Jersey Competition Regulatory Authority ("JCRA")

PUBLIC VERSION

Decision M744/11

Imposing a financial penalty

concerning an infringement of Article 20(1) of the Competition (Jersey) Law 2005 by

Brookfield Asset Management Inc.

Introduction and Executive Summary

1. On [REDACTED], the Jersey Gas Company Limited ("**Jersey Gas**") confirmed to the JCRA, following enquires made by the JCRA, that the ownership of Jersey Gas had changed during December 2010.

2. On [REDACTED], the JCRA received a retrospective merger application (t**he "Application**") for approval under Articles 20 and 21 of the Competition (Jersey) Law 2005 (the "**Law**") concerning the acquisition on 8 December 2010 of Prime Infrastructure[1] ("**Prime**") and, thereby, Jersey Gas and Kosangas (Jersey) Limited ("**Kosangas**") by Brookfield Infrastructure Partners L.P., an associated entity of Brookfield Asset Management Inc. ("**Brookfield**") (the "**acquisition**").The information provided in the Application leads the JCRA to conclude that Brookfield executed its acquisition of **Prime** without complying with the obligation set out in Article 20(1) of the Law, namely to noti**fy** the acquisition to the JCRA and not execute the same until after it had rece**ived** JCRA approval.

3. On the basis of the information detailed above, the JCRA has determined that Brookfield acquired control of Prime, as the concept of control is defined in Article 2(2) of the Law on 8 December 2010, without first receiving approval from the JCRA and thus infringed the Law. The JCRA hereby issues a decision to impose a financial penalty under Article 35 and 39 of the Law in the amount of £89, 233.28.

Background

The Parties

(a) Brookfield

4. Brookfield is a global asset manager incorporated in Canada and listed on the New York and Toronto Stock Exchanges and on Euronext Amsterdam. In 2009, Brookfield acquired 39.91% of the issued stapled securities of Prime through

[1] Prime acquired IEG in 2005 pursuant to JCRA approval JCRA Decision C001/05, Proposed Acquisition of International Energy Group by Prime Infrastructure Group. 16/05/05

another if its associated entities, BIP Bermuda Holdings IV Limited. In December 2010, Brookfield acquired the remaining 60.09% of the issued stapled securities of Prime, giving Brookfield control of 100% of Prime. The worldwide turnover of Brookfield for the financial year ending 31 December 2009 was approximately €8.6 billion.

5. Any reference to Brookfield includes reference to any of its subsidiaries.

(b) Prime

6. Prime is an infrastructure entity and comprises inter alia, Prime Infrastructure Holdings Limited ("**PIHL**"), Prime Infrastructure Trust ("**PIT**") and Prime Infrastructure Trust 2 ("**PIT2**""). The shares of PIHL and the units of PIT and PIT2 are stapled together and were traded as a single stapled security that was on the Australian Securities Exchange. PIHL wholly owns International Energy Group Limited ("**IEG**") which in turn own Jersey Gas and Kosangas. The principle activities of Jersey Gas are gas storage, production and distribution of the same and related activities in Jersey, while those of Kosangas are the distribution of liquefied petroleum gas ("**LPG**") and related services in Jersey. The worldwide turnover of Prime for the financial year ending 30 June 2010 was €1,084.1 million.

7. According to the Application, Prime does not control any other companies in Jersey.

Requirement for JCRA Approval

8. According to Article 20(1) of the Law, a person must not execute certain mergers or acquisitions except with and in accordance with the approval of the JCRA. The type of mergers and acquisitions subject to this requirement is set out in the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the "**Order**").

9. Acquisitions satisfying one or more of the thresholds set out in the Order are subject to the Law's notification and approval requirements. Brookfield's

acquisition of Prime satisfied the threshold set out in Article 4 of the Order, as that threshold may be determined under the parameters set out in Article 1 of the Order. Article 4 of the Order is satisfied on the grounds that Jersey Gas has a share of over 40% of the supply of gas for domestic consumption by Jersey residents. On this basis, pursuant to the Order, the JCRA's approval is required under Article 20(1) of the Law before an acquisition is executed**.**

The JCRA's procedure

10. As noted above, in 2009 Brookfield acquired 39.91% of the stapled securities of Prime and on 9 October 2009 notified the European Commission ("**EC**") of the same. Submissions were made to the EC and on 3 November 2009, the EC confirmed that there was no obligation to notify them because there were insufficient elements to conclude Brookfield would acquire de facto sole control over Prime[2]. Based on the same analysis it was considered that the approval of the JCRA was not required – on the grounds that no one acquired control of Jersey Gas and Kosangas as it is defined in Article 2(2) of the Law.

11. In the autumn of 2010, Brookfield sought to increase its holding in Prime to 100%; the acquisition was notified to the EC and the matter completed on 8 December 2010. A letter to the JCRA dated [REDACTED], from Jersey Gas, setting out the details of the 2009 and 2010 acquisitions, details that Brookfield engaged external London lawyers who were instructed to identify any local law merger clearances that were required; but that the need to obtain ex-ante JCRA approval was not identified and nor was Jersey legal advice sought in relation to local merger control issues.

