COMPETITION AND CONSUMER PROTECTION COMMISSION

GUIDELINESS FOR MERGER REGULATIONS

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GUIDELINES FOR MERGER REGULATIONS

Contents

PREAMBLE..5

GENERAL..5

Short Title & Commencement..5

Definitions..6

PART 1: THE LEGAL FRAMEWORK...7

PART 2: MERGERS AND ACQUISITIONS.................................8

Control..8

Acquisition of Assets..10

Common Ownership..11

Merger Notification..13

Pre-Notification Consultation..15

The Notification Process..16

Notification Fees..17

Negative Clearance..18

Consequences of Non-Notification..19

Investigation Time Table and Procedures................................19

Two Phase Investigation Process..20

Consultations with Parties..22

PART 3: MERGER ASSESSMENT..23

Types of Mergers..24

Horizontal Mergers...24

Vertical Mergers...24

Conglomerate Mergers...24

Theory of Harm and Effects..25

a. Unilateral Effects...25

b. Coordinated Effects...26

Factors Conducive to Coordination..26

Non-horizontal (vertical and conglomerate) Effects..............26

Assessing Vertical Effects...27

Ability...28

Incentive..29

Effect..29

Market Definition...32

Market Concentration..33

Market Shares..34

Numbers of Enterprises 36

Counterfactual...36

Barriers to Market Entry..39

Import competition..39

Countervailing Buyer Power..41

Removal of a Vigorous Competitor...42

Effective Remaining Competition...43

Public Interest Considerations..44

Efficiencies..45

Employment...46

Saving a "failing firm"...47

Related Public Interest Issues...47

PART 4: DETERMINATIONS, REMEDIES AND ACTIONS.........49

Remedies...49

Interim measures...50

Penalties...50

Appeals..51

Monitoring compliance...51

ANNEX TO THE COMPETITION & CONSUMER PROTECTION COMMISSION GUIDELINES FOR MERGER REGULATIONS.....53

PREAMBLE

Section 84(1) of the Competition and Consumer Protection Act, No 24 of 2010 (the Act), read together with the Competition and Consumer Protection (General) Regulations (Statutory Instrument No.97 of 2011) ("the Regulations"), mandates the Competition and Consumer Protection Commission (The Commission) to issue Guidelines on how it conducts its activities.

The purpose of these Guidelines for merger regulation is to give practical advice and guidance on the application of the relevant procedures and assessment methods set out in the Act and in the Regulations.

These Guidelines shall bind all persons regulated under the Act in so far as they are not inimical to the Act. [1]

The Guidelines reflect the Commission's procedures and analytical approach at the time of publication and may be revised periodically in the light of fresh legislation, legal precedent, evolving insight and best practice.

GENERAL

Short Title & Commencement

These guidelines may be cited as the Competition and Consumer Protection Commission Guidelines for Merger Regulations and shall come into force on the date of their publication, in accordance with Section 84(2) of the Act.

Definitions

All references to statute, unless otherwise stated, relate to the Competition and Consumer Protection Act, No. 24 of 2010 – referred to throughout as "the Act" – and all reference to "Section(s)", unless otherwise specified, relate to the Act. The "Regulations" are the Competition and Consumer Protection (General) Regulations (Statutory Instrument No.97 of 2011).

PART 1: THE LEGAL FRAMEWORK

1. A system of merger control came into operation in Zambia in 1997. It is governed by Part IV of the Act,[1] supplemented by the Competition and Consumer Protection (General) Regulations ("the Regulations")[2]. It is applied to all economic activities in Zambia[3] and operates alongside other measures to preserve and promote competition, notably Part III of the Act which outlaws certain kinds of arrangements such as market sharing, bid-rigging and re-sale price maintenance.[4]

2. The Competition and Consumer Protection Commission ("the Commission") is responsible for conducting merger regulation as well as for implementing other aspects of competition and consumer protection legislation. It should be noted that other Regulators in Zambia have concurrent competition regulatory functions in relation to certain economic sectors under other statutes. However, approval by other Regulators of transactions or conduct does not automatically imply approval by the Commission and vice versa.

1 The Act superseded the Competition and Fair Trading Act, 1994.
2 Statutory Instrument No 97, 2011.
3 The Act, section 30. An approval of a merger does not relieve an enterprise from complying with other applicable law.

4 The Act, Part III

PART 2: MERGERS AND ACQUISITIONS

3. A merger as contemplated under section 24 of the Act is regarded by the Commission as a transaction between two or more independent parties which results in one party acquiring an interest in the other party. This interest may be through shares or assets or an agreement to work together in a joint venture. This acquired interest prevents to an extent the free will of the acquired party to make independent business decisions on its operations. The extent of control is thus defined in section 24(3) of the Act. Where the interest does not materially influence[5] the decision of the other party, the Commission is less likely to take up such a transaction as a merger.

Control

4. The definition of a merger above means that the acquisition of control is not limited to the acquisition of outright voting control (i.e. direct control) but applies to situations that fall short of this (indirect control).[6]

5. In particular "material influence" may sometimes be exercised when the acquiring enterprise owns only a

5. In Zambia and other jurisdictions, the distinction is expressed in terms of "material influence" (by which Company A, the acquirer, may acquire the ability to materially influence the policy of Company B, the target), "de facto" control (by which Company A acquires the ability to control the policy of Company B) and "de jure" control (by which Company A acquires a controlling interest in Company B).
6. In Zambia and other jurisdictions, the distinction is expressed in terms of "material influence" (by which Company A, the acquirer, may acquire the ability to materially influence the policy of Company B, the target), "de facto" control (by which Company A acquires the ability to control the policy of Company B) and "de jure" control (by which Company A acquires a controlling interest in Company B).

small proportion of the shares but may nonetheless still be able to control the strategic direction of the target or merged enterprise. Material influence can be exercised in various ways and its assessment requires a case-by-case analysis of the overall relationship between the acquiring enterprise and the target enterprise. [7]

6. Acquiring shares or otherwise exercising control of another enterprise is the most common route to creating a merger. However, a merger may also be consummated without one enterprise necessarily acquiring formal control over another but through the acquisition of part of the business assets of another enterprise or through common ownership arrangements between enterprises, for example:

- Financial arrangements may confer material influence, where the conditions are such that an enterprise becomes so dependent on the lender that the lender gains material influence over the enterprise's policies or activities. For example, where the lender threatens to withdraw loan facilities if a particular activity is not pursued, or where the loan conditions confer on the lender the ability to exercise rights over and above those necessary to protect its investment. The Commission will pay particular attention to

7 In some instances, the Commission will consider for example, an enterprise with a shareholding of less than one half of the issued shares and its influence will be analysed on the basis of past voting patterns, the ability to block special resolutions proposed by the target enterprise's management , and its ability to limit the strategic options open to the target enterprise.

financial arrangements to determine whether or not the purpose of the loan goes beyond that of protecting the lender's interest.

- Control may exist where minority shareholders have additional rights which allow them to veto decisions that are essential for the strategic commercial behaviour of the enterprise, such as budget, business plans, major investments, appointment of senior management or market specific rights. The latter would include decisions on technology to be used where technology is a key feature of the merged enterprise.

- Pure economic relationships may also play a decisive role in certain circumstances when determining whether or not control exists. For example, in very important long-term supply agreements, the supplier may be able to exercise decisive influence over a customer by creating a situation of economic dependence.

Acquisition of Assets

7. The Commission will consider a merger to have been created when one enterprise buys or leases[8] the assets belonging to another,[9] if such assets have a market

8 The lease of assets of a competitor, supplier, customer or other person and being able to exercise control over them as if the lease-holder owns them.

9 See the Act, section 24(2). "Assets" as defined in the Act (Section2), i.e." In relation to an enterprise, includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and knowhow."

presence, or a market turnover which can clearly be attributed to them and the control now exercised over them has changed the competitive situation in the relevant market.

Common Ownership

8. Mergers also occur when two or more enterprises mutually agree to adopt arrangements for common ownership. The Act explicitly separates the requirement for control from the issue of common ownership.

9. The adoption of mutual arrangements is identified in the following situations:

   - an enterprise amalgamates or combines with another enterprise; or
   - a joint venture (JV) occurs between two or more independent enterprises. Under a JV arrangement, each enterprise must make a substantial contribution to the implementation of a common project, and it must be a separate business – and usually a separate legal entity – but is jointly owned and controlled by the parent enterprises.

