IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

APPEAL NO. 2017/020/COM

BETWEEN:

OMNIA FERTILIZER ZAMBIA LIMITED — **APPELLANT**

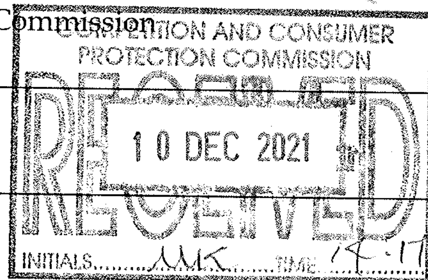
AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION — **RESPONDENT**

CORAM: Mrs. Eness C. Chiyenge (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), and Mr. Buchisa K. Mwalongo (Member)

For the Appellant: Mr. A. J. Shonga Jr, SC and Mr. S. M. Lungu, SC – Messrs. Shamwana & Co.

For the Respondent: Ms. M. Mtonga, Senior Legal Officer – Competition and Consumer Protection Commission



JUDGMENT

Legislation referred to:

1. Competition and Consumer Protection Act No. 24 of 2010, sections 2, 8, 9, 55 and 71.
2. Companies Act No. 10 of 2017, sections 15 and 16.
3. Companies Act, No. 26 of 1994.
4. Competition and Fair Trading Act, No. 18 of 1994, section 9.
5. Competition and Consumer Protection (Tribunal) Rules, S.I. No. 37 of 2012, Rules 15 and 29.
6. Competition and Consumer Protection (General) Regulations, S.I. 97 of 2011, Regulation 11.

Cases referred to:

1. STM v. Commission (1966) ECR 235.
2. Competition Authority v. Bids and Barry Brothers, 20 November 2008.
3. European Night Services v. Commission Joined Cases T/374/375/94 [1998] ECR 11-3141.
4. Northern Pacific Railway Co. v. United States, 356 US 1, 5 (1957).
5. Salomon v Salomon & Co Limited (1897) A.C. 22.
6. Associated Chemicals Limited v. Hill and Delamain Zambia Limited and Ellis and Co (1998) ZR 9.
7. Madison Investment, Property and Advisory Company Limited v Peter Kanyinji, Selected Judgment No. 48 of 2018.
8. Celtel Zambia Limited (T/A Zain Zambia) v. Zambia Revenue Authority (2011) ZR Vol. 2.

9. ZCCM Investments Holdings v. Cordwell Sichimwi, Appeal No. 172/2014.
10. Shilling Bob Zinka v. The Attorney General (1990-1992) ZR 73 (SC).
11. Competition and Consumer Protection Commission v. Omnia Fertilizer Zambia Limited and Nyiombo Investments Limited Appeal No.205/2014/selected judgment No.5 of 2017.
12. Societe Techinque Miniere v. Maschinebau Vim Case 56/65/1996/ECR23, 249.
13. Top Gear and Nine (9) others v. Competition and Consumer Protection Commission Appeal No. 2013/CCPT/003.
14. Insurers Association v. Competition and Consumer Protection Commission Appeal No. 2018/CCPT/022/COM.
15. Pangaea Securities Limited v. Competition and Consumer Protection Commission Appeal No. 2017/CCPT/005/Com.

Other Works referred to:

1. Okeonghene Odudu, The Boundaries of EC Competition law - Scope of Article 81.
2. OECD: Policy Brief, 2007 (Seen at https://www.oecd.org/competition/cartels/38704302.pdf on 25.11.2021 at 17:17 hrs).
3. OECD: Prosecuting Cartels without Direct Evidence DAF/COMP/GF 2006.
4. OECD: The Concept of Potential Competition (2021)
5. Black's Law Dictionary 10th edition, Thomas Reuters 2009, by Bryan A Garner.
6. Federal Trade Commission of the United States of America, "Guide to Antitrust Laws".

   https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-riggingeen (seen on 3rd December 2021 at 18:45 hours).

CHIYENGE, Chairperson, delivered the judgment of the Tribunal.

INTRODUCTION

1. This is our judgment in this appeal which was launched by Omnia Fertilizer Zambia Limited (hereinafter referred to as "the Appellant") against a decision of the Competition and Consumer Protection Commission (hereinafter referred to as "the Respondent"), which decision was rendered on 24th April 2013.

BACKGROUND

2. According to the Record of Proceedings (the RoP) filed by the Respondent, the Respondent carried out unannounced searches at the premises of the Appellant and Nyiombo Investments Limited (hereinafter referred to as "Nyiombo") on 19th October 2012. This followed information from some source(s) alleging tender irregularities and business malpractices involving cartelistic conduct between the two enterprises in the procurement of contracts for supply of fertilizers to the Government of the Republic of Zambia (the GRZ or the government) under the Fertilizer Input Support Programme (the FISP). In the course of the said searches, the Respondent seized some documents and computers. The Respondent launched formal investigations of the two enterprises. Upon launching

investigations, the Respondent issued a Notice of Investigation to the Appellant on 6th November 2012.

3. In its Notice of Investigation, the Respondent stated that the Appellant working in collaboration with Nyiombo was alleged to be engaged in allocation of markets, bid rigging and sharing of price information in supplying fertilizer under the FISP. The Respondent further stated that the alleged conduct was anti-competitive and in contravention of section 9 (1) (a), (b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter referred to as "the Act"). The Respondent requested the Appellant to respond to the Notice within fourteen (14) days. The Notice of Investigation was received by Vincent Mkuyamba on 8th November 2012, as General Manager and he stamped it "Omnia Small Scale Limited".

   (See pages 7-13 of the RoP)

4. According to its Staff Paper of November 2012, apart from the complaint received from an unnamed source on 3rd September 2012[1], a study the Respondent undertook revealed that the Appellant was being investigated for an export cartel in South Africa, one of the cartel markets of which was Zambia. Further that there was newspaper article locally in the Post Newspaper of 3rd August 2012 titled *"Fertilizer corruption renders subsidies meaningless"*, which alleged, *"For the past seven years, the supply of fertilizers has been monopolised by two companies, with one buying from the other. This has been virtually a cartel business, with the government as a principal or main customer. Schemes have been devised to make this business virtually a preserve of two companies. These two companies have curved the country into two – Eastern Province, Southern and Lusaka Provinces being supplied by one and the rest of the country being supplied by the other, the principal or main supplier of fertilisers to this country. This has been the pattern for the last seven years or so"*. **(See page 5 of the Amended RoP, being the Staff Paper filed on 9th September 2021)**

5. The Respondent in its Staff Paper also stated that the Appellant was incorporated on 5th June 1992 and among the directors was a Zambian by the name Vincent Mukuyamba and four others being South Africans. That the Appellant was wholly owned by Chemical Holdings International of Mauritius, which was involved in organic chemical manufacturing. Further, that Chemical Holdings was a subsidiary of Omnia Holdings based in South Africa and listed on the Johannesburg Stock Exchange.

6. The Respondent further stated that Nyiombo was incorporated on 16th May 2003 and that the nature of its business was farming, import and export as well as general trading. Further, that its directors and shareholders were Gulam Patel (Zambian), Maurice Jangulo (Zambian) and Maureen Dlamini (South African). And that the Appellant and Nyiombo were the main suppliers of fertilizer under the FISP.

   (See pages 7-10 of the Amended RoP)

7. The relevant product market was defined as the supply of fertilizer under the Government FISP, while the relevant geographical market was defined as including Eastern, Lusaka,

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[11] This information appears to be in the minutes of a meeting held on 3rd September 2012 between officers of the Respondent and an unnamed person who made submissions of a complaint to the Respondent on behalf of a company named as Greenbelt Fertiliser Limited. The minutes appear at pages 3 – 5 of the RoP.

