

REGULATORY

Memorandum of understanding concluded between the Broad Based Black Economic Empowerment (“BBBEE”) Commission and the Competition Commission – the increasingly important interface between BBBEE and Competition Law

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1. The Competition Commission investigates certain mergers and anticompetitive practices including cartel conduct (for example price fixing, collusive tendering and market division between competitors) and abuses of dominance. The BBBEE Commission focuses on complaints relating to BBBEE including fronting practices (which are widely defined as a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives or the implementation of the Broad Based Black Economic Empowerment Act).
2. One of the purposes of the Competition Act is to promote a greater spread of ownership in particular to increase the ownership stakes of historically disadvantaged persons (“**HDPs**”). In investigating mergers, the competition authorities are currently required to consider the effect of the merger on the ability of firms controlled or owned by HDPs (“**HDP Firms**”) “to become competitive”. This must also be taken into account by the Competition Commission when deciding whether or not to grant an exemption to an agreement or practice which would otherwise be prohibited by the Competition Act.
3. Proposed amendments to the Competition Act were published in December 2017. The background note to the proposed amendments explain that they provide for “scrutiny of the racially-skewed spread of ownership of the South African economy” and that measures are required in order to “realise the transformative vision of economic empowerment for all South Africans in particular those individuals who are historically excluded and disadvantaged”. The proposed amendments are intended to “create more opportunities to advance the transformation of ownership of the economy”. One of the priorities identified by the Ministry of Economic Development is that special attention must be given to the impact of anticompetitive conduct on HDP firms. The proposed amendments include –
 1. a new requirement to consider the effect of price discrimination by dominant firms on HDP firms;
 2. changing and widening the current test used in exemption applications and merger cases (referred to above) to take into account the “promotion of the effective entry into, participation in and expansion within a market” by HDP firms;
 3. obliging the Competition Commission to take HDP firms into account when conducting a market inquiry and deciding if any feature of the market prevents, restricts or distorts competition;
 4. obliging the Competition Tribunal to take into account the effect of a competition contravention on HDP firms when deciding the amount of a penalty to be imposed on a firm.
4. The memorandum of understanding (“**MOU**”) between the BBBEE Commission and the Competition Commission was concluded in August 2017 and will affect complaints and transactions submitted to either regulator. It is conceivable that a fronting practice for BBBEE purpose could also constitute a contravention of the Competition Act and vice versa. The MOU provides for consultation procedures between the two regulators and participation by representatives each regulator in complaints and transactions submitted to the other regulator. The MOU specifically provides that if the Competition Commission considers a complaint involving a transaction with implications for BBBEE and over which the BBBEE Commission also has jurisdiction, the Competition Commission must consult with the BBBEE Commission and have regard to the BBBEE Commission’s views. A joint working committee will be established between the two regulators and provision is made for the exchange of information between the two regulators. Disclosure of confidential information will however require the permission of the party which submitted such confidential information.
5. It is likely that BBBEE will become more important in future competition cases. The involvement of the [BBBEE](#) Commission in competition cases (and the Competition Commission in BBBEE cases) is an important development and may lead to complications and delays in the investigation and finalisation of cases. The manner in which MOU is implemented in practice will be watched with interest.



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