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# Burger King merger approved – what role will black ownership play in future mergers?

6 October 2021 *8 min read*

## Burger King merger

1. 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, caused much interest and concern. 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 but the Commission was concerned that the shareholding of "historically disadvantaged persons" in BKSA would decrease from 68% to 0% as a result of the merger. The Competition Act requires the Competition Commission to determine whether the merger may be justified on public interest grounds and the Commission is obliged by a 2018 amendment to the Competition Act (which came into effect on 12 July 2019) ("**2018 Amendment**") to consider the effect of the merger on "the promotion of a greater spread of ownership, in particular to increase the levels of ownership of historically disadvantaged persons and workers in firms in the market". The term "historically disadvantaged person" is defined in the Competition Act as a category of individuals who were disadvantaged by unfair discrimination on the basis of race before the South African Constitution came into effect (or an association or juristic person majority-owned and/or controlled by such persons) ("**HDPs**").

2. The 2018 Amendment is not the only public interest ground which the Commission is obliged to "consider" in terms of the Competition Act. The other grounds are the effect of the merger on –

1. a particular industrial sector or region;
2. employment;
3. the ability of small and medium-sized businesses and firms owned or controlled by HDPs to "effectively enter into, participate in or expand within the market";
4. the ability of national industries to compete in international markets.

## The prohibition of the BKSA merger

3. The prohibition of the BKSA merger caused uncertainty about the interpretation and scope of the 2018 Amendment. At the time of the prohibition, the Commission stated that it effectively had no choice but to prohibit the BKSA merger and was simply enforcing the law as provided in the 2018 Amendment. However, 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 legal position is accordingly not as simple and clear cut as initially indicated by the Commission i.e. the mere fact that Black ownership decreases are not sufficient justification for an outright prohibition of the merger. The Competition Act merely obliges the Commission to "consider" the effect of the merger on the five stipulated public interest grounds and the Commission accordingly has a discretion as to how to deal with public interest concerns.

4. In the BKSA case the Commission advised that it had engaged with the merging parties before the prohibition decision but did not get a satisfactory response. One must bear in mind that the BKSA case was an "intermediate" merger and in terms of the Competition Act,

intermediate mergers are deemed to be unconditionally approved by the Commission if the Commission fails to decide the merger within 60 business days after the date of filing. The prohibition may have been the result of the Commission running out of time. The Commission is however empowered by the Competition Act to grant a conditional approval and it is not clear why the Commission opted for a prohibition as opposed to a conditional approval in June 2021.

5. The merging parties had been prepared to agree to the following conditions for an approval in June 2021 –

1. investing at least R500 million for the establishment of new Burger King stores in South Africa and increasing the number of stores to at least 150;
2. increasing the number of permanent employees employed in South Africa by at least 1 250 HDPs and increasing the total value of all payroll and employee benefits in respect of all employees employed by the merged entity by at least R120 million;
3. subject to supply on reasonable commercial terms, increasing the procurement of products and/or services from "BBBEE accredited suppliers" in South Africa from approximately R665 million to an aggregate value of at least R930 million per year.

6. The additional conditions agreed by the parties, the Minister and the Commission and approved by the Tribunal appear to be that –

1. BKSA will establish an employee share ownership program which will acquire an "effective 5% interest" in BKSA;
2. a meat plant (which makes patties for BKSA) will be disposed of to a HDP buyer and BKSA will conclude a supply agreement with the plant/HDP buyer. The meat plant is owned by (and ECP Africa is acquiring a 100% shareholding in) Grand Foods Meat Plant (Pty) Ltd.

7. It is not clear whether participation in the employee share ownership program will be limited to HDP employees only but assuming this is the case, then the Commission has accepted a substantial decrease in HDP shareholding in BKSA from 68% to an "effective" 5%. The sale of the meat plant may also allow the seller to claim "deemed" Broad-Based Black Economic Empowerment ownership points if the sale complies with the relevant requirements in the Codes of Good Practice issued in terms of the Broad-Based Black Economic Empowerment Act.

## The outcome of the BKSA case

8. The outcome of the BKSA case is no doubt satisfactory to the merging parties and their shareholders (including the 68% HDP shareholders in BKSA). At the time of writing the Tribunal's reasons had not yet been published but the following may be noted –

1. it appears that the mere decrease in HDP ownership of a target does not automatically amount to a public interest concern which justifies an outright prohibition of the merger. This applies even if the decrease is substantial as it was in the BKSA case;
2. the Competition Act obliges the Commission to "consider" the effect of a merger on all the five listed public interest grounds but does not give any weighting or preference to any one of the five grounds. It appears from the BKSA case that concerns with regard to one of the five public interest grounds may be mitigated or resolved by undertakings by the parties and/or the positive effects of the merger on the other public interest grounds. From a policy perspective, a more holistic approach to public interest is preferable to a rigid inflexible "silo" approach and this is consistent with the past approach of the Competition Tribunal and the Competition Appeal Court;
3. the prohibition of a merger that raises no competition concerns must always be carefully considered and preferably limited to exceptional cases. The BKSA case is historic because it was the first merger ever to be prohibited solely due to a public interest concern. The consequences of a prohibition are however material factors for the Commission to take into account. The Commission's prohibition of the BKSA merger had very serious implications for other mergers and particularly for sales by HDP owned and controlled firms. Requiring that a HDP owned/controlled firm may only sell its business to (or may only be acquired by) a firm with at least the same or substantially similar level of HDP ownership, would have a massive chilling effect on the ability of HDP owned/controlled firms to realise value from their investments by restricting the pool of potential buyers and potentially (and unintentionally) weakening the negotiating position of the HDP sellers. Any buyer (especially foreign investors) would balk at being required by the Competition Commission to give up majority control or a substantial portion of their acquisition to third party HDPs;
4. the Commission's acceptance of a conditional approval for the BKSA merger indicates the adoption of a more nuanced and commercial approach to the five public interest grounds. It does however beg the interesting question as to what circumstances would justify a prohibition by the Commission of a merger which raise no competition concerns. The BKSA merger could have been a "test case" in this regard. In practice, buyers need to assess fully and carefully any potential adverse effects of the merger on the five stipulated public interest grounds as part of their due diligence of the target. Any decrease in Black ownership of the target as a result of the merger must

be flagged and, if the decrease is material, the buyer should consider possible undertakings which may mitigate or remove any concern the Commission may raise in this regard. This will help to avoid the costs and delays experienced by the parties in the BKSA case.

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