10. Some JV's involve the integration of parts of the business activities of the enterprises to the joint venture, including a contribution of productive assets to the new joint venture. This can result in a reduction or elimination of competition between the parties

to the joint venture in the joint venture's field of activity. Whether it does so depends on the relative permanence of the joint venture and the degree of autonomy it enjoys from its parent companies.

11. However, not all JVs are subject to merger control. The Commission distinguishes between "full function" JVs and JVs that are "auxiliary" to the activities of their parent enterprises.

12. A full function JV, whose assets or turnover value is above the notification threshold, has to be notified to the Commission as a merger. By definition, such a JV performs on a lasting basis all the functions of an autonomous economic entity, competing with other enterprises in a relevant market, and has sufficient resources and staff to operate independently on the relevant market. Although full function JVs would generally conduct little business with the parent enterprises, there may be situations in which the JV uses a parent enterprise's networks or outlets to conduct its sales. A full function JV may also rely entirely for an initial start-up period on sales to its parent enterprises or purchases from them before it can become established independently on the market. The length of the start-up period depends on the characteristics of the market concerned.

13. Auxiliary JVs fulfil a specific purpose for their parent enterprises, for example in sales, production or research and development (R &D). Such JVs will not be

considered as a merger subject to control. However, parties to auxiliary JVs may have to apply to the Commission for Authorisation under Part III of the Act.

Merger Notification

14. Parties to a merger that meets the prescribed notification threshold must notify the Commission. The notification threshold is set by the Minister on the recommendation of the Commission.[10] The threshold applies to the "combined turnover or assets, whichever is higher in Zambia of the merging parties". The combined assets or turnover, whichever is higher must be "at least fifty million fee units" in their latest financial year, for which figures are available".[11]

15. An enterprise in Zambia that comes within the control of a foreign enterprise will be subject to notification and review as far as the operation has an effect on competition in Zambia. In such a case, the turnover or assets that will be assessed will be those of an enterprise present[12] or with a presence in Zambia[13].

16. In an event that the control of a Zambian enterprise comes about purely as a result of a merger or acquisition

10 The Act, section 26(5).

11 SI 97 of 2011 - Regulation 8. The monetary equivalent of a fee unit is to be found in the Fees and Fines Act Cap 45 of the Laws of Zambia.

12 The enterprise is duly registered in accordance with the laws of Zambia and generates a turnover within Zambia

13 The enterprise may not be duly registered in accordance with the laws of Zambia but has sales in Zambia.

involving enterprises wholly domiciled outside Zambia, the Commission will nonetheless assess the merger if it has a local nexus, i.e. a local connection. The Commission will only assert jurisdiction over those transactions if the foreign enterprise has a local nexus of sufficient materiality, such as having subsidiaries in Zambia or having made 10% of its sales in Zambia over the last three years. [14]

17. Mergers that are below the prescribed notification threshold are not notifiable with the Commission. Nevertheless, the Commission may ask parties to notify such a merger if the Commission has reason to believe the merger could substantially lessen competition in a relevant market[15]. The Commission could do so on its own initiative or if prompted by complaints or information from competitors, consumers or suppliers of the merging enterprises. Such notifications will attract merger filing fees.

18. Any of the parties involved in the merger may notify the transaction to the Commission. Parties outside Zambia need to appoint local legal representatives to

14 For example, the acquisition in October 2012 by Toyota Tsusho Corporation (TTC) of the shareholding in CFAO of the Pinault Printemps Redoute Group resulted in a change of indirect control at CFAO Zambia and created a possible overlap between TTC and CFAO in the distribution of new vehicles and parts in Zambia. The merger was initially blocked but was later cleared following changes in the distribution market.

15 The Act, section 27; the Commission may consider such a merger if it creates or is likely to create a dominant position in a localised market, or could lead to a series of small mergers which could collectively create dominance in a market, or could substantially lessen competition, or is concluded outside Zambia but has potential consequences within the country, or raises other competition or public interest issues.

notify on their behalf in accordance with the laws of Zambia.

Pre-Notification Consultation

19. Pre-notification meetings are valuable to both the notifying party(ies) and the Commission in determining the precise amount of information required in a notification and, in the majority of cases, may result in a significant reduction of the information required. Accordingly, notifying parties are encouraged to consult the Commission regarding the possibility of dispensing with the obligation to provide certain information. Such consultations may take place in person, by phone, or by any other means the Commission determines to be appropriate to enable the parties and the Commission to clarify matters such as:

    (a) Whether or not a transaction is a merger;

    (b) Whether or not a merger is required to be notified;

    (c) The calculation of annual turnover, value of assets, market shares, the merger notification filing fee and other matters;

    (d) The requirements of Form 1 and

    (e) Requests for confidential treatment of information or documents.

The Notification Process

20. Notification entails the lodging in of all relevant documents with the Commission and the payment of a statutory notification fee. Parties to a merger must fill in a Form 1[16] and supply relevant documents as requested in the form.

21. The Commission prefers a single application submitted in triplicate to be made jointly or severally by the parties to the transaction. However, parties may submit separate notifications if they wish, particularly if they are including information they do not want to be given to the other party(ies).

    If an applicant believes its interests could be harmed by publication or disclosure in other ways of certain information, it should submit the information separately, clearly marked as "Business Secrets", and also explain why it considers the information to be confidential. The Commission reserves the right to determine what constitutes a Business Secret.

22. The application(s) must be signed by an authorised signatory on behalf of each of the parties separately. If some of the requested information is unavailable, applicants should explain the reasons for this and give their best estimates of the information.

16 See Form 1 attached as Annex 1

23. Only when all of the steps above have been taken and the notification fee has been paid will notification be deemed to be complete.

Notification Fees

24. The fee for the notification of a merger is contained in SI 97 of 2011.[17] The notification fee is based on account of the total values of the turnover or assets of the economic entity in Zambia even if proportions of these amounts are generated outside the market(s) for the merger assessment. For parties wholly domiciled outside Zambia, the notification fee will be based on the total values of the turnover generated in Zambia.

25. Where parties to a merger have notified through a special purpose vehicle (SPV), the Commission shall consider all the relevant subsidiaries and/or holding companies (with direct and indirect interest) in Zambia. Therefore, the notification fee and the assessment of the merger shall take these into consideration in so far as there are horizontal, vertical and complementary overlaps.

26. The amount of the notification fee should be obtained from the Commission before payment of the fee.

17 SI No 97 of 2011, Regulation 8 and Schedule 2.

Negative Clearance

27. Where parties to a transaction are not sure whether or not it qualifies for merger review they may apply to the Commission for negative clearance (defined under Section 28 of the Act). Parties can in this way seek guidance from the Commission as to whether a transaction or proposed transaction meets the definition of a merger and is notifiable.

28. Form 1 must be completed in lodging an application for negative clearance and parties will be required to pay the prescribed fee stipulated under the SI 97 upon the Commission issuing an invoice.

29. Negative clearances may be given for a variety of reasons. In some cases, the Commission has calculated that the merged entity's turnover would fall below the notification threshold and that the criteria for notifying below-threshold mergers were not met.[18] In other cases, it has concluded that a merger would not be created because the activity would not lead to any change of control among the enterprises concerned.[19] In cases where a merger concluded outside Zambia has no effect in Zambia, negative clearance may be granted.

30. Negative clearance does not remove the

18 For example, in the case of the acquisition by J.K. Sopper of J.N. Oosthusen Limited (March 2011), negative clearance was given on the grounds that the merger did not qualify for review under the provisions of the Act.

19 For example, Barclays Bank Zambia PLC (BBZ) was granted negative clearance in November 2012 for the restructuring of Barclays' operations in Africa because the proposed transaction was not judged to be a merger; there would be no change of control at BBZ.

Commission's right to review the transaction as a merger in future should new information become available and lead the Commission to consider that a review is necessary.[20]

31. The Commission may re-investigate a case where negative clearance was issued if new information, not disclosed during the original investigation, comes to light and it may revoke its approval.

Consequences of Non-Notification

32. Enterprises that go ahead with notifiable mergers without the Commission's approval are liable to fines of up to ten (10) per cent of their annual turnover (based on the latest audited accounts[21]).

