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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM128Oct16

In the matter between

TRIALPHA INVESTMENT VEHICLE	Acquiring Firm
And	
KOUGA WIND FARM (RF) (PTY) LTD; RUSTMO1 SOLAR FARM (RF) (PTY) LTD AND SLIMSUN (RF) (PTY) LTD	Target Firms

Panel	: Mr Norman Manoim (Presiding Member)
	: Ms Yasmin Carrim (Tribunal Member)
	: Mr Andreas Wessels (Tribunal Member)
Heard on	: 15 December 2016
Order Issued on	: 15 December 2016
Reasons Issued on	: 19 January 2017

REASONS FOR DECISION

Approval

[1] On 15 December 2016, the Competition Tribunal approved the large merger between Trialpha Investment Vehicle ("Trialpha") and Kouga Wind Farm (Rf) (Pty) Ltd ("Kouga"); Rustmo1 Solar Farm (Rf) (Pty) Ltd ("Rustmo1") and Slimsun (Rf) (Pty) Ltd ("Slimsun").

[2] The reasons for the approval follow.

Parties to the transaction and their activities

Primary Acquiring Firm

[3] The primary acquiring firm is Trialpha, comprised of five special purpose vehicles ("SPV's"), incorporated for the purpose of acquiring shares in various wind and solar farms.[1] Trialpha is controlled by Specialised Infrastructure Equity *En Commandite* partnership ("SP Equity") which possesses 100% of the available shares in the five SPV's.

[4] SP Equity's general partner is Specialised Infrastructure Equity GP (Pty) Ltd ("GP") and its sole limited partner is First Energy Capital (Pty) Ltd ("First Energy"). First Energy wholly owns GP and is in turn owned by Specialised Holdings Trust 1 ("HT 1"). Very little, if any of the economic benefit accruing to the investments in the SPV's and underlying Project Companies flow to SP Equity, First Energy and ultimately HT 1. The economic benefits flow instead to an *en commandite* partnership called Specialised Infrastructure Debt E*n Commandite Partnerships* (Debt) ("Debt ECP") through its holding of all the issued debentures of the SPV's.

[5] Debt ECP's General Partner is First Energy and its limited partner comprises various entities, of which Trialpha Specialised Investment Trust III ("Trialpha Trust") has a controlling interest. Trialpha Trust, a funds-of-funds investment vehicle, is thus the recipient of more than 90% of the economic returns flowing from Debt ECP and controls Debt ECP as contemplated in s12(2)(g) of the Competition Act 89 of 1998. This control may however only be exercised within the bounds agreed to in terms of Debt ECP's partnership agreement.

[6] Debt ECP, Equity ECP and various other funds which are limited partners of Debt ECP (Including the Trialpha Trust) are all managed by Trialpha Investment Management, on an outsourced basis in terms of a management agreement.

[1] These SPV's are Renewable Energy K (Pty) Ltd, Renewable Energy C (Pty) Ltd, Renewable Energy S (Pty) Ltd, Renewable Energy R (Pty) Ltd and Renewable Energy F (Pty) Ltd.

Trialpha Investment Management has, in turn, entered into a management agreement with Gaia Infrastructure Partners (Pty) Ltd ("Gaia").

[7] Equity ECP directly and indirectly controls three other SPV's which ultimately hold interests in the Dorper Wind Farm as well as Jasper, Letsasi and Lesedi Independent Power Providers ("IPP's").[2] These projects are IPP's that have entered into 20 year Power Purchase Agreements ('PPA's') with Eskom in terms of the Renewable Energy Independent Power Producer Procurement Program ("REIPPPP"). Dorper Wind Farm is an onshore wind energy electricity generation facility in the Eastern Cape. Jasper, Letsatsi and Lesedi are solar photovoltaic projects that have entered an agreement with Eskom to provide a total of 203MW of electricity. Presently Dorper, Letsatsi and Lesedi are generating electricity into the South African electricity grid.

Primary Target Firms

[8] The primary target firms comprise of Kouga, Rustmo1 and Slimsun, all of which are ring-fenced IPP's that operate renewable energy producing plants pursuant to the award of a right to do so by the Department of Energy ("DoE") under the REIPPPP, a license from the national Electricity Regulator of South Africa and the conclusion of a Power Purchase Agreement ("PPA") with Eskom on a take-or-pay basis.

