

Zambia Competition Commission

Promoting a Culture of Fair Competition for the benefit of Business and Consumers

Competition Rules In Zambia

The Competition and Fair Trading Act

1. Introduction

The Competition and Fair Trading Act (the Act) of 1994 came into full force on 15th February, 1995. The Act deals with agreements and concerted practices of enterprises and organizations that are appreciably anti-competitive, and the abuse of market power by enterprises that are dominant within the market. It also deals with consumer welfare and protection issues. The Act came into force as a result of government's policies of liberalization and privatization of state owned enterprises. The main objective of the Act was to ensure there was effective flow of competition in commerce and industry in order to yield the desired results for business and the consumer, and ultimately, the national economy.

2. The Zambia Competition Commission (ZCC)

ZCC was established in May, 1997 as a Statutory Body Corporate with perpetual succession. The main function of ZCC is to monitor, control and prohibit acts or behaviour which are likely to adversely affect competition and fair trading in Zambia. ZCC has wide ranging powers of enforcement and investigation under the Act. The Commission comprises a wide spectrum of representatives (Commissioners). From the government are Commissioners from the Ministry of Commerce Trade and Industry, and the Ministry of Finance. Other Commissioners are from trade and professional associations like the Zambia Bureau of Standards, Zambia Association of Chambers of Commerce and Industry, Zambia Congress of Trade Unions, Economics Association of Zambia, Law Association of Zambia, Zambia Institute of Certified Accountants, Engineering Institute of Zambia, and two from the Consumer Movement.

3. Prohibitions Under the Act

The Act contains the following prohibitions:

- Section 7 (Anti-Competitive Practices)
- Section 8 (Mergers and Takeovers)
- Section 9 (Trade Agreements)
- Section 10 (Anti-Competitive Trade Practices by Associations)
- Section 11 (Criteria for Controlling Monopolies and Concentrations of Economic Power)
- Section 12 (Unfair Trading/Consumer Welfare and Protection)

4. Anti-Competitive Trade Practices

4.1 **Section 7(1)** prohibits agreements or concerted practices between enterprises which have the object of preventing, restricting or distorting competition to an appreciable extent in Zambia or any substantial part of it. A concerted practice in and of itself may not necessarily be anti-competitive. However, there are three issues

which will qualify an agreement or a concerted practice to be anti-competitive, namely:

- The agreement or concerted practices has to be between independent enterprises
- The object(ive), purpose, aim or driving force behind such a practice
- The appreciable extent in Zambia of the practice to prevent, restrict or distort competition e.g. in a relevant product or geographic market.

Therefore, in using Section 7(1), ZCC will look firstly at the nature of the enterprises involved. It should be noted that there can never be a concerted practice between a company and its subsidiary or between divisions of the same company. Enterprises captured have to be independent of each other. Secondly, ZCC will look at the impact or effects the practice has had, has, or is likely to have in the particular relevant product or geographic market. Thirdly, the level of the free flow of the process of competition is considered. The effects would either be seen through a complaint from a competitor, a consumer or from ZCC's own observations.

4.2 Vertical Restraints

Section 7(2) of the Act refers to vertical restraints or restrictions. These are arrangements or agreements between operators at different stages of the production and marketing chain. These arrangements are dealt with in the Act as possible instances of abuse of dominant positions under a "rule of reason" or case-by-case approach. The rule of reason treatment of a practice means that the legality of the practice is evaluated with reference to its economic effects in the relevant markets. This reflects a view that such restraints are not always harmful and may, in fact, be beneficial in particular market circumstances. While they arguably put restrictions on firm's ability to compete freely, they may at the same time be efficiency enhancing.

Examples of such arrangements included exclusive dealing (restrictions on a firm's choice of buyers or suppliers); exclusive territory (restriction on the firm's choice of location); tying arrangements (restrictions on the source of supplies for particular inputs used by firms); and resale price maintenance (restrictions on the price to be charged by downstream firms).

