

SOUTH AFRICA / JUDGMENT

General Electric Company v Thermal Power, Renewable Power And Grid Business of Alstom (LM176Jan15) [2015] ZACT 57 (18 June 2015) [2015] ZACT 57

COURT

Competition Tribunal

BEFORE

Andreas Wessels, Fiona Tregenna, Medi Mokuena

CASE / FILE NUMBER

LM176Jan15

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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM176Jan15

DATE: 18 JUNE 2015

In the matter between:

General Electric Company.....Primary Acquiring Firm

And

The Thermal Power, Renewable Power and Grid.....Primary Target Firm

Business of Alstom

Panel Andreas Wessels (Presiding Member)

Prof Fiona Tregenna (Tribunal Member)

Medi Mokuena (Tribunal Member)

Heard on 27 May 2015

Order issued on 27 May 2015

Reasons

issued on : 18 June 2015

Reasons

for Decision

Approval

[1] On 27 May 2015, the Competition Tribunal (“Tribunal”) unconditionally approved the large merger between General Electric

Company (“GE”) and the Thermal Power, Renewable Power and Grid Business of Alstom (“Alstom Energy”).

[2] The reasons for approving the transaction follow.

Parties to proposed transaction

[3] The primary acquiring firm is GE, a firm duly incorporated in accordance with the laws of Connecticut, United States of America (“USA”). GE is listed on the New York Stock Exchange, London Stock Exchange, Frankfurt Stock Exchange and Paris Stock Exchange. GE is not owned by a single firm.

[4] GE is a global, diversified manufacturing, technology and services company, made up of a number of business units, each with its own divisions. Its primary business units include GE Energy Management, GE Power and Water and GE Oil and Gas. Of relevance to the competition assessment of the proposed transaction are GE’s activities relating to power generation, gas turbines, steam turbines and products that protect, monitor, control and automate the grid, as well as visualization software that helps to optimize the grid.

[5] The primary target firm is Alstom Energy, which is controlled by the Alstom Group (“Alstom”). Alstom is duly incorporated in accordance with the company laws of France and is listed on the Paris Stock Exchange.

[6] Alstom Energy comprises of the Thermal Power, Renewable Power and Grid business of Alstom. Alstom is mainly active in the manufacture of equipment and the provision of services for power generation and rail transport.

[7] Of specific relevance to this proposed transaction are the activities of Alstom Energy as a supplier of equipment utilised in several

coal-fired power plants in South Africa and the only nuclear plant (i.e. Koeberg) of Eskom Holdings SOC Limited (“Eskom”).

Alstom Energy furthermore has ongoing projects with respect to the Medupi Power Station and the Kusile Power Station in South Africa.

Proposed transaction and rationale

- [8] In terms of the Master Agreement concluded by Alstom, Alstom Holdings, GE, GE Industrial France SAS and GE Albany Global Holdings B.V., GE will, directly or indirectly, acquire all the shares held by the Alstom Group, Alstom and Alstom Holdings (“Seller”) in the Alstom subsidiaries and a majority of the shares held by the Seller in Alstom Grid Holdings B.V., which together operate Alstom Energy, giving GE sole control over Alstom Energy.[1]
- [9] According to GE the proposed transaction is aimed at enlarging and fostering GE’s offering in the power and grid sector by integrating Alstom Energy’s largely complementary products and services. It is expected that the transaction will lead to cost synergies with a focus on supply chain, sourcing, R&D optimization and selling, general and administrative expenses. [2]

[10] It is worthy to note that the proposed transaction is a global transaction notified in numerous jurisdictions including Australia, Brazil, China, Columbia, the EU, India, Israel, Mexico, Pakistan, Russia, Serbia, South Korea, Turkey and the USA.

Competition assessment

[11] The Competition Commission (“Commission”) identified horizontal overlaps between the activities of the merging parties in relation to the manufacture and supply of steam turbines, gas turbines, tidal energy, hydro turbines, wind turbines and substation automation systems. The Commission however found that there is no geographic overlap of the activities of the merging parties in South Africa in relation to tidal energy, hydro turbines and wind turbines. The Commission thus focused its competition analysis on the markets for the provision of steam turbines, gas turbines and substation automation systems. We deal with these markets next.

