



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM157Dec22

In the matter between:

Starsight Energy Africa Holding Ltd

Primary Acquiring Firm

and

SolarAfrica Energy (Pty) Ltd

Primary Target Firm

Panel	:	J Wilson (Presiding Member)
	:	I Valodia (Tribunal Member)
	:	F Tregenna (Tribunal Member)
Heard on	:	22 February 2023
Order issued on	:	22 February 2023
Reasons issued on	:	23 March 2023

REASONS FOR DECISION

- [1] On 22 February 2023, the Competition Tribunal (“Tribunal”) conditionally approved the large merger between Starsight Energy Africa Holding Limited (“Starsight”) and SolarAfrica Energy (Pty) Ltd (“SolarAfrica”), in terms of which Starsight intends to acquire ██████% of the issued share capital in SolarAfrica from SolarAfrica (Africa) Ltd (“SolarAfrica (Africa)”). Post-merger, Starsight will (subject to the further transaction referred to in paragraph 6 below) solely control SolarAfrica.

The Parties

- [2] Starsight is a private company incorporated in Mauritius and created as a special purpose vehicle for purposes of the proposed merger. It is currently ██████████ by Dogstar Mauritius, which is in turn jointly controlled by Dogstar Holdings Limited (“Dogstar Holdings”) and African Infrastructure Investment

Fund (“AIF3”). Dogstar Holdings is ultimately controlled by Helios Investment Partners LLP (Helios). AIF3 is ultimately controlled by Old Mutual Limited (“OM”). Helios and OM are not controlled by any firm. Dogstar Mauritius, all the firms controlling it and all the firms controlled by those firms will be referred to as the “Acquiring Group”. Post-merger, Starsight will be jointly controlled by Dogstar Mauritius ([60-70]%) and SolarAfrica (Africa) ([30-40]%).

[3] Relevant to this transaction are the activities of OM, which ultimately controls AIF3. OM also controls the IDEAS Managed Fund (“IDEAS Fund”), an infrastructure equity fund investing in economic infrastructure and social infrastructure. OM, through the IDEAS Fund, is active in the supply of solar photovoltaic (“solar PV”) to Eskom, through the Department of Mineral Resources and Energy’s Renewable Energy Independent Power Producer Procurement Programme (“REIPPPP”), and on a retail basis to commercial and industrial sectors. The supply of solar PV to the commercial and industrial sectors is conducted through the IDEAS Fund’s two solar projects, namely Orionis Holdings RF (Pty) Ltd (“Orionis”)¹ and AIIM C&I Clean Energy Asset Co. Platform (Pty) Ltd (“AIIM C&I”)².

[4] The primary target firm is SolarAfrica, which is wholly owned by SolarAfrica (Africa) Ltd. SolarAfrica (Africa) is wholly owned by SolarAfrica (Mauritius) Ltd which is in turn controlled by ██████████. ██████████ does not control any other firms in South Africa. SolarAfrica and the firms controlled by it will be referred to as the “Target Group”.

[5] The Target Group is a supplier of solar PV to the commercial and industrial sectors through a power purchase agreement (“PPA”), fixed roof rental or an outright cash sale of the solar system. The Target Group also provides battery energy storage, wheeling³ and hybrid power solutions as part of its product offering to commercial and industrial customers.

¹ IDEAS Fund has a [40-50]% shareholding in Orionis.

² IDEAS Fund has a [70-80]% shareholding in AIIM C&I.

³ Wheeling involves the delivery of energy from a renewable energy generator to an end-user in a different location using existing distribution and transmission networks.

[6] In a separate transaction that will occur simultaneously with this merger (and which was also conditionally approved by the Tribunal on 22 February 2023), the IDEAS Fund intends to acquire [30-40]% of the issued share capital in SolarAfrica from Starsight.⁴

Rationale

[7] According to the Acquiring Group, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

[8] For the Target Group, [REDACTED]
[REDACTED].

Competition Assessment

Overlaps

[9] The Commission found that there is a horizontal overlap between the activities of the merging parties in that they are both active in the supply of solar PV.

⁴ IDEAS Infrastructure I GP (Pty) Ltd and SolarAfrica Energy (Pty) Ltd (Case No: LM167Dec22).

⁵ In 2022, the Department of Mineral Resources removed the requirement for a licence for embedded generation (the production of power from small-scale projects) outside formal government procurement programmes such as the REIPPPP. The regulatory changes also allow for wheeling.

[10] As noted above, the Acquiring Group supplies solar PV to Eskom under the REIPPPP and to the commercial and industrial sectors. The Target Group, on the other hand, is only active in the supply of solar PV to the commercial and industrial sectors.