Western and Southern Provinces where most of the fertilizer was supplied under the FISP by the Appellant and Nyiombo. **(See pages 10 – 11 of the Amended RoP)**

8. In summary, according to the Respondent's Staff Paper, the evidence and findings were, inter alia, as follows:

8.1 **Substantial Lessening of Competition Test (or "Effects" Test)**

In terms of whether the two companies (Appellant and Nyiombo) were competitors:

(a) The two companies were independent of each other, and both companies were involved in the supply of fertilisers with both companies bidding to supply the product to the GRZ under the FISP.

(b) The two companies could therefore be regarded as competitors as they were competing to be awarded the Government contract under the FISP.

(See page 12, paragraph 5.2.2 of Amended RoP)

In terms of whether there was an agreement by the two companies (as alleged):

Referencing the definition of *"agreement"* in section 2 (1) of the Act - *"any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises;"* **(see page 12, paragraph 5.2.3)**

The Respondent further outlined the following as evidence **(at pages 12 - 14 of the Amended RoP)**:

(a) **Market allocation**

(i) **Annex 1**, an express Memorandum of Understanding (MoU) of 2007 retrieved from the computer seized at Nyiombo, attached ato the Staff Paper**)**, stating that the two companies would cooperate in the distribution and supply of fertiliser in Zambia and that the primary objective was for each company to focus on supplying and distributing fertiliser in the allocated zones where it had sustainable competitive advantage. That a plausible argument that the MoU could not be used as evidence because it was not signed was not tenable as in cartels what was important to establish was the intention and *consensus ad idem.* The Respondent's position was that the agreement did not need to be signed to fall within the dominion of section 9 (1) of the Act, and that the definition in section 2 was instructive and also referred to oral agreements, which are incapable of being signed. **(See pages 25-27 of RoP)**

(ii) **Annex 2**, a signed document called Addendum No. 1 of 2007 (dated September 2007) seized by the Respondent, attached to the Staff Paper, which allegedly showed that the two companies were colluding. The Respondent found that, for example, Omnia tenders alone and wins Eastern Province but the Addendum states that Nyiombo has appointed Omnia to supply and deliver fertiliser in Eastern Province. **(see page 28 of the RoP)**

(iii) **Annex 3**, a matrix allegedly created from the tender documents that were seized, attached **(see pages 29-30 of the RoP).**

(iv) **Annex 4**, a Sale Agreement (dated August 2006) between the two companies for the supply of fertiliser under the FISP, providing that Omnia would buy fertiliser from Nyiombo. The Respondent's finding was that this increased the price for the government because Omnia implicitly became a middle player who had to add a mark up. **(See pages 32-35 of the RoP).**

(v) **Annex 5**, an email (dated 24th February 2010 (from Kwazi Dlamini of Nyiombo to Vincent Mkuyamba, General Manager of Omnia Small Scale Limited, reading as "Forwarded by Vincent Mkuyamba Zambia Omnia group on 25.02.2010..."). The Responding quoting the email stating, *"Kindly forward me your latest receipts in your areas. Also be advised that the Lundazi cargo will be received by you by Friday .... More details to follow after I confirm with the guys at the loading point. Thus far the first lot of cargo that will be coming in will be 240mt of Urea. I will keep you updated over the same."* The Respondent's finding was that this kind of correspondence confirmed market allocation and virtually eliminated any contrary position. **(See page 36 of the RoP)**

(vi) **Annex 6**, an email (dated 23rd March 2011, from Kwazi Dlamini of Nyiombo sent to one Idris Mulla; Vincent Mukuyamba at Omnia; and Collins Nanjaya, but addressed to "Idris and Vincent"). The email subject matter was *"Urea allocations into Southern"* and in the body it stated *"Find attached Urea allocations for Omnia"* and proceeded to give the allocations for Monze, Kalomo, Choma, Mazabuka, Lusaka, and Livingstone. The email went on to state *"For the second consignment Ayia Mariner will be sending qtys to the following"* and provided these quantities for Lusaka and Kapiri and further stated *"From Judi Alamar we have 1500mt in Mbeya for Lundazi. ..."* The attachment to the email continued with D compound allocations to Chipata, Katete, Petauke, Nyimba, Lusaka, Kaoma, Choma, Livingstone, Monze and Lundazi. The Respondent found that the email further showed market allocation and collusion by the two companies discussing their allocations in the respective regions. **(See page 39 of the RoP)**

(vii) **Annex 8**, an email (dated 2nd May 2010 from Kwazi Dlamini of Nyombo sent to Vincent Mkuyamba among others on the subject *"Nyiombo ... offloading in Chipata"*, asking Vincent to *"assist with the needful...."*); **(See page 46 of RoP)**

(viii) **Annex 9** (email dated 1st March 2010 from Kwazi Dlamini on Nyiombo receipts update, attaching an email from Mulonda Mubita at Omnia to Kwazi at Nyiombo with copy to V. Mkuyamba at Omnia, requesting for reports and providing that *"attached is a file of summaries of the stock received in Chipata, Petauke a and Katete as at 26th February 2010. ..."*; an email dated 24th February 2010 from Kwazi Dlamini at Nyiombo to V Mkuyamba at Omnia asking Vincent to forward *"your latest receipts in your areas"* (same email in Annex 5); **(See page 47 of RoP)**

(ix) **Annex 10** (dated 10th March 2010 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia, and others, with copy to V Mkuyaba at Omnia and others asking Mubita if he had an update to the last report and advising that D compound would *"start to be received within your areas within the first to second week of April"*); **(See page 49 of RoP)**

(x) **Annex 11** (dated 11th January 2011 correspondence between Kwazi Dlamini of Nyiombo and V Mkuyamba of Omnia informing Vincent of trucks to be received by latter for Eastern Province, and latter requesting the former to advise as to when the "Eastern deliveries" would be concluded and to revert urgently "as the Minister is expecting my feedback this afternoon)"; **(See page 50 of RoP)**

(xi) **Annex 12** (dated 11th January 2011 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia with copy to V Mkuyamba at Omnia requesting Omnia to send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries; **(See page 51 of RoP)**

(xii) **Annex 13** (dated 17th October 2012 from Kwazi Dlamini of Nyiombo to others of Nyiombo with copy to Vincent Mkuyamba of Omnia asking to *"facilitate Omnia with receiving 800 bags of urea and 1200 bags of NPK"*, to *"facilitate with the needful"* and that Vincent would *"call over the same"* **(See page 38 of RoP)**

(xiii) and **Annex 14** (text not seen in RoP).

The Respondent concluded that these emails showed market allocation and collusion.

(b) Price information sharing

Annex 15, email (dated 26th June 2007 from Idris Mullar of Nyiombo to Vincent Mkuyamba of Omnia providing the latter Nyiombo prices in Western Province). The Respondent found that Omnia had bid and won the tender for the province for that season but Nyiombo provided its pricing. **(See page 54 of RoP)**

(c) Bid Rigging

Annex 19, that in 2009, both enterprises bid in two zones (Zone 9 - Western Province and Zone 3 – Eastern Province), but that as usual, Omnia won the tender for Zone 9 while Nyiombo won the tender for Zone 3. Further that the differences between their bid prices were very minimal. That in Zone 9, Nyiombo's bid price was USD3,669,047.27, while Omnia's was USD3,734,526; and in Zone 3 Nyiombo's bid price was USD15,740766.08, while Omnia's price was USD15,045, 888.That this information was properly elucidated in Tender Document TB/ORD/008/09 attached as Annex 19 (dated 24th April 2009). That further it was difficulty to see why Nyiombo was not bidding for Eastern, Lusaka, and Southern Provinces when it was the one supplying Omnia with fertilisers destined for these areas. That in addition, it was demonstrated that Nyiombo had the capacity to supply and distribute in the said areas if it could supply in far flung areas like western Province. **(See page 56 of RoP)**

In terms of whether the conduct had the object to prevent, restrict or distort competition:

(a) That the alleged conduct was captured under section 9 of the Act; therefore, it was prohibited *per se*. That once the conduct was proved, there was no need for any justification. That in other jurisdictions, these were seen as restrictive agreements by object and viewed seriously. That under the EU competition law, most prominent examples on the horizontal level included price fixing; market allocation or restricting the quantities of goods or services to be produced, bought or supplied. That examples of hardcore restrictions in vertical relationships (i.e. between enterprises operating at different levels of the production or distribution chain) were resale price maintenance and certain territorial restrictions.

