

Kluwer Competition Law Blog

The increasing importance of Broad-Based Black Economic Empowerment (“BBBEE”) in South African competition law

Pieter Steyn (Werksmans) · Monday, May 2nd, 2022

One of the purposes of the South African Competition Act is stated in the Act to be to “promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons”. The term “historically disadvantaged persons” (“HDPs”) is effectively defined in the Act as non-white South Africans and firms which are majority-owned and controlled by them.

Amendments to the Competition Act in 2019 included

- prohibiting a dominant firm from requiring an unfair trading condition or imposing an unfair price on a supplier controlled by HDPs and operating in a sector designated by the Minister of Trade, Industry and Competition;
- specifically prohibiting price discrimination by a dominant firm where this impedes the ability of firms controlled by HDPs to participate effectively in a market;
- expanding the public interest test for mergers to include the effect of the merger on the “promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market”.

BBBEE is regulated by the Broad-Based Black Economic Empowerment Act and various Codes of Good Practice issued under the Act. BBBEE is focused on ownership by HDPs, the involvement of HDPs in management, procurement from HDPs, the development of suppliers and other firms owned and controlled by HDPs and charitable and other developmental initiatives for the benefit of HDPs.

2021 saw several cases which illustrate the increasing focus by the South African competition authorities on BBBEE issues.

The most high profile case dealing with HDPs was the Competition Commission’s prohibition in June 2020 of the sale of Burger King (South Africa) (RF) (Pty) Ltd (“BKSA”) to private equity firm ECP Africa. It was the first time since the Competition Act came into force on 1 September 1999 that a merger had been prohibited solely on public interest grounds. The merger raised no competition concerns, and the sole reason for the prohibition was that the post-merger shareholding of HDPs in BKSA would decrease from 68% to 0%. Following discussions with the merging parties and the Minister of Trade, Industry and Competition (who is entitled in terms of the Competition Act to participate and make representations on public interest grounds), the

Commission changed its view and accepted a conditional approval of the merger which was approved by the Competition Tribunal on 17 September 2021. The conditions included undertakings to

- increase the procurement of products and/or services from “BBBEE accredited suppliers” in South Africa;
- establish an employee share ownership program to acquire an “effective 5% interest” in BKSA;
- dispose of a meat plant (which made patties for BKSA) to a HDP buyer, and that BKSA would conclude a supply agreement with the plant/HDP buyer.

Several other mergers in 2021 were approved by the competition authorities subject to BBBEE related conditions. For example

- A merger involving Puregas (Pty) Ltd (and which raised no competition concerns) was approved subject to the condition that Puregas invest in training and education for certain employees and their children and provides support to a HDP owned gas transport company and a HDP owned potential provider of carbon oxide. Of interest is that the Commission accepted these non-ownership related conditions to deal with its concern about the post-merger dilution of the HDP shareholding in Puregas. This indicates a more nuanced approach compared to the Commission’s 2020 prohibition of the BKSA merger;
- A merger involving Altantica South Africa Operations (Pty) Ltd (and which raised no competition concerns) was approved subject to the condition that it implements a BBBEE ownership transaction including an employee share ownership program and a minimum 8% shareholding by HDP employees.

There has not yet been a case involving the above amendments to the Competition Act dealing with the relationship between dominant firms and HDP owned and controlled firms. However, it is important to note that the effect of BBBEE issues in competition cases is not necessarily limited to the provisions of the Competition Act that expressly refer to HDPs. An interesting cartel settlement approved by the Competition Tribunal in 2021 and involving SAAB Grintek Defence (Pty) Ltd included undertakings by SAAB to increase both its HDP enterprise and supplier development expenditure and its procurement of goods and services from HDP owned and controlled firms. These undertakings were used to justify why the Commission agreed that the settlement would not involve an admission by SAAB that it had contravened the Competition Act.

BBBEE is likely to remain an important factor in South African competition law and offers both challenges (for example, in mergers) and opportunities (for example, in settling cases). BBBEE is a complex field of law, and businesses and advisors need to be fully aware of the legal framework for BBBEE in South Africa and how it is implemented in practice.

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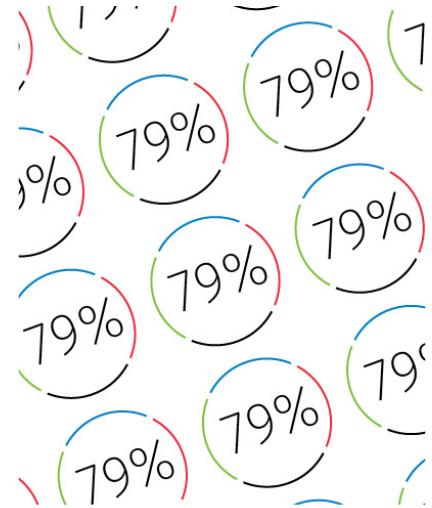
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