4.2.1 Determination of Abuse of Dominant Position of Market Power: Determination of abuse of a dominant position of market follows a two-stage test:

- Whether the undertaking is dominant within its particular (relevant) market; and
- Whether it is abusing that dominant position

(i) **Is the Undertaking Dominant?** Generally, an undertaking is considered to be dominant if it has a level of market power that allows it to behave independently of competitive pressures (e.g. pricing and distribution strategies). An important but not conclusive factor in determining dominance is the share of the market that the undertaking has. An undertaking is unlikely to be dominant if its market share is less than 40% - although this rule will largely depend on the circumstances of the case. The other main factor in establishing dominance is what level of competition the undertaking faces from new entrants to the market. ZCC would look at whether any barriers to entry to the market exists, that give businesses already existing in the market an advantage (strategic, economical or otherwise) over new or potential entrants.

(ii) **Is the Dominant Undertaking Abusing its Market Power?** The abuse of a dominant position is one of the key elements of the Act. For the provision to apply, one or more persons must substantially control a class of business throughout Zambia or a substantial part of it, and have engaged in or currently be engaging in a practice of anti-competitive nature that have the effect of preventing or lessening competition substantially. The law requires dominant firms not to be permitted to use their advantage to block challenges from existing or potential competitors. The abuse of dominant provision is particularly important in the context of a deregulated and privatized business environment and can be instrumental in assisting the transition from regulation to deregulation. Moreover, the provision helps to ensure that dominant firms do not preclude the competition discipline promised by the removal of trade barriers and increased foreign competition.

5. Merger Control Regulation

5.1 Section 8 of the Act concerns mergers and takeovers. The merger control regulation under the Act applies to all mergers in the economy that involve the acquisition or the establishment of control over a significant interest in the whole or a part of a business of a competitor, supplier, customer or other person. Firms are required to fulfill mandatory pre-notification requirements to ZCC. The assessment of mergers or takeover by the Commission focuses on the question of whether a proposed transaction is likely to prevent, distort or lessen competition. Some mergers and takeovers are however prohibited

outright by the Act. Others can be authorized by the Commission and others are legal and do not need to be authorized. It is an offence under the Act to effect a merger between two or more independent enterprises engaged in manufacturing or distributing substantially similar goods and in providing substantially similar services (horizontal mergers).

However, where the proposed merger or acquisition involves firms which are engaged in manufacturing or distributing dissimilar goods or services, an application for authorization is not needed. Thus, many vertical and conglomerate mergers or acquisitions are legal in Zambia, unless it can be shown that they are intended to restrict or distort competition, such as, if they are employed to foreclose distribution channels to competitors.

5.2 Assessment of Mergers and Takeovers

5.2.1 **Thresholds:** The Act has set two thresholds, one to deal with the situation on unilateral market power (i.e. single firm dominance) and the other to deal with the situation of concentrated markets, where there may be combined or oligopoly market power. These thresholds are set so that the Commission would look at mergers which have:

- *Unilateral Market Power:* the merged firm has more than 50% of the market; and
- *Combined Market Power:* a dominant undertaking which together with **not** more than two independent undertakings have more than 50% of the market.

5.2.2 **Issues for Decision:** In considering whether to grant authorization to a proposed merger, takeover or any other form of acquisition, the Commission's main concern will be to ensure that the merger or takeover will not result in a substantial lessening of competition in any relevant market in Zambia or a substantial part of it. The Commission normally evaluates proposed mergers, takeovers and other forms of acquisitions in two circumstances, namely:

- Where it is believed that the object of the merger or acquisition is to prevent, restrict or distort competition – refer to Section 7(1); or
- Where the merger or takeover could, through acquisition and abuse of dominant position of market power, result in undue restriction of competition or have an adverse effect on trade or the economy in general – refer to Section 7(2).

5.2.3 **Final Analysis:** The final analysis process consequently takes into account the following:

- What is being acquired?
- What are the relevant markets which may be affected by the proposed acquisition?
- Are there barriers to entry likely to be created?
- What are the motives and purposes of each party to the transaction?
- What are the anticipated, likely and possible effects of the proposed acquisition on competition in each relevant market?