(b) That the term object may mean the natural tendency of conduct to restrict competition. That there are some types of conducts the anti-competitiveness of which can be determined simply from their object. That the word "object" means not the subjective intention of the party but the objective meaning and purpose considered in the context considered in which it is to be applied.

(c) That in the EU case of **STM v. Commission**[2] the ECJ stated that *"Article 81 (1) is based on an assessment of the effects of an agreement from two angles of economic evaluation"* and confirmed that both "object" and "effect" seek to identify the same consequences of collusion: restriction of competition.[3] That the distinction between the two infringements arises from the fact that certain forms of collusion between enterprises can be regarded, by their nature, as injurious to the proper functioning of normal competition (citing **Case C-209/07 Competition Authority v. Bids and Barry Brothers, 20 November 2008, para. 17**). That the ECJ also referred to the CFI holding in the case of **European Night Services v. Commission**, that object category consists of "obvious restrictions of competition" (Joined Cases T/374/375/94 [1998] ECR 11-3141).

(d) That (on the other hand), to prove anti-competitive effect, it necessary to engage in an in-depth analysis of the agreement in question and the economic context in which it functions. That the finding of an anti-competitive objects dispenses costly proof requirements. That the object rule can be described as a presumption rule; if the object is found, harmful effects on competition are presumed. Whether the agreement really has the presumed effects is irrelevant.

(e) That *per se* rules that are applied under section 9 of the Act where the alleged conduct in this case fall are also applied in the USA; that *per se* rules in anti-trust law was described by the Supreme Court in **Northern Pacific Railway Co. v. United States** in following terms:

> *"There are certain agreements or practices which because if their pernicious effect in competition and lack of any redeeming virtue are conclusively presumed to be*

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[2] (1966) ECR 235.

[3] Citing Okeonghene Odudu, The Boundaries of EC Competition law – Scope of Article 81, p. 113.

unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[4]

(f) That those agreements falling under the *per se* rule are "unlawful in and of themselves" and it is not necessary to assess their impact on competition in the relevant market.

(g) That having analysed such agreements in both the context of the Act and practice in other jurisdictions, *per se* offenses and restrictions by object as the EU would call them had very little or no prospect of beneficial effects. That the conduct by the Appellant and Nyiombo had been expressly captured under section 9 of the Act and there was no need for further analysis of the mischief.

(See pages 14 – 16 of the Amended RoP)

In terms of whether the effect on competition is to an appreciable extent in Zambia or any substantial part of it:

(a) That determining the effects of conduct on competition is only necessary where the restriction by object cannot be proved, and that this was also true for *per se* conduct because these offenses are presumed to have negative effects in competition without any redeeming prospects.

(b) That usually the effects of a conduct are analysed in order to authorise a *prima facie* anti-competitive conduct if it can be demonstrated that its anti-competitive effects are outweighed by the benefits emanating from such conduct. That this could not be done in this instance as it would amount to violation if the Act which left no room for such analysis. **(See pages 16 – 17 of the Amended RoP).**

In terms of estimated loss to the government as a result of the agreement between the two parties

(a) That it had been established that in the years when there was less competition, the prices of the two companies were very high. That the year of the Staff Paper (2012), the prices suddenly dropped due to the entry of new players. That this led to a saving of **USD10 million**. That the editorial comment of the Post Newspaper of 3rd August 2012 **(Annex 21 of RoP)** elucidated similar facts. And quoting the Newspaper article, *"Over the last seven years, the government has lost not less than US$10 million each year through this system of supplying fertilizer to the government and consequently to the farmers"*.

(b) That the analysis from the tender documents of 2011 and 2012 buttressed the above position. That the tender documents revealed that the government saved about **K50 billion** in 2012 as a result of new players entering the market. That further it was established that the government could have made similar savings had the fertiliser been bought from the open market. That, therefore, the two companies had been cheating the government on the prices and that this was demonstrated by the

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[4] 356 US 1, 5 (1957).

reduction in 2012 and confirmed by the price on the open market. That the government had therefore lost more than **K350 billion** in the last seven years. **(Referencing attached Table at page 18 of the Amended RoP)**

(See page 17 of the Amended RoP)

8.2 **Recommendations**

The Technical Committee recommended to the Board what the Board ultimately determined in its decision of 26th April 2013, which decision basically adopted the findings contained in the Staff Paper as we have outlined above. The Board directed as follows:

(a) Nyiombo be fined 5% annual turnover in accordance with section 9 (3).

(b) Omnia be fined 5% annual turnover in accordance with section 9 (3).

(c) Both Omnia and Nyiombo be prosecuted in accordance with Section 9 (2) of the Act.

(See the recommendations at page 19 of the Amended RoP; see the findings and directions of the Board in its Decision at pages 69 – 87 of the RoP (directions are at page 87))

APPEAL AND TRIBUNAL HEARING

9. The Appellant appealed the Respondent's Decision by its Notice of Appeal filed on 27th October 2017.[5] According to the Notice of Appeal, the Appellant appealed the whole decision which decided that:

"The Board of Commissioners determined that the respondents were engaged in collusion or cartelistic behaviour"; and

"In view of the foregoing analysis and conclusions, the Board of Commissioners decided that:

(i) Omnia be fined 5% annual turnover in accordance with section 9 (3) of the Act.

(ii) Both Omnia and Nyiombo be prosecuted in accordance with section 9 (2) of the Act."

10. The Appellant filed two grounds of appeal, with fifteen following thereafter, being in the alternative (in the event the two do not succeed). We shall outline these grounds in the CONSIDERATION AND DETERMINATION part of the judgment. The Appellant sought the following reliefs:

    (a) A declaration that the decision of the (Respondent) which decides (sic) that the Appellant was engaged in collusion or cartelistic behaviour be set aside.

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[5] This followed the Respondent's successful appeal to the Supreme Court against the Appellant and Nyiombo in a matter in which the latter had challenged the Respondent's Notice of Investigation, which at the first instance was upheld by the Tribunal and the High Court but was overturned by the Supreme Court in favour of the Respondent. The Court also ordered that the Appellant was at liberty to appeal the Respondent's substantive Decision to the Tribunal. The Court in essence redeemed the time allowed for appeal under section 60 of the Act, in light of the time spent on the intervening appeal proceedings.

(b) A declaration that the decision of the Respondent that decides (sic) that the Appellant be fined 5% if its annual turnover in accordance with section 9 (3) of the Act be set aside.

(c) A declaration that the decision of the Respondent that directs (sic) that tge Appellant be prosecuted in accordance with section 9 (2) of the Act be set aside.

(d) An order that the Respondent bears the costs of this appeal.

(e) Any other Order the Tribunal may deem fit.

11. The Respondent in response filed its grounds of opposition to the grounds of appeal on 23rd November 2017. We have not found it necessary to outline these grounds verbatim, as they are addressed in the Respondent's submissions and we deal with these later, as we see appropriate.

12. On 23rd April 2021, we sat to hear the appeal. This was after we had heard and determined interlocutory applications filed by the Appellant. However, at the hearing of the appeal, the Appellant sought to proceed with the appeal by relying on the RoP without bringing any witness. The Respondent also chose to rely on the RoP without bringing any witness. Counsel for the two parties opted instead to file written submissions, respectively. We directed the parties to file their submissions, the last of which would be the Appellant's Submissions in Reply, if any, on or before 7th July 2021. However, on application by counsel for the Appellant we issued further directions extending the time, but in the course of reviewing the appeal proceedings, we discovered that the RoP that had been filed by the Respondent on 5th June 2018 was incomplete. That is, all the pages that were supposed to bear odd page numbers in the Respondent's Staff Paper was missing; and, therefore the page numbering was incorrect. We issued an order pursuant to section 71 (1) (a) directing the Respondent to file an amendment to the RoP. The Respondent filed what it called "Amended Record of Proceedings" (Amended RoP) on 9th September 2021, which is the complete Staff Paper. Following that, we issued further directions granting the parties liberty to file amended submissions consequential to the Amended RoP, and the time frames for the filings expired on 10th October 2021, by which date the Respondent should have filed amended submissions, if any. As it turned out, neither of the two parties amended their submissions.