12. Following receipt of the Application, on the [REDACTED], the JCRA Board agreed that given the facts and circumstances relating to the acquisition, a fine amounting to 2% of the relevant turnover of Jersey Gas - amounting to £89,233.28 was appropriate and proportionate. On [REDACTED], the JCRA sent a written notice (the "**written notice**"), to the local legal representative of

[2] Prime was at this time known as Babcock and Brown Infrastructure.

Brookfield, of its proposed decision to issue a financial penalty regarding the infringement of the Law under Article 20(1); and invited comments to the proposed decision, to comply with Article 35(2) of the Law.

13. On [REDACTED], the JCRA received representation from Brookfield (the "**representation**"), acknowledging its liability to pay any such financial penalty the JCRA board members (the "**Board**") may determine appropriate, up to the amount of £89,233.28, but asked that their comments be brought to the Board's attention with a view to reducing the level of the financial penalty. Brookfield accepted that the acquisition did require ex ante JCRA approval and so there were no objections as such, but in their representation Brookfield asked for certain facts and circumstances to be considered as mitigating factors, which are dealt with in turn in paragraphs 14 – 18 below.

14. Brookfield feel that they acted appropriately by instructing reputable external London lawyers to identify any local law merger clearances that were required and that if so instructed would have notified the JCRA. In the written notice, the JCRA acknowledges, as mitigating factors, both the co-operation of Brookfield and its belief that Brookfield did not intend to circumvent the Order or the Law, but was merely negligent. Consequently, the JCRA believes that the fact that external counsel failed to advise its clients accurately has already been considered in mitigation.

15. The JCRA considers it an aggravating factor that in 2005, the JCRA did approve Prime's acquisition of the International Energy Group[3] ("**IEG**") on the grounds that Jersey Gas had a share of over 40% of the supply of gas for domestic consumption by Jersey residents. The JCRA feel that the Parties therefore, knew of the requirements under the Law and, at the very least, knew to check the Order's notification thresholds in respect of the 2010 acquisition. Brookfield detail that they were not the notifying party in the 2005 acquisition and were not aware of, or privy to, the application when Prime acquired IEG. The JCRA does

[3] JCRA Decision C001/05

not accept this is a mitigating factor on the grounds that it believes that robust due diligence prior to the completion of the acquisition would have shown that when IEG was acquired, ex ante JCRA approval was required.

16. Similarly, Brookfield considers that because the management team at Jersey Gas were not directly involved in the acquisition in the period leading up to completion, local management knowledge as it pertained to the JCRA's remit and the merger thresholds was not available to Brookfield. The JCRA has a working relationship with the management team at Jersey Gas and has held meetings with representatives of Jersey Gas on different aspects of the Law and the JCRA considers that even if Brookfield did not have access to this information, the management team at Jersey Gas were in a position to advise their parent company Prime of the same.

17. Brookfield question whether it is appropriate to cite the monopoly and very large market share that Jersey Gas and Kosangas have respectively for many products and services supplied in Jersey as relevant aggravating factors, on the basis that the JCRA consider that the acquisition did not substantially lessen competition in Jersey or any part of Jersey. These facts are considered an aggravating factor because there can be no question or uncertainty that the threshold of Article 4 of the Order was satisfied, as detailed in paragraph 9 above.

18. The representation also questions whether the JCRA, in levying a financial penalty that was significantly larger than those imposed in the past for similar infractions of the Law under Article 20(1), took account of all the mitigating factors which were acknowledged in the written notice. However, in determining the level of any penalty in this case, the JCRA has considered and taken account of, as detailed in the written notice, Brookfield's cooperation and that there was no substantial lessening of competition in Jersey as a result of the acquisition. This latter fact was reflected in the percentage of turnover that is being used to calculate the financial penalty. In addition, using its discretionary powers, the JCRA took the date of non compliance as ending on the date the JCRA learnt of

the acquisition, a full 30 days before receipt of the Application, which had a significant bearing on the amount of the financial penalty. Further the JCRA has based the penalty on the turnover of Jersey Gas and Kosangas rather than on the wider IEG business or Brookfield's wider business. The JCRA believes in the circumstances the fine is appropriate and proportionate.

Conclusion

19. The information provided in the Application leads the JCRA to conclude that the acquisition satisfies the threshold set out in Article 4 of the Order as that threshold may be determined under the parameters set out in Article 1 of the Order.

20. Brookfield executed its acquisition of Prime without complying with the obligation set out in Article 20(1) of the Law, namely to notify the acquisition to the JCRA and not execute the same until after it had received JCRA approval.

21. On the basis of the information detailed above, the JCRA has determined that Brookfield acquired control of Prime, as the concept of control is defined in Article 2(2) of the Law on 8 December 2010, without first receiving approval from the JCRA and thus infringed the Law.