5.3 Transnational Mergers/Takeovers

5.3.1 Appreciable extent in Zambia within the meaning of Section 7(1) is present whenever a merger or takeover is completed within Zambia (e.g. acquisition of the assets or the shares of a domestic enterprise, formation of a joint venture within Zambia – even where the acquirers or the founders are foreign enterprises). As regards the domestic subsidiaries of the participating enterprises, a merger effected abroad is held to be a merger completed in the Republic of Zambia. Mergers completed abroad have domestic effect if the merger affects the structural conditions for the domestic enterprise (inclusive of subsidiaries and other affiliate companies) which is a party to the merger)

5.3.2 As regards mergers effected abroad between two directly participating enterprises:

- (i) There are domestic effects, if both enterprises were already operating in Zambia before the merger either directly or through subsidiaries or branches;
- (ii) There may be domestic effects, if only one of the enterprises was operating in Zambia before the merger.

5.4 **Approval Process:** Merger analysis is a demanding exercise which calls for considerable cooperation and input from business. The process leading to authorization or rejection can be long and strenuous, depending largely on the cooperation of the notifying parties. It takes at least 3 months to complete a merger/takeover case.

6. Trade Agreements

Section 9 deals with horizontal agreements. Horizontal agreements refer to implicit or explicit arrangements between firms competing with identical or similar products in the same market. Such arrangements serve no purpose other than to shift surplus from consumers to producers, at the cost of dead-weight losses, organizational inefficiencies and rent seeking. These arrangements are outrightly prohibited under the Act; they cannot be authorized by ZCC. The Act specifically prohibits the following trade agreements:

- Price fixing
- Collusive tendering
- Market or Customer Allocation
- Sales/Production Quotas
- Refusal to supply
- Collective denials of access to an arrangement or association which is crucial to competition

The agreements referred in the section apply to formal, informal, written and unwritten agreements and arrangements, which are outrightly prohibited by the Act.

7. Anti-Competitive Trade Practices by Associations

Section 10 does capture anti-competitive practices by trade associations. “Trade Association” here means a body of persons which is formed for the purpose of furthering the trade interests of its members or of persons represented by its members. Whereas members of the public are at liberty to form trade associations, the anti-competitive trade practices by such associations are prohibited by the Act. These are:

- Unjustified exclusion from a trade association, and
- Recommendation to trade association members on prices to be charged or terms of sale.

8. Controlling Monopolies and Concentrations of Economic Power

8.1 Section 11 concerns control of monopolies and concentrations of economic power. The Act defines a monopoly undertaking as a dominant undertaking or an undertaking which together with not more than two independent undertakings:

- 8.1.1 produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed throughout Zambia or any substantial part of Zambia; or

8.1.2 provides or otherwise controls not less than one half of the services that are rendered in Zambia or any substantial part thereof.

8.2 The Commission, in some instances, will authorize a dominant undertaking to acquire a failing competitor if there is cause that there will be more efficient use of resources which may be achieved through the merger or acquisition, and consequently convey substantial benefits to the community. Accordingly, **efficiency considerations** are of primary importance in assessing the extent to which there may be an overall public benefit from a merger. The Commission, after making its evaluation of the dominance likely to be created or further consolidated as a result of a merger/acquisition, will grant a conditional authorization. Such a transaction will be subject to **undertakings** (commitments) to be submitted by the notifying parties to the Commission, and a **Compliance Programme**, which implements those undertakings. A compliance programme requires considerable input from business, and should make provision to:

8.2.1 Review the impact of any agreements or practices with other competitors, customers and consumers in that market, or any vertical agreements (such as supply and distribution agreements) with due attention to the provisions under Sections 7 and 9 of the Act).

8.2.2 Review the possibility of the enterprise being dominant in the relevant market, and if it may be dominant, pricing and distribution policies should be assessed for possible infringement under Section 7(2).