CONSIDERATION AND DETERMINATION OF APPEAL

13. We have seriously considered the grounds of appeal in light of the RoP and Amended RoP (Staff Paper of November 2012), as well as the submissions filed by the Appellant and the Respondent, respectively. We refer to these documents in our consideration of grounds of appeal as we see appropriate. We have considered the first two grounds together as they are related.

Ground 1: The Respondent erred in finding in finding that Appellant participated in the supply of fertiliser under the FISP as the entity that was engaged in the supply of fertiliser under the FISP was Omnia Small Scale Limited, a totally different entity at law;

Ground 2: The Respondent erred in therefore, fining the Appellant 5% of its annual turnover in accordance with section 9 (3) of the Act.

14. In arguing the two grounds of appeal, counsel for the Appellant have heavily canvassed the position that from the Respondent's RoP, it is clear that the entity that was involved in the supply of fertiliser was not the Appellant, but Omnia Small Scale Limited. That this company according to company law was a distinct entity, separate from the Appellant. Counsel argued that the Respondent pursued a wrong party. That paragraph 1.0 (i) of the Respondent's Decision, at **page 67 of the RoP**, contains what purports to be information and relevant background upon which the said Decision is grounded. That the complaint allegedly received by the Respondent, according to this paragraph, was that Nyiombo and the Appellant had been supplying fertilizer under the FISP for a decade.

15. Counsel further referred to minutes of a meeting between an unknown party and the Executive Director, Chief Analyst and Research Analyst of the Respondent recorded to have occurred on 3rd September 2012. That the minutes appear at **page 3-5 of the Respondent's RoP** and that at page 3 in paragraph 3, it is evident that a competitor of the Appellant going by the name Greenbelt Fertiliser Limited was apparently the secret complainant. That what was submitted by the said Greenbelt Fertiliser Limited is no different from what is contained in the information and background in the Respondent's Decision referred to in paragraph immediately above.

16. Counsel have further submitted that the Notice of Investigation, appearing at **page 12 of the RoP**, was addressed to the Managing Director of Omnia Fertilizer Zambia Limited, the Appellant; that therefore, the party given notice of an investigation was the Appellant. Further, that following "an investigation" the Respondent published a ***Staff paper on restrictive business practices by Nyiombo Investments Limited and Omnia Fertilizer Zambia Limited***. And that from the caption, it is undeniable that the party being cited was the Appellant. And that throughout the said paper, reference to Omnia, as can be clearly seen from paragraph 1.1, is meant to refer to the Appellant. That further yet, the Respondent, in its decision delivered on 26th April 2013, appearing at **page 67 to 81 of the Respondent's Record of Proceedings,** the Respondent found that the Appellant was a party; that this is clear from perusal of paragraph 4.1.1 **at page 69 of the RoP**.

17. Counsel have further submitted that, to the contrary, the evidence gathered by the Respondent and wielded to condemn the Appellant tells a different story. That it reveals that the Appellant was not the party that was involved in the FISP transactions. That the documents show that the party that participated in the FISP was in fact Omnia Small Scale Limited. Counsel referred to paragraph 5.2.3 (iii) of the decision, at **page 74 of the RoP,** where the Respondent stated that, "*there is an express Memorandum of Understanding of 2007 that was retrieved from the computer seized at Nyiombo. The Memorandum of Understanding has expressly stated that the two companies shall cooperate in the distribution of fertilizer in Zambia.... The Memorandum of Understanding is attached as annex 1*" That to the contrary, the parties to the said document are Omnia Small scale Limited and Nyiombo. That this document appears to be one of the key documents employed by the Respondent to establish culpability of the Appellant.

18. Counsel have gone further and submitted that at paragraph 5.2.3 (iv) of the Respondent's Decision, at **page 74 of the RoP**, the Respondent says, *"...pursuant to the Memorandum of Understanding, the commission seized a signed and sealed document called Addendum No 1 of 2007. This is attached as annex 2. This document further shows that the two firms are colluding."* That A close look at *Annex 2* illuminates the glaring fact that the Appellant is not a party to the said document. The Addendum is between Omnia Small Scale Limited and Nyiombo. Further, that at paragraph 5.2.3 (v) of the Decision, **at page 75 of the Respondent's RoP**, the Respondent says, *"the Commission also seized a Sale Agreement between the two firms for the supply of fertilizer under the fertilizer support program...see annex 4."* That also the sale agreement appearing as annex 4 is between Nyiombo and another called Omnia Small Scale Limited. That nowhere in the agreement does the Appellant appear in any fashion.

19. Counsel have added that in fact the trend is the same with respect to other annexes introduced as evidence by the Respondents. They each consistently relate to transactions undertaken by Omnia Small Scale Limited and not the Appellant.

20. In arguing the issue on a point of law, counsel for the Appellant have said that in terms of section 15 of the Companies Act, No. 10 of 2017, a company is deemed to come into existence on the date of incorporation, that is, from the date its name is entered into the register and given a certificate of incorporation by the Registrar of Companies. Accordingly, section 15 of the Companies Act states that:

    "15. (1) A certificate of incorporation issued in accordance with section 14 shall be conclusive evidence that –
    (a) the requirements of this Act regarding the incorporation of the company have been complied with; and
    (b) from the date of registration stated in the certificate, the company is incorporated in accordance with this Act."

21. Further, that one of the consequences of incorporation is that an incorporated company, as such, becomes a separate legal person distinct from its shareholders or members. This is known as the principle of separate corporate personality. This principle was fully established at the end of the nineteenth century in the celebrated case of ***Salomon v Salomon & Co Limited (1897) A.C. 22*** (**Salomon v. Salomon**) where the court was of the view that a company is, at law, a different person altogether from the subscribers to its memorandum. That the decision in **Salomon v Salomon & Co Limited** was confirmed in the case of **Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Co (1998) ZR 9 at 11** where the Supreme Court of Zambia held that upon incorporation, a company becomes a body corporate and thereby, a person distinct from its shareholders or members. That the court stated at page 11 that a company is:

    "........not, like a partnership or a family, a mere collection or aggregation of individuals. In the eyes of the law it is a person distinct from its members or shareholders, a metaphysical entity or a fiction of law, with legal but no physical existence."

22. Further that the above position of the law has now been mirrored in section 16 of the Companies Act, which states that:

"16. A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered, and shall continue to exist as a corporate until it is removed from the Register of Companies."

23. Further, that more recently, in the case of **Madison Investment, Property and Advisory Company Limited v Peter Kanyinji – Selected Judgment No. 48 of 2018 ((the Madison v. Kanyinji case)**, the Supreme Court had this to say at page J31:

> *"In Adam v. Cape Industries PLC, Slade LJ, in rejecting the approach taken in DHN Food Distributors, was emphatic that the veil should not be pierced merely because there is a group structure. He stated in a passage that Mr. Chiteba referred to in his submissions, as follows:*
>
> > *"...the court is not free to disregard the principle of Salomon v. A Salamon & Co. Ltd merely because it considers that justice so requires our law, for better or worse, recognizes the creation of subsidiary companies which though in one sense the creature of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all rights and liabilities which would normally attach to separate legal entities. There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary the fundamental principle is that each company in a group of companies is a separate legal entity possessed of separate legal rights and liabilities."*

24. Further, that the above authorities make it abundantly clear that each company is distinct and may not, under any circumstances, be taken to be another. That, thus, no indictment may be attached to the Appellant for dealings allegedly undertaken by a totally separate company. That it was wrong for the Respondent to try the Appellant when all the evidence that buoyed its case appeared to relate to Omnia Small Scale Limited.

