SOUTHERN AFRICAN VENTURE CAPITAL AND PRIVATE EQUITY ASSOCIATION

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Feature: Competition issues

This month marks the 15th anniversary since the South African Competition Commission, Competition Tribunal and Competition Appeal Court were founded. Trudi Makhaya, an independent economist and former Deputy Commissioner of the Competition Commission, reflects on the current competition regime and future focus areas for the authority.

In your opinion, how successful has the Competition Commission been in balancing the interests of business with public interest considerations?

In general, the Commission has been successful in its adherence to due process. The authority has provided certainty in its actions with clear rules and very few surprises. It has tackled some major industries with a number of victories. This includes penalising the construction sector for widespread collusion and uncovering a bread cartel. Cases like these position the Commission strongly as a public champion. Within boards, directors are more mindful of competition law and this flows into corporate behaviour. This is good for business. There are some gaps where more transparency would be beneficial. For example, the Commission is yet to provide clear guidelines on how penalties are determined. In addition, the Commission needs to be clearer on the level of information industry bodies, such as SAVCA, can exchange without contravening competition law.

Where do you think the Commission will focus its attention next?

In tough economic times employment security and protecting consumers' pockets take on a heightened importance. In mergers, potential job losses especially amongst unskilled and semi-skilled workers, who earn lower incomes, will be of concern. I also expect to see a greater focus on abuse of dominance, in other words single-firm behaviour as opposed to cartels. Recent successful abuse of dominance cases such as Telkom and Sasol set the framework for future investigations.

What should be taken into consideration before a merger is pursued?

Size and resulting risk of market dominance is a first concern. Companies need to be aware of the thresholds clearly specified by the law. However, while size is a screen it is not necessarily an obstacle. In some instances a scaled-up organisation may bring benefits of increased sustainability, economic growth and possible price relief for consumers. The Commission may be amenable to the transaction should it demonstrate obvious benefits for consumers.

What actions should an investor take should they determine that an investee company is involved in anti-competitive behaviour?

The first step would be to ensure that the misconduct stops immediately. In the case of cartels, approaching the authorities first may result in leniency, where no penalty is paid, or a lesser penalty. Regardless of the transgressions, it's important that the company put clear guidelines in place on how to go forward. A strong compliance programme should ensure that issues don't reoccur or are identified early. Competition issues differ vastly according to industry and there are many grey areas. While advice is often necessary, it important that providers take an industry-specific approach and undertake a comprehensive audit of the business to pick up risk areas.

South African private equity firms are active in Africa. What should they consider as a growing number of African countries introduce competition regimes?

This is a fast-developing field on the continent and one where lessons learnt are shared across borders. Most recently Namibia was looking closely at private healthcare, Kenya is investigating its banking sector, and cartels have come under scrutiny in Mauritius and Swaziland. As requirements become stricter companies have to up their game in terms of compliance. South African firms need to be aware that reputational issues in one market will follow them in other markets. Growing consumer awareness and increasing political pressure means that suspected anti-competitive behaviour will be taken very seriously.