



## COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM171Nov16

In the matter between

**HOLDCO, DEVCO and ASSETCO**

Acquiring Firms

And

**ALDWYCH POWER HOLDINGS LIMITED**

Target Firms

**ALDWYCH INTERNATIONAL LIMITED**

**CABEOLICA S.A.**

**CENPOWER GENERATION COMPANY LIMITED**

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Panel	: AW Wessels (Presiding Member)
	: Prof Imraan Valodia (Tribunal Member)
	: Medi Mokuena (Tribunal Member)
Heard on	: 25 January 2017
Order Issued on	: 25 January 2017
Reasons Issued on	: 13 February 2017

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### REASONS FOR DECISION

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#### APPROVAL

[1] On 25 January 2017, the Competition Tribunal ("Tribunal") approved the proposed transaction involving the abovementioned parties.

[2] The reasons for the approval are as follows.

## **PARTIES TO THE PROPOSED TRANSACTION AND THEIR ACTIVITIES**

### **Primary Acquiring firms**

- [3] The primary acquiring firms are HoldCo, DevCo and AssetCo (collectively referred to as "the Acquiring Firms"). They are new companies yet to be formed for purposes of the proposed transaction.<sup>1</sup>
- [4] HoldCo will be a joint venture in equal share between (i) Aldwych Holdings Limited ("AHL") (50%); and (ii) AFC Equity Investments Limited ("AFC Equity") (50%). HoldCo will be the holding company of DevCo and AssetCo.

### **AHL**

- [5] AHL is controlled by Pan African Infrastructure Development Fund ("PAIDF"). AHL controls the following firms: (i) Aldwych International Limited ("AIL"); and (ii) Aldwych Power Holdings Limited ("APH"). PAIDF controls the following firms in South Africa:<sup>2</sup> (i) NewGX Partnership; and (ii) Kelvin Power (Pty) Ltd ("Kelvin Power").<sup>3</sup>
- [6] Globally, PAIDF is a leading African infrastructure fund manager with equity investments and capital across two infrastructure funds. PAIDF specializes in investments in infrastructure projects in the energy, transport including road, rail, ports and airports, ICT, water and sanitation and telecommunications.

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<sup>1</sup> At the time of filing, the companies were yet to be incorporated. After the hearing, the merging parties notified the Tribunal that the companies have been incorporated as Edison Energy Holding Company ("HoldCo"), Edison Energy Development Company ("DevCo") and Edison Energy Asset Company ("AssetCo").

<sup>2</sup> PAIDF also has a non-controlling shareholding in Lanseria International Airport.

<sup>3</sup> NewGX Partnership holds 31.7% in Community Investment Ventures Holdings and Community Investment Ventures Holdings in turn holds shares in Dark Fibre Africa (Pty) Ltd.

- [7] The Aldwych group of companies develops, invests in construction, power generation, transmission and distribution businesses in Sub-Saharan Africa.
- [8] In South Africa, PAIDF is only active through AHL which has interests in Kelvin Holdings (Pty) Ltd ("Kelvin Holdings")<sup>4</sup> / Kelvin Power in the power generation sector, which will be transferred to AssetCo. Kelvin Power operates the Kelvin power coal fired power station which generates electricity in South Africa, which is purchased by the municipality of Johannesburg.

### *AFC Equity*

- [9] AFC Equity is controlled by Africa Finance Corporation<sup>5</sup> ("AFC"). AFC is not controlled by any single firm. AFC Equity has non-controlling interests in the following firms: (i) Cenpower Generation Company Limited ("Cenpower")<sup>6</sup> (31.85%); and Cabeolica SA ("Cabeolica")<sup>7</sup> (23.45%).
- [10] AFC Equity is an African-led Global Business Category 1 License Company that is involved in principal investment in various infrastructure projects in Africa.
- [11] Cenpower is developing a 350 megawatts combined cycle power generation plant located in Kpone, Tema, Ghana, which can operate on liquid fuel (distillate and light crude oil) as well as natural gas.
- [12] Cabeolica does not control any firm in South Africa. It operates a 26 megawatt wind power project consisting of four wind farms set across the Cape Verde Islands.

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<sup>4</sup> A special purpose investment holding company. Its sole purpose is to hold shares in Kelvin Power.

<sup>5</sup> Incorporated in the Federal Republic of Nigeria.

<sup>6</sup> Cenpower is incorporated in Republic of Ghana and is one of the target firms.

<sup>7</sup> Cabeolica is incorporated in Cape Verde and is one of the target firms.

- [13] In South Africa, AFC does not control any firm and only has a non-controlling 6.63% shareholding in South African Toll Road Company Proprietary Limited ("SATRC"). SATRC holds 5.48% in the Bakwena Platinum Corridor Concession.