25. Counsel have further submitted that they have combed through the documents contained in the RoP, in search of any link between the Appellant and Omnia Small Scale Limited and had found none. That the Respondent had not produced or offered any evidence at all to support the notion why the Appellant must be held accountable for the transactions allegedly committed by another company. That the Respondent fell into error when it failed to appreciate elementary rules that govern the existence of companies. And further that the Respondent erred in fining the Appellant 5% of its annual turnover in accordance with section 9(3) of the Act and in directing that the Appellant be prosecuted in accordance with section 9(2) of the Act. That as illustrated above, the Appellant did not participate in the FISP. That it follows that the Respondent not only blamed but fined the wrong party. That the Respondent erred when it fined the Appellant 5% of its annual turnover.

26. Counsel for the Appellant also submitted that the Respondent erred when it directed that the Appellant be prosecuted in accordance with section 9(2) of the Competition and Consumer Protection Act. That section 9(2) is structured in the following terms:

> *"9(2) A person who contravenes subsection (1) commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both."*

27. That the Respondent erred in the said direction as it had not shown that the Appellant had committed a criminal offence to warrant prosecution. That though cognizant of the fact that

this Tribunal has in the past held that it has no jurisdiction to hear matters where the Respondent has ordered the prosecution of a party, but it is counsel's submission that even before any consideration can be made on whether a party should be prosecuted or not, there has to be some semblance of evidence that reveal that a criminal offence could have been committed. That, as counsel have argued above, the Appellant was not involved in the FISP that was the source of the investigations and as such it was wrong for the Respondent to have directed that it be prosecuted.

28. In conclusion, counsel for the Appellant submitted that on these two grounds alone, the appeal should succeed, but that in the event the two grounds fail, counsel would proceed to present further arguments in support of the Appeal.

29. In response, counsel for the Respondent argued somewhat at length against these grounds of appeal, but we have restricted ourselves to what is relevant to what has been raised in the grounds of appeal and the Appellant's arguments in support thereof.

30. Counsel for the Respondent have argued that it cannot be a mere coincidence that the Appellant and the said Omnia Small Scale Limited are both in the supply and distribution of fertiliser in Zambia. In addition to this, they have similar names and participated in the FISP programme. That moreover, during the dawn raid that the Respondent conducted on the Appellant and Nyiombo, information pertaining to the said Omnia Small Scale Limited was found at the Appellant's premises. That the only reasonable inference that can be drawn from this is that the Appellant and the said Omnia Small Scale Limited are one and the same legal person. That the Appellant has not adduced any evidence to dispel the fact they are the said Omnia Small Scale Limited. That therefore counsel have submitted that the Appellant's ground one cannot stand as the Appellant and the said Omnia Small Scale are interconnected bodies.

31. Concerning Ground 2, counsel for the Appellant have argued that the Respondent was on firm ground in fining the Appellant 5% of its annual turnover and in further directing that the Appellant be prosecuted, as the said directives were within the ambit of the law. Counsel have referred to section 9 (3) of the Act. Counsel have further argued that the Respondent was well within the ambit of the law when it directed the Appellant to be prosecuted. And further that in terms of criminal prosecution, it is it is the directors of the erring enterprise that are prosecuted.

32. In reply, counsel for the Appellant have argued against the Respondent's proposition that it was justified in finding that the Appellant participated in the supply of fertilizer under the FISP because, according to the Respondent, evidence showed that the Appellant and the said Omnia Small Scale are interconnected bodies. That the basis for this assertion is another assertion that it cannot be a coincidence that the Appellant and Omnia Small scale limited are both in the supply and distribution of fertilizer. That the Respondent further suggests that the similarity in names between the Appellant and Omnia Small Scale Limited and the fact that information pertaining to the said Omnia Small Scale Limited was found on the Appellant's premises is reason for this Tribunal to find that the only reasonable inference is that the Appellant and Omnia Small Scale Limited are one and the same legal person.

33. Further, that with the greatest respect, counsel for the Appellant find the above submission not only shocking but an invitation for the Tribunal to overlook well established legal precedents regarding the identity of a limited company. That the identity of a company is established by the fact of its incorporation. That counsel have reiterated arguments on this point in their main submissions. That it is practically impossible for two distinct companies to be one company or, for that matter, to be treated as one. The principle of separate legal personality forbids it. Further, that it is clear, beyond refute, that the Respondent have no argument to counter the fundamental error of separate identity between the Appellant and the company known as Omnia Small Scale Limited. That they cited the wrong company and pursued the wrong company. That this Tribunal should not give that glaring error a Nelsonian eye. That this Tribunal should firmly pronounce the law as it exists and allow this appeal on this ground alone.

34. Counsel in reply to the Respondent further argues that the Respondent has gone on to allege that the Appellant has not adduced any evidence to dispel the fact the Appellant and Omnia Small Scale Limited are not the same. That this argument does not help the Respondent as it is not in dispute that though the Respondent cited the Appellant, all the supporting documents employed to establish liability relate to a company called Omnia Small Scale Limited. That the Appellant need not have gone any further than showing this Tribunal that it is not Omnia Small Scale Limited. That counsel asks this Tribunal to give effect to the law and find that the Respondent cited the wrong party and that the decision against the Appellant is therefore irreparably flawed.

35. In our consideration of the two grounds of appeal, we note that there is no dispute that the documentary evidence the Respondent relied upon, as reflected in its RoP, reveals that the parties who directly engaged in the conduct alleged to have violated the Act are Omnia Small Scale Limited and Nyiombo. Therefore, in our view, the central issue is whether or not in light of the evidence on record and the general principle of company law referred to by counsel for the Appellant, the Respondent erred in charging and finding that the Appellant violated the Act.

36. We start by addressing ourselves to the general principle of law cited by counsel for the Appellant. Counsel cited sections 15 and 16 of the Companies Act, No. 10 of 2017 (which came into force 15th June 2018[6]), the texts of which do not appear to have existed in the law in force at the material time, which is the Companies Act No. 26 of 1994. However, it is a well-established general principle which was enunciated in the well- known case of **Salomon v. Salomon**, cited by counsel for the Appellant, that each company incorporated is a separate legal personality and is treated as such in the world of commerce. This principle has been pronounced by our Supreme Court in a number of cases, as stated by counsel for the Appellant.

37. We are, however, also aware that this is a general principle of law. In **the Madison v. Kanyinji case**, cited by counsel for the Appellant, the Supreme Court set aside the decision of the High Court piercing the corporate veils of the group of companies to which the appellant in that case belonged, the reasoning being that the mere fact that the companies

[6] Note that the Companies Act No. 10 of 2017 only came into force on 15th June 2018 (per the Companies Act (Commencement) Order, S.I. 47 of 2018).

were managed as one economic unit did not justify piercing these companies' corporate veils. However, in its judgment, the Court observed that there are exceptions to the sacrosanct distinct legal personality of a limited company. That these include circumstances where a company is used to commit fraud or deceit or other misconduct (which was not in issue in this case), and that this may be founded on common law or statute. (See pages 1767 - 1770). At page 1769, the Court observed:

> *"That fraud or improper conduct will justify the lifting of the corporate veil even outside the context of statutory provisions is exemplified by the cases of Gilford Motor Company v. Horne(15) and Jones v. Lipman(16)."*

38. And at page 1775, the Court stated:

> *"The principle that should underpin any attempt to pierce the corporate veil is therefore this; the courts will not allow the corporate personality to be used to protect individuals from wrong doing. Fraudulent actions will not be protected ...."*

39. The Supreme Court went further and cited cases where the Supreme Court and the High Court have lifted the corporate veil for fraud or other misconduct (pages 1777 - 1779) and concluded at page 1779:

> *"Two things are clear to us. First, the courts have been inclined to lift the veil where fraud or improper conduct is established. Second, all these cases were anchored in section 383 of the repealed Companies Act."*

40. According to the Supreme Court in **the Madison v. Kanyinji case**, the cases in which our courts had lifted the corporate veil were founded on section 383 of the now repealed Companies Act of 1994. Section 383 provided for court orders against a person who was knowingly a party to the carrying on of any business of the company for a fraudulent purpose, upon an application by the liquidator or any creditor or member of the company in the course of the winding-up of a company or any proceedings against a company. This means the courts were exercising a statutory power to pierce the corporate veil, but courts can also pierce the corporate veil under the common law.