Market for steam turbines

[12] With regards to the market for steam turbines (STs), South African customers such as Sasol SA (Pty) Ltd (“Sasol”) confirmed that STs with a power output of >100 megawatt (MW) are distinct from those with a power output of <100 MW. The Commission thus defined separate relevant product markets for STs with a power output of <100 MW and STs with a power output of >100 MW.

[13] With regards to the supply of STs with a power output of <100 MW in South Africa, the Commission however found that the merging parties' activities do not overlap since Alstom Energy has not supplied STs with a power output of <100 MW to date in South Africa.

[14] With regards to the sale of STs with a power output of >100 MW, the Commission’s market investigation revealed that GE tendered for only one project in that market in South Africa in 2012. The Commission however found that GE has not made any sales in the past 10 years of STs with a power output of >100 MW in South Africa. The Commission therefore concluded that the merging parties are not close competitors in South Africa and that the proposed transaction is unlikely to substantially prevent or lessen competition in the national market for the provision of STs with a power output of 100 MW.

Market for gas turbines

[15]Based on the Commission's market investigation, it delineated the gas turbines (GTs) market according to the differences in the power output of the turbines. The market was delineated into GTs with a power output of (i) <90 MW; and (ii) >90 MW.

[16]The Commission however found that the merging parties' activities do not overlap in South Africa in the market for the supply of GTs with a power output <90 MW.

[17]In the market for the supply of GTs with a power output of >90 MW, the Commission found that GE has a market share of less than 10% in South Africa and that Alstom Energy has not supplied any GTs in the South African market in the past 34 years. The Commission's analysis of past tenders showed that Siemens AG ("Siemens") is the largest player in the South African market, followed by Ansaldo Energia ("Ansaldo").

[18]The Commission further considered the bids that took place in the GTs market with a power output of >90 MW between 2004 and 2014 and found that both the merging parties submitted bids on projects during that time. Alstom Energy bid on [...] [3] projects [...] tenders, whilst GE bid on [...] projects and won [...]. Siemens and Ansaldo won all the other projects.

[19]The Commission ultimately concluded that the merged entity would be constrained by Siemens and Ansaldo post-merger and that the proposed transaction therefore is unlikely to substantially prevent or lessen competition in the market for the provision of GTs with a power output of >90 MW in South Africa.

[20]The Tribunal questioned the merging parties during the hearing regarding their activities relating to the sale of steam turbines and gas turbines in South Africa and past tenders that they were active in. We were satisfied with the answers provided and concur with the Commission that the proposed merger is unlikely to substantially prevent or lessen competition in South Africa in relation to these markets.

Market for substation automation systems

[21]The Commission found that the merged entity would have a market share of less than 15% in the national market for the provision of substation automation systems (SAS) products. The Commission further found that the merged entity will face competition from players such as Schweizer Engineering Laboratories (Pty) Ltd, ABB South Africa (Pty) Ltd, Schneider Electric South Africa (Pty) Ltd and others. The Commission therefore concluded that the proposed transaction is unlikely to substantially prevent or lessen competition in the SAS market in South Africa. We concur with this finding.

[22]The merging parties confirmed that the proposed transaction will not have any adverse effect on employment in South Africa.[4]

[23] Eskom however raised a potential public interest concern. It submitted that it currently outsources the manufacture of components to inter alia Alstom Energy. Eskom was concerned that the proposed merger could lead to a situation where GE no longer sources raw materials from local suppliers or allow local labour and content on the products to be supplied to Eskom, which could retard local industrial development.