8.2.3 Employees at all appropriate levels should be made aware of the basic implications of the Act and the consequences of infringement. The Commission considers that all compliance programs should contain at least four (4) features:

- Support of senior management
- Appropriate policy and procedures
- Training of relevant staff
- Ongoing evaluation

9. Unfair Trading/Consumer Welfare and Protection

9.1 Section 12 contains a range of provisions aimed at protecting consumers. According to the Act, the word “consumer” includes any person:

9.1.1 Who purchases or offers to purchase goods otherwise than for the purpose of resale but does not include a person who purchases any goods for the purpose of using them in the production and manufacture of any other goods or articles for sale;

9.1.2 To whom a service is rendered.

9.2 Provisions under Section 12 are outrightly prohibited. These include:

9.2.1 *Misleading or deceptive conduct*; Prohibits conduct by business which is misleading or deceptive, or which is likely to mislead or deceive;

9.2.2 *False or Misleading Representations*: Prohibits false claims about

- the standard, quality, value, grade, composition, style, model or origin of goods or services;
- whether goods are new

9.2.3 *Misleading the public as to the nature or characteristics of goods and services*: Prohibits a person from engaging in conduct which is liable to mislead the public as to the nature, manufacturing process, the characteristics, the purpose or the quality of any service.

9.2.4 *Exclude liability for defective goods*.

9.2.5 *Withholding the production of goods and services on the market or destroy the means of production and distribution of such goods, with the aim of bringing about a price increase*.

10. Powers of enforcement

10.1 The effectiveness of the Competition Law in addressing anti-competitive practices, depends on the actual degree of enforcement action by the Commission and the role the Courts or the Judiciary in the enforcement of competition law. The Act gives power to the Executive Director, after obtaining warrant from a court, to enter any premises, access to or production of any documents relating to trade or any business of any person. The Executive Director may call upon the assistance of any police officers when carrying out his duty.

10.2 The law further stipulates offences and penalties for persons who contravene or fail to comply with any provision of the Act or any regulations made there under, or any person who omits or refuses to furnish any information or produce any document required by the Commission. It is also an offence to knowingly furnish any false information to the Commission. Those found guilty are liable to a fine or imprisonment or both.

10.3 It is important to mention that the Commission has no power to issue legal binding orders to parties prohibiting conduct found to

have violated the law. The Commission is supposed to take all its cases to a Court of Law for judicial determination.

11. Authorisation of Allowable Acts

- 11.1 PART III of the act is based on the fundamental principle that any conduct which has the purpose of substantially lessening competition in the market should be prohibited, while recognizing that, in certain circumstances, full competition may not deliver the most desirable outcome. The Act, however, recognizes that some objectives of our society may not always be met by the operation of the competitive markets. To secure such objectives, exemptions from the application of the Act are available. The adjudication (Notification and Authorisation) procedures under the Act provide the exemptions. It is important to note that the adjudication procedures apply only to specific parts of the Act. For example, such exemptions do not apply to any of the consumer protection provisions of the Act.
- 11.2 To spare people from the process of undergoing an investigation by the Commission or risking an action being brought by a third party, the Act provides a mechanism for authorization by which the Commission may grant immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene the Act. The outcome provides a greater degree of business certainty, important when a major investigation decision or other market initiatives are proposed.
- 11.3 Authorisation of some types of anti-competitive behaviour is possible if the public benefit exceeds the detriment to competition. The Commission may grant immunity on the public benefit grounds from legal proceedings for some arrangements or conduct that might otherwise breach the restrictive trade practices provisions of the Act. To grant authorization, the Commission must be satisfied that the public benefit stemming from the arrangements outweigh the anti-competitive effect. To assist the Commission in its consideration of the application, it would be helpful to have as wide a range of views as possible concerning the public benefits and anti-competitive effects of the arrangement or conduct.

12. Business Beware

The business community is called upon to familiarize themselves with the Act. The Act applies to all enterprises operating in Zambia and supplying a particular market whether through domestic sales, imports, foreign affiliates or non-equity forms of Foreign Direct Investment. In a nutshell, competition law intends to prevent inefficiencies arising from agreements or conduct designed to lessen trade or investment. The Commission and its professional

staff stand ready to offer advice and answer any questions concerning the Act, work and operations of the Zambia Competition Commission.

Our contact address is:

*The Executive Director
Zambia Competition Commission
4th Floor, Main Post Office Building
Cairo Road
P O Box 34919
Lusaka.*

Tel : +260-1-222787/232757
Fax : +260-1-222789
Email : zcomp@zamtel.zm