



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no: LM094Oct21

Atlantica Sustainable Infrastructure plc (Primary Acquiring Firm)

and

**The Employees of Abengoa South Africa (Pty) Ltd and
The assets of Kaxu CSP O&M Company (Pty) Ltd** (Primary Target Firm)

REASONS FOR DECISION

- [1] On 13 December 2021, the Competition Tribunal (“Tribunal”) conditionally approved a large merger in terms of which Atlantica Sustainable Infrastructure plc (“Atlantica”) intends to acquire (i) the employees of Abengoa South Africa Proprietary Limited (“Abengoa South Africa”); and (ii) the assets of Kaxu CSP O&M Company Proprietary Limited (“Kaxu O&M”). The employees of Abengoa South Africa and the assets of Kaxu O&M will collectively be referred to as the “Target Business”.
- [2] The primary acquiring firm is Atlantica South Africa Operations Proprietary Limited (“Atlantica South Africa Operations”), an indirect subsidiary of Atlantica. In South Africa, Atlantica also controls Kaxu Solar One Proprietary Limited (“Kaxu Solar One”).
- [3] Atlantica conducts activities in South Africa through its only active subsidiary, Kaxu Solar One. Atlantica, through Kaxu Solar One, has a 100 MW solar parabolic facility with storage capacity of up to three hours, located in Pofadder, Northern Cape (“the Kaxu Facility”). The solar power generated at the Kaxu Facility is contracted to Eskom Holdings SOC Limited.

[4] Kaxu Solar One has entered into an agreement with Kaxu O&M whereby Kaxu O&M provides operations and maintenance services to the Kaxu Facility. Kaxu O&M does not have any employees and has entered into an agreement with Abengoa South Africa to provide the labour for its services, totalling [REDACTED] employees.

[5] Pre-merger Kaxu O&M is controlled by Abengoa S.A. in Spain.

Competition assessment

[6] The Competition Commission (“Commission”) found no horizontal overlap in the activities of the merging parties. The Commission however identified a vertical overlap since Kaxu O&M operates and manages the solar power plant, the Kaxu Facility, on behalf of Kaxu Solar One. The Commission assessed the proposed transaction in the upstream market for the provision of power plant O&M services in South Africa and the downstream market of generation of solar renewable energy in South Africa.

[7] [REDACTED]
[REDACTED]
[REDACTED] the Kaxu Facility does not utilise any other upstream O&M managers. As such the Commission was of the view that the proposed transaction is unlikely to raise any input or customer foreclosure concerns since there are no third parties who can be foreclosed as a result of the proposed transaction.

[8] Given the above, the Commission concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. We concur with this finding.

Public interest

Employment

[9] The acquiring firm does not have any employees at the Kaxu Facility and through Kaxu O&M has acquired the services of employees of Abengoa South Africa. The proposed transaction involves the transfer of [REDACTED] Abengoa South Africa employees to Atlantica South Africa Operations via Section 189 of the Labour Relations Act. [REDACTED] employees will retain their jobs and thus the proposed transaction will have a positive impact on employment.

Ownership

- [10] Atlantica is not owned or controlled by a member of a historically disadvantaged group as defined in Section 3(2) of the Act. However, the merging parties submitted that post-transaction, the shareholders of the primary acquiring firm, Atlantica South Africa Operations, will be:
- a. Atlantica South Africa (which is not owned or controlled by historically disadvantaged persons); and
 - b. Yet-to-be established Broad-Based Black Economic Empowerment (B-BBEE) partners (which is intended to hold 8% of the shares in Atlantica South Africa Operations). However, this had not been confirmed at the time of the merger filing.
- [11] The Minister of the Department of Trade, Industry and Competition (“Minister”) filed a Notice of Intention to Participate. The Minister in effect requested that the proposed transaction be approved subject to the creation of a Workers Trust holding the 8% as intended by the merging parties, as a condition to the approval of the proposed transaction. In response, the merging parties submitted that Atlantica South Africa Operations shall at its own expense effect and implement a B-BBEE ownership transaction which will ensure that a minimum of 8% of its issued share capital is held by Black Persons / People (who are also employees of Atlantica South Africa Operations).
- [12] In order to give effect to the above, the merging parties, in agreement with the Commission, tendered the following ownership-related conditions that we have imposed on the transaction:
- a. Within 12 months from the implementation date, Atlantica South Africa Operations shall at its own expense effect and implement a B-BBEE ownership transaction which will ensure that a minimum of 8% of its issued share capital is held by Black Persons / People¹ (who are also employees of Atlantica South Africa Operations) as ordinarily understood and interpreted in terms of the Codes² and the B-BBEE Act³.

¹ “Black Person” means a natural person who falls into the category of “Black People” as defined in the B-BBEE Act from time to time, and Black and Black People shall be construed accordingly.

² “Codes” mean the Codes of Good Practice on B-BBEE published by the Minister in terms of the B-BBEE Act under General Notice 1019 in Government Gazette 36928 on 11 October 2013.

³ “B-BBEE Act” means the Broad-Based Black Economic Empowerment Act 53 of 2003.

- b. Atlantica South Africa Operations shall have full latitude to design appropriate transaction/s to give effect to the undertakings set out in a above, to ensure performance of the obligations in a above, it being agreed that the B-BBEE ownership transaction shall include at least an employee participation element.

[13] The merging parties further confirmed to the Tribunal that the design and implementation of a B-BBEE ownership transaction will be at the cost of Atlantica South Africa Operations and that this includes the issue of the requisite shares to the persons or entity which Atlantica South Africa Operations selects in order to comply with the conditions.

[14] The full set of imposed conditions is annexed hereto as **Annexure "A"**.

Other public interest issues

[15] The proposed transaction raises no other public interest concerns.

Conclusion

[16] We conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. Furthermore, the imposed conditions adequately address any post-transaction ownership issues, and the proposed transaction raises no other public interest concerns.

20 December 2021

Mr Andreas Wessels

Date

Ms Mondo Mazwai and Ms Yasmin Carrim concurring

Tribunal Case Manager:

Kameel Pancham

For the Merging Parties:

Xolani Nyali of Bowman Gilfillan

For the Commission:

Nolubabalo Myoli and Grashum Mutizwa