010 by the (then) Department of Energy, the National Treasury and the Development Bank of Southern Africa. The Integrated Resource Plan for electricity ("IRP") 2010-2023 provides a long-term plan for electricity generation. The IRP calls for the doubling of electricity capacity using a diverse mixture of energy sources, mainly, nuclear and renewable energy. The REIPPPP contributes to the IRP's target of 29 330MW of additional renewable energy, and cogeneration capacity from the private sector by 2025.

[16] The REIPPPP office's mandate is to enhance South Africa's power generation capacity by securing electricity from various renewable energy sources from the private sector. This is done through a tender process that culminates in the IPPs selling electricity to Eskom.

[17] The Department of Mineral Resources and Energy ("DMRE") begins by announcing a new round of bidding ("bidding window") for available projects under the REIPPPP. In each round, the DMRE indicates the total megawatt ("MW") value that it wishes to achieve through renewable energy resources and the technologies that it wishes to contribute to that MW output. Interested parties submit proposals indicating, inter alia, what technology they will employ, where the plant will be based, the anticipated power output of the plant and the price per MW to purchase electricity.

[18] According to the merging parties, in each bidding window, the DMRE selects bidders who it awards with the status of preferred bidders. In each of the four previous large bidding windows announced since 2011, over 40 bids were received, and no less than 13 bidders were awarded the status of preferred bidder.

[19] According to the Commission, the IPPs under the REIPPPP cannot alter the price and volume of energy supplied to Eskom except for inflation, nor can they supply electricity to any third parties. It is for this reason that the Commission concluded that the proposed merger would not lead to a substantial prevention or lessening of competition.

[20] According to the Commission, it is likely that the Electricity Regulation Act 4 of 2006 provides the Minister of the DMRE a discretion to allow the direct procurement of electricity by municipalities from IPP projects. The consequences of this likelihood are explored in the following section.

COMPETITION ANALYSIS

Overlaps

[21] The Commission found that the proposed transaction results in a horizontal overlap in the renewable energy services market with specific reference to solar energy.

[22] A vertical overlap was also identified by the Commission as Xina CSP O&M operates and maintains Xina Solar One plants. However, the Commission did not assess the vertical overlap further because Xina CSP O&M offer these services only to Xina Solar One and Xina Solar One does not procure these services from any other firm in the market but Xina CSP O&M. Therefore, the Commission was of the view that the proposed transaction is unlikely to result in any input or customer foreclosure.

Relevant market

[23] The Commission assessed the proposed merger in a broadly defined national market for the supply of electricity to Eskom by renewable energy producers using Solar PV. This was because the location of an IPP's plant is only a function of where the renewable energy resource is located. Ultimately the electricity produced by the IPP is supplied directly into the national grid. [2] For completeness, however, the Commission also assessed the market on a local level which is the ZF Mgcawu District Municipality area.

[24] This was done to assess the effect of the proposed transaction on municipalities because it is unclear whether or not the Electricity Act provides the Minister of the DMRE the discretion to allow municipalities to directly procure electricity from IPP projects. The Commission consulted the National Energy Regulator of South Africa ("NERSA") in this regard. NERSA stated that

[2] It was indicated by the parties that some parts of the country are more desirable for the location of an independent power plant using renewable energy resources, depending on the type of renewable energy resource being used. The Northern Cape, for example, is ideal for solar PV power plants because of the high levels of sunshine that the area experiences.

existing arrangements under the REIPPPP could not be diverted without a new bidding process being initiated. The REIPPPP's IPP office informed the Commission that recent amendments to the electricity regulations on new generation capacity enable municipalities in good standing to procure new generation capacity from IPPs, but that this is a distinct and separate process from the REIPPPP.

[25] Given the possibility of direct procurement by municipalities, the Commission proceeded to assess the supply of electricity to Eskom by renewable energy producers using solar PV technology nationally and at local district level.

[26] We have assessed the competition effects of the proposed transaction on the above basis, however, since the renewable energy markets are relatively new and developing, we leave the exact product and geographic market delineation open.

Market shares

[27] In the broad market for the national market for the supply of electricity to Eskom by renewable energy producers using Solar PV, the Commission found that the merging parties will have a post-merger market share of approximately less than 10% with a market accretion of less than 5%.

[28] With regard to the narrow market for the supply of electricity to Eskom by renewable energy producers using Solar PV energy in ZF McCaw District Municipality, the Commission found that the merging parties will have a combined market share of approximately more than 20% with an accretion slightly above 10%, post-merger. This was done on a worst case scenario as it is unclear whether municipalities will be allowed in time to procure electricity directly from REIPPP projects.

[29] The Commission was of the view that based on the market shares and accretion, the proposed merger is unlikely to lead to significant lessening of competition in the two markets analysed.

Concentration

[30] The Tribunal noted the increase in recent years of mergers in the renewable energy market and enquired whether the Commission had assessed the extent of consolidation by the acquiring firm in the market, if any, as contemplated in section 12A(2)(k) of the Act (so-called creeping mergers).

[31] The Commission submitted in response to an information request by the Tribunal that it had investigated 14 mergers in renewable energy between 2018-2020 and had identified no concern of creeping mergers in this transaction.[3]

[32] Further, the Commission identified no less than 13 producers of Solar PV energy who were awarded preferred bidder status under the REIPPP (bid window 1 to 4) with more than 40 bids submitted. At the narrow local market, firms operating at this level in the renewable Solar PV energy market include, amongst others, Khi Solar, Ares Solar, Dyson's Klip, and Ilanga CSP. Thus, indicating the competitive nature of renewable energy markets.

[33] Given the Commission's submissions, we found no basis in the context of this transaction to conclude that creeping mergers was a concern.

PUBLIC INTEREST

[34] The proposed transaction does not result in any public interest concerns. Neither Xina CSP nor Xina CSP O&M has any employees in South Africa, as all staff at Xina CSP and Xina CSP O&M are secondees of Abengoa South Africa (Pty) Ltd and will remain in its employ, post-merger.

[35] With respect to the effects on shareholding by historically disadvantaged individuals, the shareholding held by the Xina Community Trust in Xina Solar

[3] The Commission submitted that due to time constraints, it was unable to provide a composite list of all the mergers that have been filed and assessed in the renewable energy sector. In addition, its database aggregates information and it was therefore unable to provide this information on a more granular level.

One ([redacted]%) and by Kaxu Community Trust ([redacted]%) in Xina CSP O&M will remain the same post the transaction.

[36] Thus, the proposed transaction is unlikely to negatively affect shareholding by historically disadvantaged persons (HDPs) in the Xina Solar One and Xina CSP O&M entities.

CONCLUSION

[37] Based on the above, we are of the view that the proposed transaction is unlikely to substantially prevent or lessen competition in any of the relevant markets. Furthermore, the proposed transaction does not raise any public interest concerns.

[38] We therefore unconditionally approved the transaction.

MMazwai

Ms Mondo Mazwai — **16 March 2021** (**Date**)

Mr Enver Daniels and Dr Thando Vilakazi concurring.

Tribunal Case Manager:	Lumkisa Jordan
For the merging parties:	Heather Irvine, Kathryn Lloyd and Andiswa Nyathi for Bowmans
For the Commission:	Mogau Aphane and Thabelo Masithulela