Investigation Time Table and Procedures

33. The Commission begins its investigation immediately full notification has been completed. It completes its assessment and issues its determination on the case within 90 calendar days from the date of the application for authorisation of the proposed merger. The period can be extended if the Parties have failed to provide information the Commission considers essential for the completion of the investigation. This extension will be equivalent to the time period the information was delayed[22]. The Commission can also extend the 90 day period for up to a further 30 calendar days as provided

20 Receiving negative clearance is highly advantageous because parties to a negatively cleared transaction will not be penalised should the Commission subsequently find that it had led to a substantial lessening of competition in the relevant market.
21 The Act, section 2: "Turnover means the latest audited gross sales of an enterprise"
22 This amounts to "stopping the clock" for this period.

under section 32 of the Act.[23]

34. If the Commission fails to meet the overall 90-days deadline – and the investigation has not been extended – the merger is deemed to have been approved.[24]

Two Phase Investigation Process

35. A Phase 1 assessment is conducted by the Commission's management during the first 35 calendar days of an investigation. If this shows that it is less than likely that the merger will harm competition and that no further evidence is likely to be uncovered to revise this finding, the Sub-Technical Committee of the Board (TC)[25] will "fast-track" clearance of the merger application. If the TC makes a decision to approve the merger, it will seek delegated authority from the full Board of Commissioners through a "Round Robin" written communication to issue a final Authorisation. In the event that a TC phase 1 clearance decision is rejected by the full Board, the application proceeds to phase 2.

36. The TCs decisions on Phase 1 investigations may be based on such factors as market concentration figures, the type of products in the market, the ease of market entry or efficiencies arising from the merger among other things.

23 The Act, section 32. In some cases, where the Commission has been asked to review a decision made during the 90-day period, the clock can be stopped until the resumption of the investigation for the remainder of the assessment period.

24 The Act, section 32 (2)

25 The Technical Committee (TC) comprising three full members of the Commission Board. It meets monthly.

37. After 45 calendar days, if the merger is seen as more likely than not to prevent or substantially lessen competition and therefore merits further consideration, the investigation moves to Phase 2. See the merger investigation timetable summarised below:

MERGER INVESTIGATION TIMETABLE

PHASE 1

WEEKS 1/2: Review of Notification form & documents

WEEK 3/4: Third Party Consultations

WEEK 5: Preliminary Assessment Report

WEEK 6: By calendar day 45: Phase 1 Decision by the Technical Committee.

If the TC so decides, the investigation moves to Phase 2. If the TC makes a decision to approve the merger, it will seek delegated authority from the full Board of Commissioners through a "Round Robin" to issue a final Authorisation. In the event that a TC phase 1 clearance decision is rejected by the full Board, the application proceeds to phase 2

PHASE 2

WEEKS 7/8: Further market research and analysis

WEEK 9: Draft Final Assessment Report

WEEK 10: Final Assessment Report to the Technical Committee

WEEKS 11/12: Staff Paper to the Board of Commissioners:

- By day 90[1] merging parties informed in writing of the Board determination. Board Decision to follow.

(Unless investigations are extended)

38. So as to make informed and timely decisions, the Commission relies on the cooperation of the merging parties, customers, competitors, suppliers and others holding relevant information.

Consultations with Parties

39. Throughout the investigations, the Commission undertakes wide consultations with relevant industry players and other stakeholders. These consultations are conducted in writing and sometimes in face-to-face meetings or by use of electronic media such as newspaper adverts, notices, video or teleconferences.

40. The Commission aims to be transparent in its work while maintaining the confidentiality of the information it obtains during merger investigations. Further details are given in the CCPC's administrative and procedural guidelines[26].

26 See the Competition and Consumer Protection Commission's Administrative and Procedural Guidelines – 2014.

PART 3: MERGER ASSESSMENT

Types of Mergers

41. The mergers typically assessed by the Commission are of three distinct types: horizontal, vertical and conglomerate. Each may affect competition in a different way.

Horizontal Mergers

42. These are mergers between enterprises that operate in the same relevant market(s) at the same level of business, for example, between two manufacturers, two distributors or two retailers. The Commission considers these as the most problematic mergers as they result directly in the elimination of competition.

Vertical Mergers

43. These are mergers between enterprise which operate at different levels of the production or supply chain of an industry. The Commission is mostly concerned with these mergers when one of the merging Parties has a dominant position of market power in either market.

Conglomerate Mergers

44. These are mergers between undertakings in different markets, with no functional link. Often conglomerate mergers will allow firms to achieve efficiencies and result in better integration, increased convenience and reduced transaction costs. Conglomerate mergers will rarely lessen competition substantially, but might, in some cases, reduce competition.

Theory of Harm and Effects

45. Not all mergers give rise to competition concerns though in some cases the different types of mergers may lead to specific harmful effects. The Commission will generally consider the basic theories of harm: unilateral/monopolisation effects, coordinated effects and non-horizontal (foreclosure) effects in merger assessment.

a. **Unilateral Effects**

46. Unilateral effects may arise in horizontal markets where the merger involves two competing enterprises and removes the rivalry between them. In the cases of both homogeneous and differentiated product markets, if the main competitive constraints pre-merger was the other party to a merger, in removing this constraint, may make it profitable for the merged entity to raise prices unilaterally.

47. The removal from the market of a competitive force can also result if an enterprise merges either with a potential (rather than actual) competitor, for example, a recent entrant or an enterprise with a modest market share but expected to grow into a significant competitive force.

48. In an extreme case, no actual or potential rivals remain after the merger (a merger to monopoly situation). In other cases, the main rival has been eliminated and a merger results in a market characterised by a single enterprise with significant market power and numerous smaller competitors able to supply only a

small proportion of total market demand (that is there is no strong "competitive fringe" in the market[27]).

b. **Coordinated Effects**

49. Most competition regimes, including that of Zambia[28], impose anti-trust penalties on collusion between enterprises, for example to fix prices, share out markets or allocate customers. During a merger investigation, the Commission has to consider whether the merger will result in such a high market concentration that illegal coordination becomes a risk.[29]

50. However, any type of merger can in more subtle ways enable or increase the ability of several enterprises within a relevant market (including the merged enterprise) to coordinate their competitive behaviour. Following the structural changes a merger may bring to a market, competitors may find it more advantageous than previously to come to an implicit understanding among themselves to refrain from competing.[30] This behaviour is sometimes referred to as "tacit coordination" and may arise through mutual understandings gained during routine communications and interaction among enterprises. It can even arise simply through implicit understanding among enterprises of the

27 The term "competitive fringe" is often used to describe a group of relatively small enterprises in a market containing larger enterprises.

28 The Act, Part III.

29 The Act, section 14(1) (a) and (b).

30 The Act, section 2, defines as a "concerted practice", "a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independent action and restricts or lessens competition between them."

way a market operates, so that enterprises are able to signal to each other that they will not compete on price, output, customer allocation or any other aspect of competition.[31]

Factors Conducive to Coordination

51. Among the issues to be considered in assessing market conditions conducive to coordination are:
    - Market concentration
    - The availability of information
    - The stability of the market
    - The degree of symmetry between enterprises in the market
    - External factors that may undermine coordination,

Non-horizontal (vertical and conglomerate) Effects

52. Most vertical and conglomerate mergers do not raise competition concerns. Some lead to efficiencies and raise the incentives of the merged enterprise to compete to take business from rivals. However, under certain conditions or circumstances, vertical and conglomerate mergers can weaken rivalry.

53. Vertical integration - where activities at upstream and downstream levels of the supply chain[32] have been brought under common ownership or control - may create or strengthen the ability or the merged

31 Where the products are relatively homogenous , coordinated terms are more likely to be based on price or output in markets, whereas differentiated products may be more conducive to division of a market by customer type or region.

32 An upstream enterprise provides raw materials or manufactures inputs for processing and/or distribution by a downstream enterprise.

enterprise to use its market power in an anti-competitive way, resulting in "foreclosure" effects. [33]

Foreclosure may be achieved by practices that restrict access to essential inputs ("input foreclosure") or raise rivals' costs, or limit rivals' ability to acquire customers ("customer foreclosure"). Vertically-integrated enterprises may, for example, charge a higher price for an important input into the production processes of downstream (non-integrated) rivals, or limit or deny access by downstream (non-integrated) rivals to important inputs (forcing them, for example, to use more expensive or inferior quality alternatives).