[24] The Commission brought this concern to the attention of the merging parties. The merging parties then held a meeting with Eskom and after their discussions made submissions to the Commission indicating that:[5]

- (i) GE will honour all contracts currently in place in accordance with their terms;
- (ii) GE will have no reason to take any steps that may be detrimental to the contracts insofar as they recognise and/or take into account the provisions of the Preferential Procurement Policy Framework Act No. 5 of 2000 ("PPPFA");
- (iii) GE has no reason to detract from the measures in the contracts aimed at recognising the provisions of the PPPFA. In practice, GE assumes that Eskom (through the tendering and negotiations phase) is able to exercise a high degree of influence over the contents of the contracts with Alstom Energy and Actom (Pty) Ltd, including the applicable sourcing and localisation requirements;
- (iv) Although the contracts would have been concluded and entered into in the names of Alstom Energy legal/corporate entities that are distinct from GE and, as a question of corporate law of contract, they would be binding as between Eskom and those Alstom Energy entities in accordance with the terms and conditions of the contracts in question;
- (v) These contracts will continue to bind those of Alstom Energy entities after the merger. GE sees no reason that the contracts will not be completed in the ordinary course in accordance with the provisions thereof;
- (vi) GE's expectations in South Africa, as in many African countries, is that government and state owned enterprises will continue to demand localisation commitments from suppliers, in their drive for industrialisation, job creation and growth. GE understands these demands and has demonstrated its ability to invest with governments to deliver them; and
- (vii) While the endeavours can only be concretised when tenders are issued by Eskom and/or by other organs of state in future, the above factors make it apparent that the transaction will more likely foster and identify opportunities to enhance the provisions of the PPPFA and similar legislation aimed at socio-economic imperatives in South Africa.

[25] Given the above-mentioned commitments, the Commission ultimately concluded that the proposed merger raises no significant public interest concerns.

[26]We note that Eskom was satisfied with the commitments provided and did not make any submissions at the hearing. The Tribunal at the hearing however questioned the merging parties regarding the concern raised by Eskom and the commitments that they have provided to address that concern.

[27]Mr. Bruce Campbell, the general counsel for GE Africa, confirmed that “GE has committed to honour all of those contracts in accordance with their terms, but beyond that we don’t see any particular need at this stage to interfere with the thrust of what we understand those contracts to be. We understand Eskom’s responsibilities under the legislation to promote local

enterprise, local manufacture of products.”[6] He further said that GE has “a track record of localising manufacture here in South Africa. We also have a track record in

other parts of Africa of doing the same thing and we completely understand the political imperative of African governments to localise and industrialise as far as possible. So, we would actually like to see our localisation efforts here in South Africa spread

beyond the transportation sector. We have actually been assembling low voltage switch gear for the Medupi project in Midrand”[7] Mr Campbell further spoke to GE’s announcement of its intention “to invest in a local engineering centre here in Gauteng ... that would serve customers across the sectors in South Africa, both transportation and power as well as healthcare potentially.”[8] He also said that GE announced its intention “to invest in a supplier development vehicle, which would promote black entrepreneurship and the development of small and medium sized enterprises and hopefully enable them to participate in the supply chain of all the GE businesses here in South Africa”[9]

[28]Given the above, we concur with the Commission’s finding that the proposed merger is unlikely to raise significant public interest concerns.

CONCLUSION

[29]We agree with the Commission’s finding that the proposed transaction is unlikely to substantially prevent or lessen competition in any relevant market. In addition, the proposed transaction raises no significant public interest concerns. We therefore approve the proposed transaction without conditions.

18 June 2015

Andreas Wessels

Prof Fiona Tregenna and Medi Mokuena concurring

Tribunal Researcher: Caroline Sserufusa

For the merging parties: Derek Lotter of Bowman Gillfillan and Stephen

Langbridge of Fasken Martineau For the Commission: Rakgole Mokolo

- [1] For further transaction details, see inter alia pages 10 to 13 of the Commission's Report.
- [2] Alstom's rationale for the proposed transaction has been claimed as confidential. See inter alia Commission's Report, page 14.
- [2] Alstom's rationale for the proposed transaction has been claimed as confidential. See inter alia Commission's Report, page 14.
- [3] Information claimed as confidential by the merging parties.
- [4] See inter alia pages 1701 and 1719 of the merger record.
- [5] Merging parties' submission to the Commission dated 20 April 2015.
- [6] Transcript, page 12.
- [7] Transcript, page 13.
- [8] Transcript, page 13.
- [9] Transcript, pages 13 and 14.
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