#### Primary Target Firms

- [14] The proposed transaction is a creation of a joint venture whereby AHL and AFC Equity, the joint controllers of the Acquiring Firms, will transfer some of their subsidiaries and interests in certain power assets to the Acquiring Firms.
- [15] AHL will transfer 100% of its shares in AIL and its subsidiary, Aldwych Kelvin Operations (Pty) Ltd ("Aldwych Kelvin Operations") into DevCo as a subsidiary of AIL.
- [16] AHL will transfer 100% shares in APH to AssetCo. APH will transfer the following firms it controls in South Africa into AssetCo as subsidiaries of APH: (i) Levoca 549 (Pty) Ltd ("Levoca")<sup>8</sup>; (ii) Kelvin Holdings; and (iii) Kelvin Power.
- [17] AFC<sup>9</sup> and AFC Equity will transfer 56.9% of their shares in Cabeolica and AFC Equity will also transfer 31.85% of its shares in Cenpower into AssetCo.

#### PROPOSED TRANSACTION AND RATIONALE

- [18] In terms of the proposed transaction, AFC Equity will incorporate three special purpose vehicles, namely Holdco, AssetCo and DevCo. AHL and AFC Equity will each subscribe for 50% of the issued shares in

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<sup>8</sup> Levoca 549 (Pty) is a holding company which holds 60% of the shares in Kelvin Holdings, which in turn holds 100% of Kelvin Power. It has no other business apart from holding these shares.

<sup>9</sup> AFC holds 42.1% in Cabeolica; AFC Equity holds 14.8% in Cabeolica.

HoldCo and will jointly control the Acquiring Firms. AHL will then transfer 100% of its shares in AIL into DevCo and APH into AssetCo (which includes its indirect 60% shareholding in Kelvin Power). AFC and AFC Equity will transfer their 56.9% shareholding in Cabeolica (Cape Verde) and AFC Equity's 31.85% shareholding in Cenpower (Ghana) into AssetCo. HoldCo will hold 95% of the shareholding in DevCo, while the remaining 5% will be held by AssetCo. HoldCo will also hold 80% of the shareholding in AssetCo, while the remaining 20% will be held by DevCo. Upon implementation of the proposed transaction, AHL and AFC Equity will jointly control HoldCo, AssetCo and DevCo.

- [19] AFC Equity proposes to transfer its shares in Cenpower to AssetCo in consideration for shares in HoldCo. AHL proposes to simultaneously transfer its shares in each of AIL and APH to DevCo and AssetCo in consideration for the issue to AHL of shares in HoldCo. HoldCo proposes to transfer its shares in APH to AssetCo in consideration for the issue of a loan note from AssetCo to HoldCo. HoldCo proposes to transfer its shares in AIL to DevCo in consideration for the issue of a loan note from HoldCo to DevCo.
- [20] The Acquiring Firms submitted that the proposed transaction will provide the opportunity to develop a leading power investment, operations, management and project development company on the continent, on the back of an existing operating portfolio.
- [21] From the perspective of the target firms, the proposed transaction will enable them to benefit from *inter alia* the project development, due diligence and investment origination and execution expertise of both AFC and PAIDF.

## RELEVANT MARKETS AND IMPACT ON COMPETITION

- [22] In relation to the merging parties' activities in South Africa, the Competition Commission ("Commission") found that AIL only has an interest in Kelvin Power and that AFC's only investment in South Africa is a 6.63% shareholding in SATRC which holds 5.48% in the Bakwena Platinum Corridor Concession. AFC Equity does not currently have any investments in South Africa. The Commission therefore concluded that there is no horizontal overlap between the merging parties' activities in South Africa.
- [23] The Commission, more specifically, considered whether the proposed transaction is likely to result in coordinated effects in South Africa and concluded that the proposed transaction is unlikely to result in coordinated effects since there is no overlap in the businesses being contributed to the joint venture in South Africa.
- [24] The Commission furthermore noted that AIL and AFC Equity have agreed to non-compete obligations in relation to the joint venture. In summary, this requires that each of these parties shall not, for so long as they own at least 20% of the shares in HoldCo and for a period of three years thereafter, engage in activities that compete with HoldCo's business. The Commission concluded that since the restraint is limited to activities that compete with the joint venture and is further limited in duration, it is reasonable and commercially justifiable.
- [25] The Tribunal questioned the merging parties regarding the motivation for the time period of the restraint, as well as the geographic scope of the restraint. We were satisfied with the explanation and rationale that the merging parties provided.<sup>10</sup>

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<sup>10</sup> Transcript, pages 11 to 13.

[26] We concur with the Commission's finding that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market in South Africa.

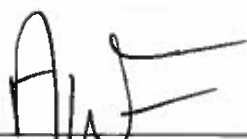
## **PUBLIC INTEREST**

[27] The merging parties confirmed that the proposed transaction will have no negative effects on employment and particularly that no retrenchments will occur as a consequence of the proposed transaction.<sup>11</sup>

[28] No other public interest concerns arise from the proposed transaction.

## **CONCLUSION**

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



**Mr AW Wessels**

**13 February 2017**

**Date**

**Prof Imraan Valodia and Mrs Medi Mokuena concurring**

Tribunal Case Managers: Alistair Dey-van Heerden and Ndumiso Ndlovu

For the merging parties Heather Irvine of Falcon & Hume Inc.

For the Commission: Boitumelo Makgabo and Zintle Siyo

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<sup>11</sup> Merger Record, see pages 5 and 53.