41. We are firm in our view that courts do not turn a blind eye to fraud or other misconduct or illegality perpetrated using a "separate legal entity". Certainly, no law facilitates such. Neither do we understand section 16 of the Companies Act of 2017, which reads, ***"A company registered in accordance with this Act, acquires a separate legal status, with the name by which it is registered, and shall continue to exist as a corporate until it is removed from the Register of Companies"***[7] to mean that a company conducting itself contrary to law under the veil of an affiliated or associated company or other enterprise is exonerated because it has a separate legal personality. In fact, for purposes of the Act in issue in this case (the Compensation and Consumer Protection Act No. 24 of 2010), the law has recognised and explicitly provided against the potential loophole of enterprises violating the law using the veil of other companies or other enterprises. Firstly, in its definition of

[7] As stated in foot note 6, this Act came into force long after the alleged misconduct we are dealing with in this case. Therefore, the provision has no bearing on the case, though we acknowledge that it confirms a doctrine that underpins company law and has universal recognition.

"enterprise", the Act is not limited to companies. Furthermore, it has not limited the definition to the specific enterprise directly involved.

42. The Act in section 2 (1) defines "enterprise" as *"means a firm, partnership, joint-venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them"*. Therefore, companies cannot be accorded special treatment on account of being separate legal personalities according to the law under which they are incorporated. Neither would any of the other entities in the category provided by the definition be accorded special treatment because of the status they enjoy under the respective laws under which they are created. The proposition by counsel for the Appellant is a serious misconception of the law and would undermine enforcement of the Act. In the case of **Kasengo Holdings Limited v. Innovative Venture Limited & Competition and Consumer Protection Commission, Appeal No. 2019/CCPT/007/COM.,** in which a similar issue was raised, we held as follows:

> *"Typically competition and consumer protection laws target conduct of enterprises, whether perpetrated directly or indirectly through the agency of subsidiaries or other associated enterprises. The law makes itself enforceable as broadly as possible without company law bottlenecks with respect to distinctions between companies as separate legal personalities, such as pronounced in* ***Salomon v. Salomon and Company Limited*** *[1895-1899] All E.R. 33. The term 'enterprise' is not even restricted to companies, but all kinds of business entities."*

43. This brings into question whether in fact the Appellant using the cover of the company called "Omnia Small Scale Limited" engaged itself in conduct that was questionable under the Act (the question whether or not the conduct amounted to a violation of the Act as alleged not being of concern here). We have in the background part of this judgment summarised the evidence on which the Respondent based its Decision, some of which counsel for the Appellant have outlined in their submissions, which we have reproduced above. We find the following evidence on the record to be of particular relevance in determining the issue at hand:

    (a) The MoU in respect of the 2006/2007 agricultural season between Nyiombo and Omnia Small Scale Limited, attached to the Staff Paper as Annex 1 (see pages 25 -27 of the RoP) was not signed. However, a signed document called Addendum No. 1 of 2007, signed on 14th September 2007, attached to the Staff Paper as Annex 2, in the heading, referred to the MoU dated 19th July 2007 between the signing parties (Nyiombo & Omnia Small Scale Limited). This Addendum No. 1 was signed by V. Mkuyamba as General Manager for Omnia Small Scale Limited. The said V. Mkuyamba (Vincent Mkuyamba) appears in another document, namely a sales agreement between the said two parties, which he witnessed and signed as General Manager of Omnia Small Scale Limited. (See Annex 2 at page 28; and sale agreement Annex 4 at pages 32 - 35).

    (b) We have also noted that according to PACRA records reviewed by the Respondent, which the Appellant has not disputed, the said Vincent Mkuyamba was a director of the Appellant[8] and he is the same person who by handwritten note dated 19th October 2012,

[8] See page 8 of Staff Paper in the Amended RoP, and the Decision at pages 69-70 of RoP.

at **page 11 of the RoP**, confirmed that the Appellant had that morning been served with search warrants by officers of the ACC and CCPC (Respondent herein). He also confirmed that the search and seizures had been carried out in accordance with their mandate and professionally. He signed as General Manager for the Appellant as follows:

"SIGNED FOR OMNIA FERTILISER (Z) LIMITED

(Signature)
VINCENT MKUYAMBA
GENERAL MANAGER"

(c) The same Vincent Mkuyamba acknowledged receipt of the Notice of Investigation served on the Appellant on 8th November 2012 and stamped it "Omnia Small Scale Ltd". **(See pages 12 -13 of the RoP)**

(d) We have further noted several communications via email, whereby the same Vincent was addressed and/or wrote as "VMkuyamba@omnia.co.za". One such email (Annex 5, at page 36 of the RoP), written by Kwazi Dlamini of Nyiombo and addressed to Vincent Mkuyamba as General Manager, Omnia Small Scale Limited, Lusaka reads, *"Forwarded by Vincent Mkuyamba Zambia Omnia Group on 25.02.2010 ..."*.

(e) Annex 11 dated 11th January 2011 was correspondence between Kwazi Dlamini of Nyiombo and the said V. Mkuyamba of Omnia informing Vincent of trucks to be received by the latter for Eastern Province, and in response Vincent requesting Kwazi to advise as to when the "Eastern deliveries" would be concluded and to revert urgently, stating, *"as the Minister is expecting my feedback this afternoon"*; Annex 12 (dated 11th January 2011 is an email from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia with copy to V Mkuyamba at Omnia requesting Omnia to send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries. **(See pages 50 – 51 of the RoP)**

(f) Annex 5, an email referred to in sub-paragraphs (d) above, from Kwazi Dlamini of Nyiombo to Vincent Mkuyamba, as General Manager of Omnia Small Scale Limited, and Annex 12, an email of 11th January 2011, addressed to General Manager of Omnia Small Scale Limited by Kwazi Dlamini, reflect as the company's postal address "P.O. Box 39100, Lusaka", which we note is the same postal address reflected in the Respondent's letter to the Appellant dated 31st May 2013 conveying the Board Decision.

(g) It is also significant that the documents forming the bulk of the evidence, in which Nyiombo and Omnia Small Scale Limited appear as parties, were seized from the Appellant and Nyiombo. Counsel for the Appellant have, however, argued that the similarity in names between the Appellant and Omnia Small Scale Limited and the fact that information pertaining to the said Omnia Small Scale Limited was found on the Appellant's premises are not reason for this Tribunal to find that the only reasonable inference is that the Appellant and Omnia Small Scale Limited are one and the same legal person.

44. We are of the view that the Respondent could have shed more light on Omnia Small Scale Limited. Failure to do so was, nonetheless, not fatal to the Respondent's case against the Appellant. We are persuaded that although some of the documents that were seized during the unannounced searches conducted on the Appellant and Nyiombo explicitly related to Nyiombo and Omnia Small Scale Limited, the facts as revealed by the evidence we have reviewed and outlined above show that the Appellant was operating through Omnia Small Scale Limited as an affiliated or associated enterprise. From the evidence, we have deduced that Omnia Small Scale Limited and the Appellant belonged to the Omnia group and that the Appellant, a fertiliser enterprise in Zambia (incorporated in 1992, according to the background information[9]), conducted its fertiliser supply business under the FISP through the said entity called Omnia Small Scale Limited. In this regard, we have observed that both the Appellant and Omnia Small Scale Limited had the same General Manager, Vincent Mkuyamba, who was also one of the directors of the Appellant. Further, that this Vincent Mkuyamba was the key operative "at Omnia" in transactions evidenced on record.

