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COMPETITION LAW: BAD ECONOMIC TIMES CAN BE GOOD BUSINESS FOR OTHERS

By Terrance Mark Booysen

As South Africa's economy continues to struggle with shrinkage of 7.1% in exports and imports -- which was recently reported by Statistics SA for the first quarter of 2016 -- our dismal GDP (gross domestic product) annual growth of less than one percent, is great cause for concern. The pressure to see some form of economic vibrancy, which has generally eluded the country since 2008, has never been greater than it is at this point in time.

Besides South Africa narrowly escaping a series of country-downgrades from Standard & Poors, Fitch and Moody's international rating agencies earlier this year, there is still very little evidence to indicate just how businesses will be re-energised to provide the much needed employment to millions of unemployed citizens, which is estimated to tally around 5.7 million people (26.7% of the population). This being said, reportedly South Africa is the only country in the world that has been placed on such a long-term warning of a potential 'junk-status' downgrade by the rating agencies, and the country has suffered consistent rating downgrades during President Jacob Zuma's tenure.

"Businesses can ill afford to adopt a cavalier attitude to conducting business which may fall within the scope of the prohibition against cartel activity."

Anthony Norton: Founder and Director of Nortons Inc.

Against this gloomy economic cloud of despair -- where many businesses have closed and others are barely managing to survive -- there are some who may be enjoying a silver lining in these difficult times, as they assess battling businesses for potential mergers and acquisition, or even hostile takeovers. In the ordinary course of business, activity of this nature is not only anticipated, it is also completely acceptable so long as their action(s) do not represent any form of anti-competitive business behaviour as determined within the various jurisdictions wherein such a transaction is being considered.

There are a number of countries with competition legislation that govern the manner in which businesses may interact and operate at a national, as well as international levels. Some of the countries that have more established competition law are Australia, Canada, the United Kingdom ('UK') and the United States of America ('USA').

Whilst South Africa is no stranger to competition law, with origins in the Regulation of Monopolistic Conditions Act of 1955 and which was followed by the Maintenance and Promotion of Competition Act of 1979; our competition law has steadily improved through the years and ranks amongst some of the best in the world. The Competition Act (Act N$^{o.}$89 of 1998) (as amended), which was passed in September 1998, replaced the Maintenance and Promotion of Competition Act and it marks a significant milestone in the development of effective market governance in South Africa. The Competition Act was developed upon international best practices of competition law and it fundamentally reformed South Africa's competition legislation and business landscape.

But given the unique circumstances of South Africa's post-apartheid era of 1994, the Competition Act has attracted much debate in respect of its interpretation and the practical manner in which companies must apply the Act. While the Competition Act applies to all economic activity as it affects our business behaviour and activities both within and outside our borders, it is also quite different from other international competition law vis-à-vis the emphasis and protection the Act places upon various public and social goals.

Unlike the UK and the USA's competition laws, South Africa's competition law also promotes a greater spread of business ownership within the economy, in particular by increasing the business ownership of historically disadvantaged individuals ('HDI') through additional acts such as the Broad-Based Black Economic Empowerment Act of 2003 and the Employment Equity Act of 1998. Through legislation and the transformational imperatives in South Africa -- supported by some of the provisions found in the Competition Act -- the Act seeks to reduce the past elitist concentration of a number of markets which have traditionally been dominated by a rather small group of business owners. Insodoing, the South African government and its legislators intend to transform the patterns of central ownership to include a much broader group of businesses and owners emanating from the HDI grouping.

Given the increased powers of the competition authorities, the Competition Act includes a number of prohibitions and criminal sanctions against those parties who participate directly and or indirectly in any form of anti-competitive business practices, including price-fixing and cartel behaviour. Some of the negative connotations to these practices include for example; abnormally high market prices for products and or services, reduced productivity, and restricted consumer choices to name just a few drawbacks. Indeed, if directors and persons with management authority are caught engaging in such 'unconscionable' behaviour, where they have deliberately participated in anti-competitive business activities, they can expect nothing less than the most severe fines, which could also include hefty prison sentences.

"It is important that we strengthen the competition authorities to deal with market abuse, particularly anticompetitive conduct by large firms who abuse their dominance in key markets of the economy."

Mr Ebrahim Patel (Minister of Economic Development of the Republic of South Africa)

Source: Competition Commission Annual Report 2014/15 Annual Report

Regardless of the amount of the fines, those in favour of the criminal sanctions for cartel-like behaviour have contended that an administrative fine imposed on the perpetrators is simply not enough of a deterrent to stop their anti-competitive behaviour, not least also the negative implications associated with the malpractice. Besides the aspect of a monetary fine -- which could be levied at ten percent (10%) of a company's annual turnover and could also incorporate their exports figures -- parties found guilty of anti-competitive business may well also face jail sentences of up to ten years.

It is without any doubt that the Competition Act must not to be taken lightly, and even though there may be certain leniency provided to offenders, there is no automatic immunity -- especially to cartel operators -- who confess their deeds after the events or facts have became known to the authorities.

Staying on the African continent, it is worthwhile to note that nineteen (19) African member states, which excludes South Africa at this point in time, established COMESA (the Common Market for Eastern and Southern Africa) in December 1994 to promote economic trade amongst the member states. Now referred to as the 'Common Market'; COMESA acts as an enforcement agency within the Common Market.

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COMESA has its own Competition Regulations which is binding on all organisations from the member states in respect of their economic activities. Interestingly, COMESA's Competition Regulations have primary jurisdiction over the competition laws of a member state, and traverses any industry sector of member states even though they may have their own competition legislation. In addition to COMESA's efforts to combat anti-competitive behaviour on the continent, other regional bodies have also established forums to emulate those of COMESA. These include; CEMAC (Central African Common Market) whose members comprise Cameroon, Central African Republic, Chad, Republic of the Congo, Equatorial Guinea and Gabon as well as WAEMU (West African Economic and Monetary Union) whose members comprise Benin, Burkina Faso, Côted'Ivoire, Guinea-Bissau, Mali, Senegal and Togo.

The adage that suggests that "when in Rome, do as the Romans do" may be an appropriate way to consider how any South African organisation should prepare itself when conducting business on the African continent. The fact that South Africa is not a signatory to the 'Common Market', nor a member of the other regional bodies, does not negate the need to observe and comply with their anti-competitive rules and regulations. By breaking the laws of another jurisdiction, or by not following appropriate protocol in that jurisdiction, could well be more serious than breaking one's own laws.

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For further information contact:

CGF Research Institute (Pty) Ltd
Terry Booysen (Chief Executive Officer)
Tel: 011 476 8264
Cell: 082 373 2249
E-mail: tbooysen@cgf.co.za
Web: www.cgf.co.za

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