Appropriate remedy concerning the infringement

22. Having determined that an infringement of Article 20(1) exists, Article 38(7) of the Law determines that the JCRA may impose a financial penalty for an infringement of Article 20(1). To impose a financial penalty, the JCRA must be satisfied that the breach was committed either intentionally, negligently, or recklessly. Under Article 39(2) of the Law, the amount of such a penalty must not exceed 10% of the turnover of the undertaking during the period of the breach, up to a maximum period of 3 years. Put simply, the JCRA could impose a fine that equals 10% of the worldwide turnover of Brookfield for the period of the breach.

23. The JCRA also concludes that resolving this matter informally would be inappropriate. Given the procedural nature of this infringement, the facts and

circumstances surrounding this specific acquisition and that the acquisition has already occurred, the JCRA does not think that voluntary commitments would be a sufficient or an appropriate remedy. The JCRA therefore concludes that imposition of a financial penalty under Article 39 of the Law is appropriate.

24. Based on the evidence provided in the Application, the JCRA does not have reason to believe that the acquisition has resulted in a substantial lessening of competition in Jersey or any part of Jersey. Brookfield is not active in the oil or gas industry anywhere in the world, such as would constitute an upstream supply for the purposes of Article 3 of the Order, and aside from its interest in Prime has no share of supply of any goods or services in Jersey and there is no supply or purchase relationship between Brookfield and Prime which is relevant to the Jersey gas market.

25. In establishing the level of fines for infringements of merger filing requirements, the European Commission has examined both aggravating and mitigating circumstances.[4] In these circumstances, the JCRA concludes that Brookfield's failure to comply with the requirements under Article 20(1) of the Law with respect to its acquisition of Prime was negligent, rather than an intention to circumvent the Order or the Law under Article 39(1).[5]

26. In the written notice sent to Brookfield on the [REDACTED], the JCRA proposed a financial penalty of £89,233.28. No account was taken of any filing fee that was due and was based on the following:

Jersey Gas turnover for the year ending 30 June 2010-per statutory accounts £[REDACTED]

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[4] Commission Decision of 10 February 1999 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89, O.J. L183/29; *see also* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89.

[5] *See* Commission Decision of 18 February 1998 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Council Reg. (EEC) No 4064/89 para 10 (fining a party for consummating an acquisition without notification to, and approval by, the Commission because, while there was no deliberate intention to circumvent the merger regulations, "the provisions of the Merger Regulation are clear in that they cover not only intentional circumvention, but also negligent circumvention").

Kosangas turnover for the year ending 30 June 2010-per statutory accounts £[REDACTED]

Less inter-company sales [REDACTED]

Net sales = £[REDACTED]

Fine calculation:
Percentage of turnover: 2%

Period of non-compliance: [REDACTED][6]: [REDACTED days] [REDACTED]% of a year)

Fine £[REDACTED] x 2% x [REDACTED]% = **£ 89,233.28**

27. The JCRA acknowledges that the amount of the penalty is larger than the financial penalties imposed in the previous three JCRA Decisions regarding a similar infringement of the Law, but the previous three financial penalties were not imposed on a local, solus utility company that had previously been involved in an acquisition that required the approval of the JCRA under Article 20(1). For the reasons detailed in paragraphs 14-18 above, the JCRA feels that the circumstances in this matter warrant a financial penalty larger than previously imposed.

28. In its representation, Brookfield ask that the Board consider certain facts and circumstances as mitigating factors, detailed in paragraphs 14-18 above, with a view to reducing the level of the financial penalty. The JCRA does not consider that any of the issues raised can be considered mitigation and as such do not warrant a reduction in the financial penalty.

29. As detailed previously, the JCRA has the discretion to impose a financial penalty of 10% of the turnover of Brookfield for the period of the breach. For the purposes of proportionality, the JCRA has chosen the relatively low turnover percentage of 2%, recognizing that the acquisition does not appear to have lessened competition in

[6] The JCRA has taken the period of non compliance as ending on [REDACTED] when Jersey Gas advised the JCRA of the acquisition, rather than the date of [REDACTED]when the Application was formally submitted.

Jersey, and has used the turnover of the two local based companies of IEG, rather than the ultimate parent company. In addition, as detailed in footnote 6, the JCRA has taken the date of non compliance as ending when it was first alerted to the infringement, which was one calendar month before receipt of the Application.

30. Considering the circumstances set out in paragraphs 14-18 above, the JCRA has determined that the appropriate financial penalty for this infringement is £89,233.28, which is within the limit set by Article 39(2) of the Law. The amount of the financial penalty is specific to this case, and is not indicative of penalties or other remedies that the JCRA might impose in other cases in the future.

Decision and financial penalty order

31. In light of the facts and circumstances set out above, the JCRA has decided that Brookfield acquired control of Prime and thus Jersey Gas and Kosangas in breach of Article 20(1) of the Law.

32. Based on this breach, the JCRA hereby imposes a fine of £89,233.28 on Brookfield under Article 39 of the Law.

33. Brookfield may pay this fine by any combination of cheque or wire transfer. Wire transfers may be made to the JCRA's account upon instructions available from the JCRA.

34. If payment is not made by 30 September 2011, interest will accrue daily thereafter on any unpaid amount at four percentage points above the published base rate of the Bank of England.

20 June 2011 **By Order of the JCRA Board**