45. In light of the evidence on the record, and considering the law in issue, while the Appellant and Omnia Small Scale Limited were not the same legal person according to the Companies Act (even the Companies Act of 1994 which was in force then), on the facts of this case, the two companies would be treated as one and the same enterprise for purposes of the Act, per section 2 (1). Therefore, in line with the definition of "enterprise" in section 2 (1) of the Act, reference to the Appellant includes Omnia Small Scale Limited, through which the Appellant conducted its fertiliser supply business. The Respondent was therefore on firm ground in laying the charges against the Appellant.

46. The conclusion we have arrived at in respect of Ground 1 of appeal automatically determines ground 2, though for the avoidance of doubt we shall deal with some aspects of grounds 16 and 17 in which issues in ground 2 are raised again. The two grounds of appeal fail. Before we move to consider the other grounds of appeal, we have a comment on the Appellant's submissions stating, *"This Tribunal should not give that glaring error a Nelsonian eye. This Tribunal should firmly pronounce the law as it exists and allow this appeal on this ground alone."* These are not submissions but condescending demands on the Tribunal. This is unacceptable and unbecoming of counsel, particularly State Counsel.

47. We now move to consider the rest of the grounds of appeal, starting with ***Ground 5:*** *The Respondent erred when it arrived at its decision without hearing from the Appellant;*

48. Ground 5 of appeal hinges on an assertion that the Appellant was not heard on the allegations before the Respondent determined the same. Counsel for the Appellant have submitted that it appears that the Respondent was in a hurry to find the Appellant culpable. That the Respondent allegedly received the complaint on 3rd September 2012, as suggested by paragraph 1.0 on **page 67 of the RoP**. That the Respondent interviewed the "secret" complainant on the same 3rd September 2012 (according to **Page 3 of the RoP**). That slightly over two months later, the Respondent sent the Appellant a Notice informing it that investigations had been initiated against it (reference **page 12 of the RoP).** That even before hearing from the Appellant, the Respondent prepared a "staff paper" wherein it concluded

[9] See page 7 of the Amended RoP, paragraph 4.1.1.

that the Appellant had breached the law (reference **page 15 of the RoP (which document is in the Amended RoP,** dated November 2012).

49. Further, that the Appellant commenced these proceedings (before the Tribunal) shortly after the Notice of Investigation was served on it. That whilst the proceedings were ongoing, the Respondent proceeded to render the determination appearing from **page 67 to 81 of the RoP.** That the Appellant had not been heard; and that the Respondent had not taken in any evidence or interviewed the Appellant. Counsel have submitted that it is the Appellant's case that this omission affects the decision taken by the Respondent. That according to section 55 (3) of the Act, the Respondent is duty bound to give written notice to a person it is investigating. This section obligates the Respondent to give notice as soon as practicable upon opening an investigation. Counsel have submitted that it is accepted that section 55 (6) of the Act permits the Respondent to defer giving of notice where it has reasonable grounds to believe that the giving of the written notice may materially prejudice its investigations. That, however, it is the Appellants position that this section places an obligation on the Respondent to, at the very least, consider and record a decision to defer giving notice. And that the record before this Tribunal shows no trace of such evidence.

50. Counsel further alleged that the Respondent, therefore, was in breach of Section 55 (3) in that it deliberately waited until after it had taken a decision on the matter to alert the Appellant of an investigation opened against the Appellant. The net result, of course, is that the Appellant was not heard prior to the decision being taken.

51. Counsel for the Appellant have gone on to argue that it would have been different were the Respondent to have merely conducted investigations and not reached a decision. That the staff paper at page 15 of the Record of Proceedings goes well beyond an investigation and conveys a firm decision taken pursuant to the investigations. That this, again, shows that the Appellant was not heard.

52. That even assuming that the failure to timeously issue a Notice of Investigation is a non-issue, section 55(8) compels the Respondent to invite comments from interested parties in the matter under investigation. This section presupposes that views will be taken in before a decision is made. It is our position that the purpose of this law was to ensure that the Respondent hears the other side before taking a decision. The Respondent breached this provision as it failed to record views from the Appellant before making a decision.

53. Counsel cited the case of **Shilling Bob Zinka v. The Attorney General (1990-1992) ZR 73 (SC),** in which the Court took the view that:

    "The principles of natural justice - an English law legacy - are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased (nemo judex in causa sua): and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (audi alteram partem)."

54. Counsel have concluded their arguments on this ground of appeal by asserting that it is the Appellants case that the actions of the Respondent did not respect the law and did not

respect the age old requirement for a person to be heard. That no matter what had transpired after giving of the Notice of Investigation, the Respondent should have ensured that no decision was taken before having heard the Appellant.

55. In response, on this ground of appeal, counsel for the Respondent have argued that the Respondent was on firm ground when it arrived at a decision without hearing from the Appellant as the Appellant opted to remain mute when the Respondent gave them an opportunity to be heard through the Notice of Investigation issued to them. Counsel have argued that this ground of appeal should fail, submitting that they stand on the authority of the case of **Competition and Consumer Protection Commission V Omnia Fertilizer Zambia Limited and Nyiombo Investments Limited Appeal No.205/2014/selected judgment No.5 of 2017** wherein, according to counsel, it was held:

> *"It is clear from the Notice of Investigation that the Appellant requested the 1st Respondent to respond to that Notice within fourteen days of the Notice. The fact that the 1st Respondent elected not to respond to the Notice cannot be construed to mean that it was not accorded an opportunity to make representations on the allegations. We therefore find merit in the second ground of appeal. The court below erred when it held that the Respondents had not been given an opportunity to be heard."*

56. Counsel for the Appellant, in reply, have conceded the Supreme Court decision but have argued that the Appellant's response to the Notice of Investigation would have had value only for the outcome of the investigation. That the gist of the Appellant's argument appears to have been lost on the Respondents. That the Appellant's case is that even though the Appellant took steps to challenge the Notice of Investigation, the Respondent should not have concluded the matter and rendered a decision without having heard from the Appellant. That the fact that the Appellant took issue with the manner the investigation was being handled should not have stopped the Respondent from taking steps to hear from the Appellant. That in fact, the law obliges them to have heard from the Appellant. That ordinarily, after the question of the legality of the Notice of Investigation was determined, the Appellant ought to have been given a chance to be heard. That in reality, what happened was that the Respondent proceeded to render a decision before determination of the issue touching on the Notice to Investigate and without hearing from the Appellant. That it is this omission the Appellant takes issue with in this ground of appeal. That had the Respondent not rushed the decision along and waited for the legal challenge to be determined, most certainly, an opportunity may have been presented for the Appellant to be heard.

57. In our consideration of this ground of appeal, we have noted that the appealed decision was taken by the Board on 26th April 2013. The Staff Paper dated November, 2012, was a document that contained a report and recommendations for presentation to the Board by its Technical Committee, as reflected at the end of the Paper. We have no basis to conclude:

    (a) that the Notice of Investigation issued on 6th November 2012 and served on the Appellant on 8th November 2012 was not issued as soon as practicable after opening an investigation; the unannounced search on the Appellant and Nyiombo having been carried out on 19th October 2012, about eighteen days before;

(b) that in the intervening period between 22nd November 2012 by which date the Appellant was expected to respond to the Notice of Investigation and the close of the month of November 2013 (when the Staff Paper could have been prepared):

(i) the Respondent could not have concluded the investigation;

(ii) prepared the Staff Paper; and

(c) that the Staff Paper was in fact the decision of the Respondent, and not that taken by the Board on 26th April 2012, as in our view, the document is evidently a staff paper and at the end it contains recommendations for presentation by the Technical Committee of the Board, and the actual Decision was taken by the Board on 26th April 2013 and appears at pages 67–87 of the RoP.

58. We have also considered that it may be expected of the Respondent to justify a Notice of Investigation delayed until after conclusion of the investigation, in terms of section 55 (6), to keep and, if necessary, produce a record of its determination of reasonable grounds for the belief that giving of notice under section 55 (3) and (4) of the Act may be materially prejudice the investigation. However, as we have already said, we have no basis for reaching a conclusion that the Notice was not issued as soon as practicable after the opening of the investigations, and that it was issued after the conclusion of the investigation so as to have required the Respondent to invoke subsection (6) of section 55 of the Act.