Assessing Vertical Effects

54. The Commission considers whether, following a vertical merger between an upstream input provider and a downstream manufacturer, the merged enterprise could foreclose the downstream rivals by for example increasing the input price rendering them uncompetitive. The Commission's assessment typically involves analysis of profitability and financial data.

55. Similarly, conglomerate mergers between makers of complementary goods may give rise to concerns of foreclosure, which may have the effect of preventing

33 Vertical arrangements may have similar effects but fall short of vertical mergers. Such arrangements may involve agreed pricing schemes or other contractual provisions between companies at different levels of the supply chain. Under Part III of the Act, a vertical agreement on resale price maintenance is generally prohibited (section 10) and all vertical agreements between parties supplying or acquiring at least 15 per cent of goods or services in the relevant market at either supply chain level, must be authorised by the Commission (section 14).

competition. In a conglomerate merger, for example, the merged enterprise might bundle together two products so that customers are made to buy both at the same time. If the supply of one of these products is a monopoly and the other faces competition, such bundling can result in the leverage of monopoly power to eliminate rivals in another market.

56. In the case of both vertical and conglomerate mergers, the Commission will look at the existence of a strong market position in one market which can be abused to restrict, distort or prevent competition in another market, eliminating or weakening rivals and damaging consumers' interest in the long run. A vertical or conglomerate merger may create a market structure where foreclosure is likely, where it was not so before. In considering the likelihood of foreclosure, the Commission assesses whether the merged enterprise would have the ability and incentive to foreclose rivals, as well also as the possible effect any such foreclosure might have.

Ability

57. The ability of the merged enterprise to engage in partial input foreclosure would be assessed by considering:

- The cost of the input relative to all costs of the final product
- The extent to which rival manufacturers could switch away from this input
- The extent to which the cost increases could be passed on to customers of the final product.

Incentive

58. Whether or not the merged enterprise would have an incentive to increase the prices charged to rival manufacturers would depend on factors such as:

- The possible loss of profits in the input market, and
- The gains in profits in the market for the final product

Effect

59. To the extent that the merged enterprise has both the ability and the incentive to adjust prices so as to foreclose its rival manufacturers access to market, the impact of such foreclosure in the downstream market has to be assessed.

60. The Commission will adapt the above approach when considering other foreclosure situations, such as total foreclosure, customer foreclosure and conglomerate effects.

The Commission's Task and Methods

61. In assessing a merger, the Commission will assess;

(1) whether a merger is likely to prevent or substantially lessen competition in a market in Zambia;[34]

(2) whether any public interest benefits, including gains in efficiency, which benefit the

34 The Act, section 30(1).

nation's social and economic development, should justify a merger that has failed the competition test going ahead. [35] Conversely, the Commission may consider any public interest detriment that might be weighed against a pro-competitive merger.

62. Not all mergers give rise to competition issues. Some mergers are pro-competitive (because they positively enhance the level of rivalry) others are competitively neutral. Some mergers may lessen competition, but not substantially, because sufficient post-merger competitive constraints exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity.

63. The precise threshold between lessening of competition and a substantial lessening of competition (an SLC) is a matter of judgment and will always depend on the particular facts of the merger under investigation. The Commission will generally take the view that lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices or reduce the quality of product without a reduction in sales. The level at which an increase in market power is likely

35 The Act, section 31.

to become significant and sustainable will vary from merger to merger.

64. In determining whether the merger would likely prevent competition, the Commission considers, for example, whether or not it would give rise to increased market concentration, heightened barriers to entry into the market and the possibility of foreclosures.

65. In establishing whether an SLC has occurred, or is likely to occur, or if competition has been or will be prevented, the Commission will carry out a structured analysis. This will be used to form its decision, as well as to provide the reasons to the merging parties and the public for its decision. Merger analysis is inherently forward-looking and necessarily involves predictions to be made about the future. The Commission will form an expectation using all the relevant evidence it can reasonably obtain.

66. The structured analysis is conducted on the basis of the factors discussed below, including mitigating factors that could constrain the market power of the merged enterprise. No specific weight is given to the factors on which the Commission will rely on. When evaluating a transaction, the Commission will perform a balancing act, the outcome of which will be determined for the most part by the specific facts of each case. The factors to be taken into account will be those relevant to the market under review and will include the following:

- Market definition;
- Market concentration;
- Counter-factual (what would happen without the merger);
- Market Entry
- Barriers to Market Entry (i.e., assessment of entry and expansion constraint);
- Import competition;
- Countervailing buyer power;
- Removal of a vigorous and effective competitor;
- Effective remaining competition (post-merger); and
- Public Interest Issues

67. The following paragraphs consider each of these factors in turn.

Market Definition

68. The Commission will take care to delineate the market as accurately as possible. The precise boundaries of a market are important in all cases for the competitive analysis A well-defined relevant market[36] is particularly important in a case where market shares and market concentration are major factors. A too narrow market definition could exaggerate the market power of the merging parties, while an overly broad market definition could wrongly imply that the merging parties would wield less market power than in reality would be the case.

36 See regulation 3 under SI 97 of 2011 and Section 17 of the Act.

Market Concentration

69. Market concentration[37] is about the number and size distribution of enterprises in a particular market. In general, the larger the market share of an enterprise the greater its market power is likely to be, particularly if its high market share has persisted over several years and is relatively stable. However, market concentration may not fully reflect the competitive significance of enterprises in the market.

70. The Commission normally uses Concentration Ratios for three firms (CR_3), showing the proportion of the market supplied by the three leading enterprises. CR3 Indicates the sum of the market shares of the three largest enterprises in the market. CR3 does not provide any information on the relative size of the enterprises nor on the number, or size, of the smaller enterprises. [38]

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37 The Organisation for Economic Cooperation and Development (OEDC) defines concentration as a reference to the extent to which a small number of firms or enterprises account for a large proportion of economic activity such as total sales or assets. While market concentration which is also referred to as seller concentration measures the relative position of large enterprises in the provision of specific goods or services. The rationale underlying the measurement of industry or market concentration is the industrial organisation economic theory which suggests that, other things being equal, high levels of market concentration are more conducive to firms engaging in monopolistic practices which leads to misallocation of resources (dead weight loss) and poor economic performance.

38 The Commission has frequently calculated market concentration on the basis of the numbers of enterprises post-merger and the CR3. In the case of the acquisition of in a shareholding in Zamtel by LAP Green (June 2010), a pre-merger market concentration ratio (CR–3) of the three largest players in the internet services provision was calculated to be 80.31%, amounting to a highly concentrated market, but the market structure would not be altered because LAP Green of Libya did not have a presence in the industry.

71. The Act specifies that where a single enterprise supplies more than 30 per cent of goods and services in a relevant market or where the CR3 amounts to a sixty (60) per cent or more market share, the market is construed to be highly concentrated and the enterprise(s) are deemed to have dominant positions. [39] However, the competition legislation in Zambia does not prohibit the existence of a monopoly or a dominant enterprise but aims to ensure that such enterprises refrain from certain acts or behaviour that would adversely affect competition in a market or the economy in general. The law deals with potential cases of abuse as and when they occur.[40]

Market Shares

72. Market shares are a key input used by the Commission when determining concentration. Market shares can be measured in terms of revenues, volumes, production capacities or inputs. The Commission will generally put together data on turnover but will sometimes calculate market shares on the basis of volumes and capacities, if the facts of the case and

39 The Act, section 15(b): "A dominant position exists in relation to the supply of goods and services in Zambia if – (a) thirty per cent of more of those goods and services are supplied or acquired by one enterprise; or (b) sixty per cent of more of those goods and services are supplied by not more than three enterprises."

40 The Act, Part 111, sections 9 and 10 lists "any category of agreement, decision or concerted practice" which are prohibited on the grounds that it "has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia": price-fixing; market-sharing, bid-rigging; production quotas, refusal to supply. It also prohibits vertical agreements involving re-sale price maintenance, horizontal and vertical agreements that restrict or substantially lessen competition (unless exempted). Section 16(2) gives examples of the business practices that constitute abuse of a dominant position. See also paragraph 91 and footnote 61, above.

the availability of information justify this.

73. The Commission draws this information, if possible over several years, from a variety of sources, such as the merging parties, competitors, customers, suppliers, trade associations and market research reports. [41]

74. In calculating market shares, the Commission may also into account the contributions of supply-side substitution – where enterprises not currently producing the merging enterprises' products shift production to introduce competing products as well as imports.