[11] The Commission found that there is no vertical overlap between the activities of the merging parties.

Market definition

Product Market

[12] The merger parties submitted that the overlap between their respective activities is minor and that there are material differences from both a demand and supply side when considering the supply of solar PV under REIPPPP, and the supply of solar PV to commercial and industrial users. The merging parties therefore submitted that the relevant market is that for the supply of solar PV to the commercial and industrial sectors.

[13] In its assessment, the Commission considered that the Tribunal has previously accepted that the supply of energy consists of two sub-categories, namely: (i) renewable energy sources: wind, solar PV, biogas, biomass, landfill gas and hydroelectric power; and (ii) non-renewable energy sources: Coal, gas and/or diesel.⁶

[14] The Commission also found that there are differences in the supply of solar PV to Eskom in terms of the REIPPPP, and supply to the commercial and industrial sectors. In particular:

- a. Supply to Eskom through the REIPPPP occurs through an annual tender process in terms of which independent power producers (“IPPs”) compete to be appointed as the preferred renewable solar energy

⁶ See *Brookfield Asset Management Inc and TerraForm Global Inc (Case No. LM155Nov20)*; and *K2014158795 (Pty) Ltd and Intikon Energy (Pty) Ltd*, Case No.: 020511

supplier. By contrast, supply to the commercial and industrial sectors takes place through PPAs, pursuant to the negotiation of bilateral agreements with customers on an ongoing basis.

- b. Supply to the commercial and industrial sectors requires a dedicated marketing and sales team to acquire customers, which is not required when supplying to Eskom.
- c. The price, capacity and duration of the REIPPPP agreement is concluded upfront with Eskom in terms of a standard PPA and these values generally do not fluctuate for the duration of the PPA (usually 20 years), As regards supply to the commercial and industrial sectors on the other hand, customers have a range of price and capacity options to suit their specific needs.

[15] The Commission formed the view that, given the lack of competition concerns raised by the merger, it was not necessary to define the precise scope of the relevant product market in this case. The Commission nevertheless assessed the impact of the proposed merger both in a broad market for the supply of solar PV via the REIPPPP and to the commercial and industrial sectors; and in a narrow market for the supply of solar PV to the commercial and industrial sectors only.

Geographic market definition

[16] The merging parties submitted that IPPs supply renewable solar energy to customers located throughout South Africa, and that the relevant geographic market is accordingly national.

[17] In assessing the geographic market, The Commission considered Tribunal precedent in *Globeleq/Springbok and Okavango Biology Luxembourg SARL*

*and Sonnedix Solar South Africa Holdings (Pty) Ltd,*⁷ where the Tribunal accepted a national market.

- [18] The Commission also found that, given that solar PV can now be supplied to customers via wheeling, it is no longer necessary to have a solar plant at each location where solar PV is supplied. Given the national energy crisis, it is likely that more firms will supply solar PV through wheeling as demand for alternative sources of energy increases. Further, the merging parties in the current transaction are active nationally.
- [19] For the above reasons, the Commission concluded that the relevant geographic market is national.
- [20] The Commission therefore assessed the effects of the proposed merger in (i) the national market for the supply of solar PV via the REIPPPP and to commercial and industrial customers (the broad market); and (ii) the national market for the supply of solar PV to commercial and industrial customers only (the narrow market).
- [21] Having regard to the evidence before it, the Tribunal assessed the effects of the proposed merger on the same basis.

Market Shares and Levels of Concentration

- [22] The merger parties submitted that there is no publicly available information on the basis of which to estimate market shares in the above relevant markets. However, they stated that there are numerous players active in the markets, and estimated their market shares in the narrow market as follows:

⁷ *Okavango Biology Luxembourg SARL and Sonnedix Solar South Africa Holdings (Pty) Ltd*, Case No.: LM181Feb22.

Table 2: Merging parties' estimated market shares for the supply of solar PV to the commercial and industrial sectors in South Africa



Source: merging parties' submission

- [23] The Commission assessed the merger parties' market shares based on information obtained from the National Energy Regulator of South Africa ("NERSA") on the total contracted capacity (MW) of each solar project registered with it.
- [24] In its assessment of the broad market, the Commission found that the total contracted capacity of solar PV to the REIPPPP and commercial and industrial sectors nationally was ████████ MW in 2022. The Acquiring and Target Groups have a total contracted capacity in the broad market of █████ MW and █████ MW respectively. The Commission therefore estimated that the merger parties have a combined market share of [10-20]% in the broad market for the supply of solar PV nationally, made up of the Acquiring Group's market share of [10-20]% and the Target Group's market share of [0-10]%.
- [25] In its assessment of the narrow market, the Commission found that the total contracted capacity for the supply of solar PV to the commercial and industrial sectors nationally was ████████ MW in 2022. The Acquiring and Target Groups have a total contracted capacity in the narrow market of █████ MW and █████ MW respectively. The Commission therefore estimated that the merger parties have a combined market of [0-10]% in the narrow market, made up of the Acquiring Group's market share of [0-10]% and the Target Group's market share of [0-10]%.
- [26] The Commission was also informed that there are over 100 players in the narrow market, and that, based on the number of projects registered with