[9] As part of the transaction, Trialpha will also acquire a non-controlling interest of 6% in one other project company, Solar Capital De Aar (RF) (Pty) Ltd ("Solar Capital").

[10] Kouga controls a power plant which generates electricity from wind energy and Rustmo1, Slimsun and Solar Capital control plants which generate electricity

[2] SP Equity ECP solely controls Dorper K Co. which, in turn holds a 30% share of the Dorper Wind Farm. SP Equity ECP controls Renewable Energy I (Pty) Ltd which has the right to acquire 100% of the shares of Intikon Energy (Pty) Ltd, an SPV which controls Jasper Power Company (Pty) Ltd which controls the Jasper Power Plant, Letsatsi Power Compnay (Pty) Ltd and Lesedi Power Company (Pty) ltd.

from solar energy. All three plants supply electricity directly to the national electricity grid in terms of a 20 year PPA with Eskom.

[11] The shares of the target firms that are to be purchased in the proposed transaction are, pre-merger, owned and controlled by the Evolution One Fund which seeks to exit its investment in the project companies.

Proposed transaction and rationale

[12] In terms of the proposed transaction, Trialpha will purchase Evolution One Fund's pre-merger shareholding in the target firms which comprises a 26.6% share in Kouga, a 51% shareholding in Rustmo1, a 40% shareholding in Slimsun and a 6% share in Solar as a going concern. Post transaction, Trialpha will be able exercise control over three of the four primary target firms, namely Kouga, Rustmo1 and Slimsun.

[13] In terms of rationale, Trialpha Investment submits that the proposed transaction supports its aims in securing investments in infrastructure projects with long-term-inflation linked returns.

[14] Evolution One Fund, the seller, submits that the proposed transaction is part of the natural evolution of the investment and exit process of the investors in the Evolution One Fund. Further, that the proposed transaction would make funds available for further investment in development projects.

Relevant market and impact on competition

[15] The Commission found that the proposed transaction would result in horizontal overlap in the broad market for the supply of renewable energy (including onshore wind energy and solar photovoltaic energy) to Eskom in South Africa. Pre-merger, the primary acquiring firm is active in the market for the supply of renewable energy because Equity ECP possesses shares in the Dorper Wind Farm as well as the Letsatsi, Lesedi and Jasper solar projects. Kouga, Rustmo1, Slimsun and Solar Capital, which control wind and solar power

generation plants respectively are also active in the market for the supply of renewable energy.

[16] In its report the Commission found, utilising the capacity factor of power plants as an indication of market share, that the merged entity will possess a 12.42% market share of the market for the supply of renewable energy market in South Africa. This percentage comprises a 4.67% share in the wind energy market and 11.15% share in solar energy market.

[17] The Commission indicated that competition to generate and supply renewable energy to Eskom takes place at the time of the competitive bidding process under the DOE's REIPPPP and therefore competition takes place 'for the market' (i.e. during the bidding stage) and not 'in the market' (i.e. after the bid has been awarded). The renewable energy generated by the IPP's is supplied at tariffs that are determined in the bidding process and have been set for 20 years. None of the IPP's capacity outputs, predetermined in their respective PPA's, are thus subject to competitive forces.

[18] It is thus apparent that owing to the low post-transaction market share as well as the constraints presented by strong competition in the market and by the obligation on the merged entity to fulfill the terms of the 20 year IPA's entered into between the target firms and Eskom, the proposed transaction is unlikely to substantially prevent or lessen competition in the relevant markets in South Africa.

Public interest

[19] The merging parties submitted, which was confirmed by the Commission, that the proposed transaction will not have a negative effect on employment because the target firms will continue to operate as is post-merger.

[20] The proposed transaction further raised no other public interest concerns.

Conclusion

[21] In light of the above, we conclude that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, no public interest issued arise from the proposed transaction. Accordingly, we approve the proposed transaction unconditionally.

Ms Yasmin Carrim

19 January 2017
Date

Mr Norman Manoim and Mr Andreas Wessels

Tribunal Researcher:	Alistair Dey-van Heerden
For the merging parties	Lizél Blignaut of ENSAfrica
For the Commission:	Daniela Bové and Lindiwe Khumalo