75. The Commission also considers the extent to which current market shares are likely to reflect future market share patterns accurately. Information on past market shares may be instructive in this respect. Evidence of volatile movements in market concentration in the past may indicate intense dynamic competition resulting, for example, from successful entry or innovative developments, regardless of a current static market concentration level. Moreover, there may be changes to the market in prospect[42] requiring some adaptation of current market shares.

41 In a typical Commission case, Continental Outdoor Media/Impact Media (November 2012), the Commission observed that there were no readily available market shares for all the market players in their respective relevant markets. The Commission therefore conducted inquiries in five selected districts to try to establish market share estimates, making use of information from the local authorities to determine market shares and concentration levels.

42 For example, evidence that substantial new capacity is due to come on-stream in a manufactured product market, that new licences are about to be issued in a broadcasting market or that some enterprises are running out of reserves in a primary product market. Prospective market changes are also relevant to the consideration of the counterfactual

Numbers of Enterprises

76. A straightforward count of the enterprises in the market is a basic measure of concentration. It does not take into account differences in market shares and the size distribution of enterprises, but can be useful when there is a gap in market share between significant competitors and smaller rivals or when it is difficult to measure revenues in a market. It can be particularly relevant when considering possible coordinated behaviour.

77. However, the degree of symmetry of market shares is often more meaningful than the absolute numbers. A market in which there are four enterprises each with an equal share is more likely to be more competitive than a market where one enterprise has an 80 per cent share and the three others split the remaining 20 per cent share.

Counterfactual

78. The competitive effects of a merger cannot be immediately observed. The Commission has to look into the future to predict what is likely to happen if a merger proceeds as compared to what is likely to happen if it does not go forward. The latter is called "the counterfactual". The Commission when assessing the counterfactual will consider whether:

- One of the parties to the merger and its relevant

assets would otherwise have exited the market?[43]

- One of the parties was the most likely potential entrant to the markets in question?
- There were other market developments likely to affect the relative competitiveness of the parties and their rivals?

79. In most cases existing market conditions provide the relevant counterfactual. However, where changes to the market are imminent and can reasonably be predicted, the Commission is likely to consider the impact of such changes in the relevant counterfactual. The Commission will need to have as much factual evidence as possible as to the timing and likelihood of such market developments.

80. The Commission under a failing firm scenario will consider:

(a). whether the firm would have failed, i.e:

- whether the firm is unable to meet its financial obligations in the near future; and
- whether it is unable to restructure itself successfully;

and if so:

(b). whether there would have been an alternative purchaser for the firm or its assets, so as to ascertain whether the failure of the firm would

43 The failing firm defence is widely recognised by many competition authorities

result in its exit or in the exit of its assets; and

(c). what would have happened to the sales of the firm in the event of its exit.

81. Since the assets of the failing firm, including its brands, would inevitably exit from the market, one important consideration is what would happen to the sales of the failing firm. If the sales would in any event have switched to the acquiring firm, rather than been dispersed between competing suppliers, the impact on competition would be neutral.

Market Entry

82. The entry of new enterprises into the market (or the expansion of enterprises already in the market) can provide an important source of competitive constraint on incumbent enterprises. If new entrants are able to offer customers an appropriate alternative source of supply at the right time, any attempt by incumbents to exercise market power will be unsustainable since their customers will switch to the new entrants' products. In some markets, however, there are barriers to entry that either prevent enterprises from entering the market altogether or delay and impede entry to such a degree that the merged enterprise is shielded from competitive constraint for a significant period. The existence of significant barriers buttresses any anti-competitive effects the merger may bring, giving the merged enterprise discretion over its pricing and other conduct.

Barriers to Market Entry

83. Barriers to market entry are usually structural or behavioural barriers. Structural barriers are due solely to conditions outside the control of market participants such as basic costs of production, adequacy of capital markets, and controls imposed by governments and regulators. Behavioural barriers (sometimes known as strategic barriers) arise from various ways in which incumbent firms (domestic, foreign or state-owned) can impede market access by abusing their market power[44].

Import competition

84. Direct competition from imported goods or services can provide a strong competitive discipline on domestic enterprises and reduce the risks of unilateral effects arising from a merger. As long as imports have exceeded a stipulated share of a relevant market for a period of years, the Commission will usually not object to a proposed acquisition in that market, even if concentration is relatively high. While the current or historic levels of imports may indicate the competitive role of imports, the Commission will also consider the potential for imports to expand if the merged enterprise increased its prices.

85. Imports are most likely to provide an effective and direct competitive constraint in circumstances where

44 Official Journal of the European Union, Commission Recommendation of 11th February 2003 on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

all of the following conditions are met:

- Imports are distributed by enterprises that are independent of the merging parties and represent at least 10 percent of total sales in the relevant market in each of the previous three years.

- There are no barriers to the quantity of independent imports rapidly increasing that would prevent suppliers of the imported product from competing effectively against the output of the merged enterprise within a period of one to two years. Such barriers may, for example, be government regulations,[45] customer-switching costs or the absence of adequate distribution networks.

- The (actual or potential) imported product is a strong substitute in all respects, and the import parity price[46] is close to the domestic price of the relevant product that would prevail in the absence of the merger.

- Importers are able to rapidly increase the volume of the goods or services they import with little or no increase in the price paid.

- The merged enterprise and other major domestic suppliers do not have a direct interest in actual or potential suppliers of imports.

45 For example, beef and dairy/poultry imports are largely prohibited in Zambia (Proposed takeover of assets and liabilities if Amanita Premier Oils Limited and Amanita Milling Limited by Zambeef Products plc, September 2007).
46 The price including any tariff or other import-specific taxes and charges.

86. The Commission may request the following types of information so as to assess the current and prospective levels of imports;

- The products imported into the relevant market.
- The identities of the importers and their relative share of the market(s).
- Estimates of the actual and potential levels of import competition in the market(s).
- Details of any barriers to market entry for importing, including access to distribution facilities, transport costs and customs restrictions.
- Details of the prices of imports relative to domestic prices and explanations of why these prices might diverge.
- The extent to which imports would constrain domestic suppliers, including the merging enterprises, in the relevant market(s) post-merger.

Countervailing Buyer Power

87. Countervailing power exists when buyers have special characteristics that enable them to credibly threaten to bypass the merged firm, such as by vertically integrating into the upstream market, establishing importing operations or sponsoring new entry. Countervailing power is more than the ability of buyers to switch to alternative domestic or imported products. The availability of effective alternatives to the merged firm provides all buyers with a means of bypassing the merged firm. Countervailing power,

however, exists when the specific characteristics of a buyer – such as its size, its commercial significance to suppliers or the manner in which it purchases goods from suppliers – provide the buyer with additional negotiating leverage. In some cases, a buyer may have countervailing power because they have market power. In the assessment of the competitive effects of a merger, the Commission also considers whether one or more buyers would have sufficient countervailing power to constrain any attempted increase in market power by a supplier.

88. In assessing whether countervailing power is likely to prevent a substantial lessening of competition by constraining any attempt by the merged firm to increase market power, the Commission will consider the following factors, amongst others:

- Whether the threat to bypass the merged firm is credible on commercial grounds;
- Whether the buyer is likely to bypass the supplier; and
- Whether the significant proportion of the downstream market is able to exert a credible threat.

Removal of a Vigorous Competitor

89. Mergers involving the removal of a vigorous and effective competitor (sometimes referred to as a maverick firm) are likely to result in a significant and

sustainable increase in the unilateral market power of the merged firm. They are also likely to increase the ability and incentive for the few remaining firms to engage in coordinated conduct. Vigorous and effective competitors may drive significant aspects of competition, such as, pricing, innovation or product development, even though their own market share may be modest. These firms tend to be less predictable in their behaviour and deliver benefits to consumers beyond their own immediate customer base, by forcing other market participants to deliver better and cheaper products. They also tend to undermine attempts to coordinate the exercise of market power. A merger that removes a vigorous and effective competitor may, therefore, remove one of the most effective competitive constraints on market participants and thereby result in a substantial lessening of competition.

Effective Remaining Competition

90. In making the assessment of the effects of the merger on competition, the Commission will have due regard to the continued existence of competitive constraints that will remain in the relevant market to ensure that rivalry continues to discipline the commercial behaviour of the merged firms. The Commission recognises that some mergers will lessen competition, but not substantially, because sufficient post-merger competitive constraints will remain.

Public Interest Considerations

91. The Act allows the Commission, in considering a proposed merger (or any act not specifically prohibited by the Act[47]) to take account of "any factor which bears upon the public interest".[48] This provision underlines the centrality of the promotion of competition in the Zambian Government's overall social and economic policies. In giving an independent competition authority direct responsibility for public interest decisions it allows the same body to weigh up the relative merits of both the competition and macro-economic aspects of a case and so ensure that the promotion of competition is in tune with the wider objectives of Government policy.

92. Public interest factors can have either positive or negative effects, and the Commission therefore applies both public benefit and public detriment tests. The Act states that a benefit to the public could "outweigh any detriment attributable to a substantial lessening of competition"[49] and it follows that an otherwise pro-competitive merger could be prohibited - or in both cases approved with appropriate remedies in place.

93. The Commission is not obliged to consider each of the public interest issues raised in the Act, but only those specifically claimed or arising during an inves-

47 The Commission may authorise any act which is not prohibited outright by the Act, that is, an act which is not necessarily illegal unless abused if that act is considered by the Commission as being consistent with the objectives of the Act.
48 The Act, section 31.
49 The Act, section 31(a).

tigation. Merging enterprises often claim public interest benefits arising from a merger, but the Commission does not rely on the testimony of the parties and will institute its own investigation into possible public interest issues where relevant. If potential public interest issues are identified, the Commission will consider them rigorously and will give significant weight only to those that are both merger-specific and have a timely, likely and substantial impact on social welfare and/or economic development. How the scale of public benefit or public detriment is assessed will depend on the specific aspects and circumstances of the case.

94. The Commission will consider the following public interest issues covered in the Act:

Efficiencies

95. One public interest is "the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia".[50] This amounts to a consideration of efficiencies, although it extends the consideration to a merger's impact on national social, industrial and economic objectives.

96. At the enterprise level, the Commission recognises that while mergers can harm competition, they can also give rise to efficiencies. Such efficiencies arising

50 The Act, section 31(b).

from the merger may enhance rivalry to an extent that the merger does not give rise to a lessening of competition, For example, a merger of two of the smaller enterprises in a market resulting in efficiency gains might allow the merged entity to compete more effectively with the larger enterprises and therefore benefit consumers. Other merger-related efficiencies may arise, for example, from the greater economies of scale and scope resulting from combining production, distribution and marketing activities, and from greater innovation yields coming from combining investment in research and development.

97. Merging enterprises often make efficiency claims for the transaction. It is difficult for the Commission to assess the claims, not least because all the information required is held by the enterprises. To form a view that the claimed efficiencies will enhance rivalry and so promote technical or economic progress and not just result in a financial benefit to the merging enterprises, the Commission must be fully satisfied, based on the information provided by the enterprises, firstly that the efficiencies will be timely, likely and sufficient to outweigh a lessening of competition and, secondly, that the gains would arise directly from the merger and would not happen without the merger going ahead.

Employment

98. The Commission places particular weight in its public interest assessment on the creation and maintenance of employment in Zambia. Merging enterprises frequently claim that employment benefits will

flow from a merger and the Commission will always consider such claims carefully.

Saving a "failing firm"

99. "The saving of a failing firm"[51] falls within the category of a public interest but is also considered as an issue for the "counterfactual" analysis.

Related Public Interest Issues

100. Beyond the commercial and micro-economic effects, the impact of efficiencies arising from a merger are considered within a national context. Public interests are paramount and the Commission will consider wider public interest benefits of the mergers concerned in terms of the promotion of exports, employment creation[52], the international competitiveness of national industries,[53] and the special interests of micro and small businesses[54].

101. Other public benefits generally assessed by the Commission, include the alleviation of poverty and the effect on Government tax revenues. The issues the Commission considers may include unspecified general issues. These include socio-economic factors as may be appropriate; and any other factor that bears upon the public interest.[55]

51 The Act, section 31(c).
52 The Act, section 31(d).
53 The Act, section 31(f).
54 The Act, section 31(e).
55 The Act, section 31(g) and (h).

102. These general provisions allow the Commission to draw attention to areas of public concern raised by a merger but not directly related to competition. These unspecified public interest issues will not be likely to be a decisive factor for the final decision on a merger review.

PART 4: DETERMINATIONS, REMEDIES AND ACTIONS

103. After completing its assessment and considering any representations made by the parties, the Commission may:

(a) Approve the proposed merger without any conditions[56];

(b) Approve the proposed merger with conditions or undertakings[57] given by the parties to address competition or other concerns that may have arisen during the assessment of the proposed merger; or

(c) Reject the proposed merger.[58] If it rejects a proposed merger, the Commission must inform the parties and explain its reasons.[59]

Remedies

104. Remedies in merger cases are conventionally classified as either structural or behavioural. The Commission will use structural remedies which are a one-off measure that seek to restore or maintain the competitive structure of the market. The Commission may also use behavioural remedies which are normally on-going measures that are designed to

56. A "condition" is contained in a direction drafted by the Commission to qualify its approval of a merger. Such directions may be considered "necessary, reasonable and practicable" to remedy the substantial lessening of competition and its actual or likely adverse effects. see section 61(1) of the Act.
57. More generally, as defined under Section 2 of the Act: "'Undertaking' means a commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission.
58. The Act, section 34(1).
59. The Act, section 34(2). 60. Interim measures.

regulate or constrain the behaviour of the merged parties. Some remedies may have features of both structural and behavioural remedies.

105. At any time during a merger investigation, if the Commission believes that the parties are engaging in prohibited agreements or business practices which prevent, restrict or distort competition, and hold a risk of "causing serious or irreparable" damage to a particular person, or are taking steps that would pre-empt remedial action by the Commission to restore competition in a market to the pre-merger level, the Commission may give written directions to the merging parties to prevent the damage or the parties' pre-emptive actions. The Commission will give the parties the opportunity to make representations before issuing such directions. [60].

Penalties

106. Where merging parties implement a notifiable merger without the approval of the Commission or implement a merger that has been rejected by the Commission, they commit an offence and are liable to an administrative fine not exceeding ten (10) percent of the merged entity's annual turnover (based on the latest audited accounts).[61] The level of fines may be calculated "to reflect other relevant factors such as aggravating or mitigating factors."[62]

60 The Act, section 62.

61 The Act, section 37 and the Commission's *Guidelines for Issuance of Fines*, 2013.

62 The Commission's *Guidelines for Issuance of Fines*, 2013, paragraph 5(vi).

107. The Commission may re-investigate an approved merger if new information, not disclosed during the original investigation, comes to light and it may revoke its approval of the merger if a substantial lessening of competition is found at that stage. It may also revoke its approval if a merged enterprise fails to comply with a condition.[63]

Appeals

108. A person or an enterprise aggrieved by a directive of the Commission may appeal to the Competition and Consumer Protection Tribunal ("the Tribunal") within thirty (30) calendar days of receiving the directive.[64]

Monitoring compliance

109. The Commission remains responsible for monitoring the compliance of directives it has given and the performance of undertakings it has received.[65] Behavioural remedies address a competitive harm less directly than do structural remedies and require ongoing monitoring for compliance. Structural remedies will generally not require detailed monitoring after the implementation of the remedy. Where monitoring is required the Commission may require that the merged parties pay for the cost of compliance.

63 The Act, section 35. The Tribunal has wider revocation powers; if a merger is implemented in contravention of the Act, it may order a merger party to sell its shares, interest or other assets acquired through the merger (the Act, section 71).

64 The Act, section 60.

65 The Act, section 63(1).

110. Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with the directives or undertakings, the enterprise shall be liable to a fine not exceeding ten percent of its turnover.[66]

111. The Commission may, where it is satisfied that there has been a material change of circumstance, agree to vary or terminate directives or accept a variation to undertakings or release the enterprise from it.[67]

66 The Act Section 37
67 The Act, section 63(2).

ANNEX TO THE COMPETITION & CONSUMER PROTECTION COMMISSION GUIDELINES FOR MERGER REGULATIONS

Introduction

1. This annex is an explanatory note of the Guidelines for Merger Regulations and should not be read in isolation.

PART 1: THE DEFINITION OF A MERGER

2. Section 24(1) of the Act provides what constitutes a merger and states that, “For purposes of this Part, a merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses”.

3. The key terms stemming from the definition are;

   (i) Enterprise

   (ii) Acquires or Establishes

   (iii) Control

   (iv) Whole or part

Enterprise

4. For the purpose of merger assessments, an enterprise is defined broadly by the Act to include "a firm, partnership, joint-venture, corporation, company, or other juridical person, which engages in commercial activities, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly, controlled by them."[68] It follows that for the purpose of the application of the merger regime, all companies related and which qualifies to be categorised as a "single economic entity" will be regarded as an enterprise and party to a merger.

Acquires or Establishes

5. Some mergers come purely as a result of one or more companies purchasing either assets or shares of another. This results in joint ownership of the acquired assets or shares. Not all mergers are as a result of purchase or acquisition of another company's property. Establishment of control over another company's property may also qualify as a merger if such control is material enough to influence the strategic direction of another company. Leasing of assets is one way in which one company may establish control over another company's assets. The purpose of acquisition or establishment must be to realise a benefit.

68 The Act, section 2.

Control

6. The definition of a merger above means that the acquisition of control is not limited to the acquisition of outright voting control (i.e. direct control) but applies to situations that fall short of this (indirect control).

7. Control has been categorised as de jure (by law) control and de facto (by fact) control. While de jure control is express, de facto control comes as a result of acquisition or establishment of material influence by which for example, Company A, the acquirer, may acquire the ability to materially influence the policy of Company B, the target. In some instances, the Commission will consider for example, an enterprise with a shareholding of less than one half of the issued shares, will be analysed on the basis of past voting patterns, the ability to block special resolutions proposed by the target enterprise's management , and their ability to limit the strategic options open to the target enterprise

Whole or Part

8. It should be noted that an acquisition or an establishment of control over a part of another enterprise constitutes a merger. This might be an outright purchase of a part of another business resulting in beneficial ownership or at times it might be beneficial possession short of complete ownership. For example, the Commission considered

the acquisition of seven hundred and thirty three (733) MTN Zambia Limited mobile towers by IHS Zambia Limited as a merger[69] as the transaction resulted in the establishment of beneficial possession and control of what used to be a part of MTN Zambia Limited. Equally, this can also be as a result of acquisition of shares which is a property of another company or the leasing of another enterprises assets resulting in beneficial possession. In order for the acquisition of a part of a business to qualify as a merger, the Commission considers whether such part of business has a market presence, a market turnover which can clearly be attributed to it and whether the established control over it is likely to change the competitive situation in the relevant market.

Notifiable Mergers

9. Not all mergers are notifiable mergers. In the assessment and determination of notifiable mergers, the Commission considers the existence of;

   (i) Change of control[70],

   (ii) Local nexus and

   (iii) Threshold.

Local Nexus

10. Mergers that occur outside Zambia but have a

69 Case File No. CCPC/MER/120
70 Refer to the paragraph above

material bearing on the Zambian markets will be considered to have a local connection (local nexus) and hence notifiable. In this regard, the Commission will only assert its jurisdiction if the transaction has an appropriate local nexus. For companies wholly domiciled outside Zambia, local nexus may come as a result of their presence in the Zambian markets either through export sales or the presence of their subsidiaries.

11. In the case were the presence is as a result of export sales into Zambia, such a transaction will be considered by the Commission to have an appropriate local nexus if the export sales into the relevant market(s) have been at least 10% for the last preceding three years. Equally, in the case of existence as a result of the presence of subsidiaries, the Commission will asset jurisdiction if, the level of sales in their respective markets are material.

12. In the case where one company is domiciled outside Zambia and is making an inward transaction into Zambia, the Commission will consider the local target company on whether it meets the threshold for notification. The manner in which the notifications are determined are as explained in this table below. However, the Commission will not exercise jurisdiction nor require a Zambian company making an outward investment to notify such as a merger regardless of its size in the market in Zambia.

Threshold

13. Parties to a merger as expressed in the Act naturally refer to the enterprise which as defined can be a single company or a company with its subsidiaries. Where a party to the merger is a company with subsidiaries, or with holding companies such a company for the purpose of considering the threshold shall be treated as one (single economic entity). The Commission does not consider the relevant markets in which they operate but will simply consider their presence in the markets. It therefore follows that all the companies related and having the same control will be considered for the purpose of threshold determination.

14. Once the parties to a merger are identified, the Regulations provide that the sum of the combined assets or turnover of the parties to the merger be used. Below is an example to show one of the ways in which the determination of the fee may be done.

Table 1: Determination of threshold

Category	Party 1	Party 2	Total	Benchmark
Assets	15,000,000	4,000,000	19,000,000	15,000,000[3]
Turnover	5,000,000	4,800,000	9,800,000	15,000,000

15. In the example above, the combined assets of the parties are more than 15,000,000 and hence the merger is considered to be a notifiable merger. Note that, there are circumstances in which both the

turnover and assets meet the notification threshold.

Calculation of notification fees

16. The Regulations sets 0.1% of the party's turnover or assets whichever is higher as the notification fee. In the determination of the notification fee, the Commission will consider either the sum of assets for the parties or the sum of turnover for the parties and calculate a 0.1% of whichever figure is higher. The determination of which accounts to include in the calculation of these figures will depend on the single economic entity doctrine. Thus, all companies falling under the same shareholding and control will be considered as one and will be included in the calculation of the fee regardless of the markets in which they operate in.

PART II: MERGER ASSESSMENT

Market definition

17. The market definition is defined in the Statutory Instrument No. 97 of 2011.

Market shares

Calculation of market shares

18. The Commission will calculate the market share of parties to a merger based on their level of supply or acquisition of goods or services in their respective markets. Therefore, in the calculation of market shares, the Commission will consider turnover or sales revenue in the relevant market. Where it is practically impossible to use turnover in the determination of market shares, other proxy measures such as the asset value and volumes sold or even production capacity may be used in the determination of market shares.

Interpretation of market shares

19. The Guidelines acknowledge that, in general, the larger the market share of an enterprise the greater its market power is likely to be. However, the Commission also recognises that the use of market share as a determinate for market power may not fully reflect the competitive significance of enterprises in the market. For example, in its assessment of the acquisition of Manda Hill by Business Venture

Investment No, 1554 (March 2012), the Commission noted that Manda Hill held a 30 per cent share of the market for the management of shopping malls and could be deemed "dominant" according to the terms of the Act, but it considered that Manda Hill was not likely to abuse its dominant position as there were several other shopping malls in the relevant market. Similarly, in its investigation into the Heinrich's Syndicate's acquisition of the Maheu business of Trade Kings Limited (August 2009), the Commission concluded that, although the acquisition would lead to an extremely concentrated market, competition concerns would not arise because the market was highly concentrated before the merger and hence the transaction was not going to significantly change the market structure.

Theory of Harm

20. "Theory of harm" has become a term of art in competition analysis and can be used as a starting point for assessing the prospective impact of a merger in a relevant market. A theory of harm is a hypothesis of how the merger might affect the relevant market. Such a theory provides focus and structure to the assessment of the effects of the merger and whether or not it could prevent or substantially lessen competition. Theories of harm are derived mainly from the three possible effects of a merger: unilateral effects, coordinated effects and non-horizontal (vertical and conglomerate) effects.

Conglomerate Effects

21. Some conglomerate mergers – involving products that do not compete – can have foreclosure effects, notably, brought about by the tying and bundling of different products of the merged enterprise.

22. For example, in the case of Zambeef's proposed takeover of Amanita companies (a conglomerate merger as Zambeef was not involved in the production of any of the products supplied by the Amanita Group) the Commission reported (September 2007) that it was possible that where strong conglomerate synergies exist, competition issues may arise.

A poultry enterprise controlling a milling plant might lead to significant advantages over its rivals in relation to stock feed access in terms of, for example, price and quantities supplied. The Commission noted that the merger of Zambeef with Amanita therefore brought about some concerns as a result of possible conglomerate effects as well as concerns arising from horizontal and vertical synergies.

The Failing Firm

23. Although treated as a public interest issue within the context of the Act, the Merger Guidelines cover the Commission's approach to a failing firm as an aspect of the counterfactual assessment – i.e. the market scenario if the merger did not take place.