NERSA, it is growing exponentially - in 2019 only 41 projects were registered, whereas by 2022 this number had increased to 406 projects.

- [27] The Commission also found that the loosening of regulatory constraints on embedded generation (the production of power from small-scale projects) in South Africa, and the ongoing energy crisis in the country, makes it likely that more firms will enter the relevant markets as demand for alternative sources of energy increases.
- [28] Based on all of these factors, the Commission concluded that the proposed merger is unlikely to give rise to unilateral effects irrespective of whether the relevant market is defined broadly or narrowly.
- [29] The Tribunal agrees with this assessment. The proposed merger is unlikely to give rise to unilateral effects given the merger parties' relatively small market shares and the wide (and growing) number of alternative suppliers in the market.

Information Exchange Assessment

- [30] The Commission found that OM's IDEAS Fund currently has the ability to unilaterally appoint directors to the boards of AIIM C&I (in which it has a sole controlling shareholding of [70-80]%) and Orionis (in which it has a joint controlling shareholding of [40-50]%).
- [31] As a result of the present merger, AIIF3 will acquire an indirect interest, through Dogstar Mauritius, in the Target Group. Dogstar Mauritius will have joint control of the Target Group post-merger. AIIF3 can nominate director/s to the board of Dogstar Mauritius and thus may have access to the Target Group's competitively sensitive information, including budgets, business plans, pricing, strategy, supplier, and customer information.
- [32] Furthermore, as noted above, in a separate transaction that will occur simultaneously with this merger, the IDEAS Fund intends to acquire a jointly

controlling [30-40]% shareholding in SolarAfrica from Starsight, which will entitle the IDEAS fund to appoint directors at the Target Group.

[33] The Commission found that AIIIM C&I, Orionis and the Target Group do not constitute a single economic entity with OM because they are not wholly-owned, and should accordingly be regarded as competitors post-merger. The Commission was therefore concerned about information exchange between the directors of these firms post-merger.

[34] In order to mitigate this concern, the Commission reached an agreement with the merging parties that any directors appointed by AIIIF3 to Dogstar Mauritius should not include any individuals with recent involvement as a director, or in the day-to-day management of, AIIIM C&I or Orionis. These undertakings are contained in the conditions referred to below.

[35] The Tribunal agrees that these conditions will assist in mitigating the information exchange concern identified by the Commission.

Public Interest

Effect on employment

[36] The merger parties submitted that the proposed merger will not result in any retrenchments.

[37] The Commission contacted the employee representative of the merging parties, who confirmed that the employees were notified of the proposed merger and that no concerns were raised.

[38] Accordingly, the Commission concluded that the proposed merger is unlikely to raise any employment concerns.

[39] The Tribunal agrees with the Commission's conclusion in this regard.

Effect on the spread of ownership

[40] The merger parties submitted that the Acquiring Group has ██████% HDP ownership, while the Target Group has ████ HDP ownership. Accordingly, as a result of the proposed transaction, the Target Group's HDP ownership will increase by ██████%.

[41] The Commission concluded that the proposed merger does not raise any concerns under section 12A(3)(e) of the Act or any other public interest concerns.

[42] The Tribunal concurs with the Commission's findings in this regard.

Conclusion

[43] The Tribunal concludes that, having regard to the information exchange conditions annexed hereto as **Annexure A**, the proposed merger is unlikely to give rise any significant competition or public interest effects.

[44] The Tribunal accordingly approves the proposed merger subject to the conditions annexed hereto as **Annexure A**.

Signed by: Jerome Wilson
Signed at: 2023-03-23 17:25:56 +02:00
Reason: Witnessing Jerome Wilson

Jerome Wilson

23 March 2023

Presiding Member
Adv Jerome Wilson SC

Date

Concurring: Professor Imraan Valodia and Professor Fiona Tregenna

Tribunal Case Managers: Matshidiso Tseki and Sinethemba Mbeki

For the Merging Parties: Werner Rysbergen of DLA Piper

For the Competition: Raksha Darji and Wiri Gumbie

Commission: