

# JOINT PROCUREMENT, BUYER GROUPS AND THE COMMISSION'S DRAFT BLOCK REGULATIONS

Andries Le Grange  
Director | Competition Law



CLIFFE DEKKER HOFMEYR

INCORPORATING  
KIETI LAW LLP, KENYA



# DRAFT BLOCK REGULATIONS



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- ❖ In August 2022, the Minister of Trade, Industry and Competition issued an invitation for the public to comment on the Draft Block Exemption Regulations for Small, Micro and Medium-Sized Businesses
- ❖ Purpose of the Regulations:
  - To exempt certain categories of agreements or practices of small, micro and medium-sized businesses (SMMEs) from the application of **sections 4(1) and 5(1) of the Competition Act, 89 of 1998** to enable collaboration between SMMEs that would otherwise contravene the Competition Act.

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The Regulations propose the exemption of the following categories of agreements/practices:

- ❖ Research and development (R&D) agreements
- ❖ Production agreements for production of a good or the provision of a service, or toll manufacturing by one firm to another (standalone or on a reciprocal basis).
- ❖ Joint purchasing agreements, which may include collective purchasing by a subset of firms in a market or any other similar arrangement.
- ❖ Joint selling prices of goods or services to and through intermediaries or other business customers by a subset of firms in a market or any other similar arrangement.

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The Regulations propose the exemption of the following categories of agreements/practices:

- ❖ Commercialisation agreements, which include co-operation between firms relating to the selling, distribution or promotion of their products.
- ❖ Standardisation agreements, which include setting the technical or quality requirements with which current or future products, production processes, services or methods may comply.
- ❖ Collective negotiations with large buyers or suppliers on the terms and conditions for purchasing or supply of goods or services.

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## Applicable Criteria to qualify as an SMME in the Agricultural Sector

Sectors or Subsectors in accordance with the Standard Industrial Classification	Size or Class of Business	Total full-time equivalent of paid employees	Total Annual Turnover (Rand)
Agriculture	Medium Small Micro	51 – 250 11 – 50 0 – 10	≤35,0 million ≤17,0 million ≤7,0 million

# Joint Purchasing Agreements/Joint Procurement/ Buying Groups

- ❖ Joint purchasing or joint procurement covers a wide variety of arrangements under which purchasers co-operate to source all or part of their requirements for products that are either production components which they transform, or goods which they resell.
- ❖ Buying Groups: The advantage of procuring products in a buying group is that the group can negotiate to receive the products at a discounted rate and sell products at a competitive rate to consumers in the market.

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## ❖ Theories of Harm

- 1. Downstream coordination: Joint purchasing agreements create buying groups that may be used as an instrument to facilitate collusion at the downstream level. If buyers in buying groups were to co-ordinate their purchasing decisions regarding the quantities of goods which they purchased, for example, this could affect the quantity of produced at the downstream level. This means that buying groups could potentially be used as a tool to enforce collusion downstream through the control of upstream input purchases. Alternatively, even if there is no co-ordination on quantities purchased, the conduct of standardising input costs may also facilitate collusion.

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## ❖ Theories of Harm

- 2. Abuse of monopsony power by restricting purchases: This refers to instances where a powerful buyer, by virtue of their dominant position in the market, is able to restrict their own purchases and thereby depress the price of a product below a competitive level. The harm from this conduct is essentially exploitative in nature and is equivalent (from a welfare perspective) to a monopoly exploiting its market power on the selling side.



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## ❖ Section 4(1) of the Competition Act:

- (1)(b) Prohibits outright (per se) competing firms from:
  - i. colluding to fix a purchasing or selling price or other trading condition,
  - ii. dividing markets by allocating customers, suppliers, territories or specific types of goods and services or
  - iii. collusive tendering.

# JOINT PROCUREMENT CASES

## ❖ *Competition Commission and Columbus Stainless Proprietary (Consent Order)*


- Market: Scrap metal
- Agreement/Concerted Practice: Around 1998 and until at least 2008, the companies entered into an agreement, alternatively, engaged in a concerted practice of directly or indirectly fixing the purchase price of scrap metal.
- Finding of the Commission: the respective companies coordinated and aligned their behavior in the market for the purchase of scrap metal, acting as a buyers' cartel and they collaborated and acted in tandem with an upstream cartel of scrap merchants.

## THE COMPLEXITIES OF CHARACTERISATION



- ❖ Room within our current jurisprudence to characterise such arrangements as conduct which does not contravene section 4 of the Competition Act.
- ❖ It is arguable that certain joint purchasing agreements may be characterised as agreements which do not contravene Section 4 of the Competition Act.