The Commission determined in December 1998, that the saving of a failing firm, Northern Breweries outweighed competition concerns arising from its takeover by the Zambian Breweries PLC (owned by South African Breweries (SABMiller)). The Board accepted that it was not commercially viable to continue the operations of Northern Breweries as a separate unit; scrutiny of its accounts and other financial data showed that the company could not continue to exist as an independent going concern; if not sold, it was destined for closure with the loss of some 454 jobs and the likelihood that creditors would not be paid.

The Board reported that Northern Breweries had sought alternative buyers but no bids had emerged. It gave approval subject to undertakings from Zambian Breweries not to engage in anti-competitive behaviour or abuse its dominant position.

Entry and Expansion

24. The Commission has emphasised in many of its merger investigations that market entry by new competitors or the expansion of production by incumbent producers can play a crucial role in constraining the potential market power of a merged enterprise.

25. In its decision on Zambeef's acquisition of Amanita enterprises (September 2007), the Commission

noted that the markets for cooking oil, stock feed and margarine were fairly open to entry and the raw material was not likely to be monopolised by Zambeef as other suppliers were already in the market

26. Equally, in its report on the proposed takeover of assets and liabilities of Amanita Premier Oils Limited and Amanita Milling Limited by Zambeef Products plc, (September 2007), the Commission noted that there appeared to be some structural barriers in the agro-processing industry generally as a result of an increase in vertical integration of enterprises within the sector.

Enterprises that were not going to be vertically integrated and/or had the ability to negotiate exclusive contracts of supply to major buyers were likely to find it difficult to access the market.

Import Competition

27. The Commission considers import competition to be a positive aspect in merger determination. In this aspect, the Commission considers the evolution of imports into the relevant market and to some extent, determine what effect the imports have had. The Commission thus regards imports to be significant and capable of offering countervailing effects if they have been at least 10% of the goods supplied or acquired in the market for at least three preceding years. In the takeover of Northern Breweries by Zambian Breweries PLC transaction, the Commission equally considered imports from Namibia.

Buyer power and countervailing buyer power

28. The Guidelines describe countervailing buyer power as a factor that can constrain any attempted increase in market power by a supplier. This should be distinguished from the buyer power that mergers in a market can sometimes confer. Mergers can sometimes enhance the market power of buyers as well as sellers. Where the merging enterprises purchase the same products, the merged enterprise may enjoy greater buyer power (known, in an extreme form, as monopsony power) than the enterprises could exert individually. (Two merged supermarkets, for example, might have considerable power to extract better terms from their suppliers.) The benefits might in some cases be passed on to customers, but increased buyer power can sometimes harm competition, for example when the merged enterprise has an incentive to lower the volumes it purchases and to reduce the purchase price it pays (known as 'demand withholding'). Buyer power may also lead to suppliers having lower incentives to invest in new products and processes.

29. Countervailing buyer power is distinct from buyer power. It is also more than the ability of buyers to switch to alternative domestic or imported products. Countervailing buyer power can be exerted only when buyers have special characteristics that enable them credibly to bypass the merged entity by, for example, vertically integrating into the upstream market, establishing importing operations or sponsoring new entry, and to be able therefore to have substantial

negotiating leverage over suppliers.

30. One example of a finding of countervailing buyer power comes from the Commission's investigation into the acquisition of Drum and Can by Crown Cork (Z) Limited, in which the Commission found that the customers of the merged enterprise, being mainly intermediate users, would be able to exert considerable countervailing power to minimise any attempted unilateral anti-competitive conduct.

Efficiencies

31. As noted in the Guidelines, the Act states that public interest relates to the extent to which a proposed merger contributes to technical or economic progress, the transfer of skills and the improvement of the production and distribution of goods and services. In effect this definition extends the consideration of efficiencies beyond enterprise-level efficiencies to a merger's impact on national social, industrial and economic objectives. Several mergers, approved on competition grounds, have been found by the Commission to bring ancillary benefits in terms of the criteria set out in the Act.

32. When the Commission approved on competition grounds the acquisition by Heinrich's Syndicate of the Maheu business of Trade Kings (August 2009), it noted that National Breweries (of which Heinrich's held a majority shareholding) was likely to become cost efficient with the acquisition of machinery and know-how of Trade Kings owing to the synergies that

were likely to arise. National Breweries was also likely to use the distribution network established by Trade Kings to enhance its distribution efficiencies.

33. In approving Zambeef's acquisition of Amanita companies on competition grounds (September 2007), the Commission noted that Amanita's business operation was marginal and that it was likely that Zambeef would be able to reposition Amanita and revitalise its market potential. Customers would benefit because the merged entity was likely to achieve economies of scope and be able to offer more diverse services.

Dynamism of the market

34. The Commission, when analysing the competitive effect of a merger, takes into account the changing nature of the market in the future. It will seek robust evidence, where relevant, of dynamic market characteristics such as growth, innovation and product and/or service differentiation. Such judgements are elements in the consideration of the counterfactual). Markets that are growing rapidly may offer both greater scope for new entry and the erosion of market shares over time. Markets characterised by rapid product innovation may be unstable so that any increased market power gained through a merger is transitory. In general, a merger is less likely to substantially lessen competition in a market that is rapidly evolving.[71]

71 Positive market trends were, for example, cited among the grounds for approving the merger involving Continental Outdoor Media Zambia Limited and Impact Media Limited (November 2012) and the acquisition of the Maheu Business of Trade Kings by Heinrich's Syndicate Limited (August 2009).

Public Interest

35. The dual role of the Commission in assessing both the competitive impact and macro-economic aspects of a proposed merger is evident in its decisions on many cases.

36. The acquisition by Zambeef of the assets and liabilities of Amanita Premier Oils Ltd and Amanita Milling Limited (September 2007), for example, passed the competition test, but the Commission also lauded the public benefits it brought as exemplary. It noted that the merger would lead to further economic growth and diversification, increased investment, the creation of employment and the alleviation of poverty, as well as making Zambia more competitive on the international market. It would result in higher corporate earnings and consequently increased government revenues from taxes. The issue of additional Zambeef shares on the stock market to finance the transaction would deepen the local capital markets and provide needed liquidity in the Lusaka Stock Exchange.

37. The creation and maintenance of employment in Zambia are frequent themes in the Commission's decisions. For example, in approving, on its pro-competitive merits, the Heinrich's Syndicate's acquisition of the Maheu maize drink business of Trade Kings (September 2009), the Commission noted that the transaction would not result in any

job losses and was likely to generate additional employment opportunities as the business grew. Moreover, Trade Kings intended to re-invest some of the proceeds of the transaction in the Zambian steel industry, which was likely to create further employment in that sector. In another case, the preservation of over 450 jobs was an important factor in the Commission's decision to allow Zambian Breweries PLC to acquire Northern Breweries in 1998 even though this strengthened Zambian Breweries' monopoly position in the clear beer market.

Remedies

38. The remedies applied as conditions for the approval of two mergers of breweries included both structural changes and behavioural undertakings. When South African Breweries Plc (SAB) took over National Breweries Plc it made a commitment to the Commission voluntarily to divest four plants to local entrepreneurs. The undertakings submitted by Zambian Breweries when the Board of Commissioners cleared its acquisition of Northern Breweries included behavioural undertakings such as;

    (i) Refrain from excessive advertising of recommended prices, which had the effect of price-fixing

    (ii) Continue the exercise by the two companies' non-exclusive industrial property rights, especially relating to brand names or trademarks

(iii) Cancel exclusive dealership or distributor arrangements, as then formatted, and replace them by new distribution agreements adhering to specific conditions authorised by the Commission for urban and rural distributors.

39. Other provisions in the undertakings were forms of structural remedies. In particular, the merged enterprise undertook that the Board of Directors of Northern Breweries (1995) Plc should, in the majority, be separate and independent from those of Zambian Breweries Plc, and that the two companies should keep independent accounts. The undertakings also included commitments that Zambian Breweries would promote certain public interests such as increased exports, support for emerging breweries, including those owned by SMEs.

(Footnotes)

1 , Section 84(3) of the Act

2 If Ninetieth (90th) day falls on a holiday or falls over the weekend, the deadline becomes the following working day (as stipulated in the Interpretation and General Provisions Act, Part 6, section 35).

3 15,000,000 is the current Kwacha equivalent of 50 million fee units at k0.3 per unit as provided for in the Regulations

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