## DISCUSSION POINTS...

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- Benefits: Negotiating Bulk Price Discounts & Offering the product/service to consumers at a discounted rate.
  - The Regulations provide some relief for SMME's, however, firms that do not fall within the threshold requirements for SMME's do not qualify for the exemption. The exempted agreement must be inclusive of the majority of SMMEs in a market.
  - It is not clear to what extent the Draft Exemption Regulations imply that, without the exemption of the agreements listed therein, these agreements would necessarily contravene the Competition Act.

## DISCUSSION POINTS...

- ❖ To the extent that the Draft Exemption Regulations come into effect SMMEs should take advice regarding the application of the exemption to them.
- ❖ Other firms who are part of buyer groups should carefully consider whether their arrangements are compliant with the Competition Act.
- ❖ Other ways to comply with the Competition Act:
  - ❑ mergers of firms in order to enjoy scale benefit;
  - ❑ formation of or contracting through wholesale entity through which can negotiate discounts

# B-BBEE REGULATORY LANDSCAPE

Allan Hannie  
Director | Corporate & Commercial



CLIFFE DEKKER HOFMEYR

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KIETI LAW LLP, KENYA

## B-BBEE REGULATORY LANDSCAPE

- ❖ B-BBEE Act
- ❖ B-BBEE Codes govern B-BBEE implementation and measurement
- ❖ State must apply B-BBEE Codes
- ❖ EME's, QSE's and Large Enterprises
- ❖ Measurable Entities
- ❖ Measured Elements

## B-BBEE REGULATORY LANDSCAPE

- ❖ Sector Codes and Generic Codes
- ❖ Overlap/Conflict between B-BBEE Codes
  - ❑ Sector Code V Sector Code
  - ❑ Generic Codes vs Sector Code
  - ❑ Group Companies



# B-BBEE REGULATORY LANDSCAPE

## Agri Sector Vs Fishing Sector

- ❖ Agri Sector
  - B-BBEE Agri Sector Code
  - Application
  
- ❖ Fishing Sector
  - No B-BBEE Sector Code
  - Application



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## AGRI SECTOR CODES: OBJECTIVES



- DE-RACIALISING LAND OWNERSHIP
- TRANSFORM AGRI SUPORT SYSTEMS
- UNLOCKING OF POTENTIAL



- EQUITABLE ACCESS & OPPORTUNTY
- SOCIAL UPLIFTMENT
- COMMUNITY PARTICIPATION



- BETTER WORKING & LIVING CONDITIONS
- PROTECTING LAND RIGHTS & TENURE

## AGRI SECTOR CODE: SCOPE

### ❖ Scope Of Application –

- Primary production
- Suppliers
- Beneficiators
- Logistical and Trading (non beneficiated)

### ❖ MULTINATIONALS

- SA Operations
- Sale of equity in foreign ops

# AGRI SECTOR CODE: THRESHOLDS AND DEEMED RECOGNITION

## Thresholds

- ❖ EME's - <R10 Million
- ❖ QSE's - >R10M and <R50Million
- ❖ Large - > R50M

## Deemed Recognition levels

- ☐ EME'S – LEVEL 4 (100%)
- ☐ 51% BLACK OWNED EME'S and QSE's – LEVEL 2 (125%)
- ☐ 100% BLACK OWNED EME'S and QSE's – LEVEL 1 (135%)

# AGRI SECTOR CODE: PRIORITY ELEMENTS

## Priority Elements

- **OWNERSHIP**

- 40% of Net Value Points
- Land Claim Farms
- Statement 102

- **SD**

- 40% of Total Points (ex BP)
- Target – 6% Large and 3% QSE (8/9pnts)
- 85% on scarce and critical skills

- **ESD**

- 40% for each PP, ED and SD
- 51% BO QSE's – 15% (5pnts) phased in (3 years)

## AGRI SECTOR CODE: SCORECARDS

### ❖ OWNERSHIP

- Large – 25 points (25% +1)
- QSE – 25 points (25% +1)
- Review every 2 yrs. if ESD works

### ❖ MANAGEMENT CONTROL

- Large – 19 points
- QSE - 15 points

### ❖ SD

- Large – 20 points
- QSE – 30 points

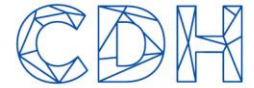
## AGRI SECTOR CODE: SCORECARDS

### ❖ ESD

- Large – 40 points
- QSE - 25 points
- PP – (51% BO and 30% BWO - targets phased if 3% SupD.
- SupD (Large) – 2% (3% NPAT for yrs. 1-4) and 1% QSE
- ED (Large and QSE) 1.5%
- ESD initiatives enhanced recognition (x 1.5)

### ❖ SED

- Large and QSE – 15 points
- lease of 10% farm land = full points



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# QUESTIONS





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