59. At any rate, the Appellant has not stated or demonstrated that it was prejudiced because the Respondent issued the Notice of Investigation about eighteen days after the unannounced raid on the Appellant's and Nyiombo's premises. More importantly, as far as we can deduce from the evidence on record, nothing prevented the Appellant from responding to the Notice within the 14 days, and even to ask for more time, if necessary.

60. It is also our view that the language of subsection (8) of section 55 of the Act does not make it mandatory, but gives discretion to the Respondent, to invite comments from any party with an interest in a matter under investigation. Apart from notification to a person under investigation under section 55 (3) and rules of natural justice requiring a person to be heard on charges levelled against them, there is no provision in section 55 or elsewhere in the Act compelling the Respondent to call for comments from a person under investigation before a decision is taken.

61. The application of section 55 (3) has been augmented by Regulation 11 of the Competition and Consumer Protection (General) Regulations, S.I. 97 of 2011, which in Form V provides the form of the Notice of Investigation, which at the end (after providing for an outline of the allegations) gives the person being investigated an opportunity to be heard as follows: *"You are hereby requested to respond to this notice within fourteen (14) days of receipt thereof."* This is the form of Notice that was issued to the Appellant on 6th and served on 8th November 2012, to which the latter did not respond as requested.

62. It was not until the introduction of the Respondent's Administrative Guidelines issued in 2014 that provisions were added under Part II, Guideline 8 **–Process of dealing with a complaint** - that:

(i) ....

(ii) The Respondent shall be notified of the investigation in writing by notice. The purpose of such notice is to inform the party being investigated on the specific allegations raised against them and also to provide them with an opportunity to respond to the said allegations.

(iii) ....

(iv) The Complainant (provided it is not the Commission) and Respondent shall be notified of Secretariat's findings and its proposed recommendation to the Board, following a complete investigation through a report pursuant to section 55(10) of the Act.

(v) The Respondent and Complainant have the right to respond to the Secretariat's findings and shall be given seven (7) working days to respond to Secretariat's findings, in relation to part VII cases while14 working days will be given as regards cases contained in any other part of the Act.

(vi) Upon the expiry of the 7 working days within which parties are to respond to the Secretariat's findings, the Secretariat shall submit its recommendations to the Board.

(vii) The Complainant or Respondent may within 7 working days of receiving a report on the Secretariat's findings request to make written or oral submissions to the Board following investigations by the Secretariat prior to a decision being made by the Board.

(viii) The request by either party to make submission to the Board shall be in triplicate and shall be availed to the other party, the Board and Secretariat.

(ix) Where submissions are made to the Board by either party, they shall be made at no cost and such submissions will be availed to the other party for purposes of being given an opportunity to respond to them.

63. Therefore, the case having been investigated and decided in 2012 and 2013, respectively, we agree with the Respondent that the Appellant was given an opportunity to be heard. It is instructive that the Supreme Court faulted the decision of the High Court thus, *"It is clear from the Notice of Investigation that the Appellant requested the 1st Respondent to respond to that Notice within fourteen days of the Notice. The fact that the 1st Respondent elected not to respond to the Notice cannot be construed to mean that it was not accorded an opportunity to make representations on the allegations. We therefore find merit in the second ground of appeal. The court below erred when it held that the Respondents had not been given an opportunity to be heard."* The Supreme Court ultimately held that the whole appeal against the Respondent's Notice of Investigation was a nullity.

64. Accordingly, our understanding is that the other matters pertaining to the fact that the Appellant had purported to appeal the Notice of Investigation to the Tribunal have no bearing on the issue of opportunity to be heard. The so-called appeal was a nullity per the decision of the Supreme Court. Therefore, the purported appeal was inconsequential as far as the investigation was concerned. As the Supreme Court also held, the investigative

mandate of the Respondent would be undermined if its notices of investigation were appealable before determination of the subject of investigation by the Respondent. Such appeals would practically stop investigations. In fact, subsection (11) of the Act states, "*The Commission shall not investigate a matter that is before the Tribunal unless the Tribunal directs otherwise.*" In our view, this provision only applies to matters that are competently brought before the Tribunal, such as where a decision of the Respondent is appealed pursuant to section 60 of the Act whereby the Respondent is prohibited from launching further investigations into the case, unless the Tribunal issues a direction to that effect.

65. The Appellant's proposition that the Respondent should have halted its proceedings following its so-called appeal against the Respondent's Notice of Investigation, and that it should have taken steps to hear from the Appellant after determination of the purported appeal before determining the case against the Appellant not only lacks merit in terms of the law. Such a practice would literally impede the proper functioning of the Respondent.

66. Therefore, ground 5 of appeal fails too. We proceed to consider ***Ground 6:*** *The Respondent erred in basing its findings on certain conduct which allegedly contravened the Act that occurred prior to the commencement of the Act;*

67. Under ground 6 of appeal, counsel for the Appellant have submitted that it is the Appellant's case that the Respondent erred when it found that the Appellant had contravened the provisions of section 9 of the Competition and Consumer Protection Act No. 24 of 2010. That the **RoP** dated 5th June 2018, filed by the Respondent before this Tribunal should ideally contain evidence to support the Respondent's Decision, subject of this Appeal. That the Respondent relied on the provisions of the Act, a 2010 Act, in conducting its investigations and subsequently in arriving at its decision against the Appellant.

68. That the person further submitted that Nyiombo and the Appellant had been supplying fertilizer under the Farmer Input Support Programme for the past 10 years. That he further submitted that there were serval issues regarding the tendering and eventual award of the contracts by the Zambia Public Procurement Authority (ZPPA) that were in contravention of the Competition and Consumer Protection Act. That he alleged that Nyiombo and Omnia were engaged into dividing the market horizontally.

69. Counsel submitted that the Respondent then started investigations that culminated in a search warrant being issued against the Appellant on or about 18th October 2012, and the said warrant stated in part that:

    " *INONGE MULOZI of the COMPETITION & CONSUMER PROTECTION COMMISSION, being duly sworn, complains that OMNIA FERTILISER ZAMBIA LIMITED together with other known parties in the period 2007 to 2012, are reasonably suspected to have participated of facilitated conditions resulting in allocation of markets and bid rigging in the tender of fertilizer contracts and the supply of fertilizer to the Government of the Republic of Zambia contrary to section 9(1)(b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010.*"

70. That it is clear that *annex 1*, allegedly seized by the Respondents during its search on the Appellant's premises, is not signed by any party. That the unexecuted MoU was allegedly drawn up in 2007. That the Respondent applied the provisions of section 9 of the Act No 24 of 2010 and held that the Appellant had breached competition laws in Zambia. That the Act only became operational on 26th August 2010 and that before that date, section 9 had no legal effect whatsoever and placed no obligations on the Appellant, the reason being that this law was not in existence. That the question begging an answer is whether it was correct for the Respondent to use new law and apply it to events that occurred well before the law came into being.

71. Counsel submitted that it is a cardinal principle of construction in Zambia that every statute is *prima facie* prospective unless it is expressly, or by necessary implication, made to apply retrospectively. That this was the view taken by High Court Judge, Honourable Mr. Justice A. M. Wood, as he then was, in the case of **Celtel Zambia Limited (T/A Zain Zambia) v Zambia Revenue Authority (2011) ZR Vol. 2 at 11**, where he stated that:

> *"For a law to be retrospective, the wording of the retrospective effect must be clear. There is no such clarity in Act No. 2 of 2009. The submission by the respondent that the Court should generally hold that Act No. 2 of 2009, had retrospective effect is untenable since it does not state so with sufficient clarity in any of the sections."*

72. Counsel went on to submit that this position was also taken by the Supreme Court in the case of **ZCCM Investments Holdings v Cordwell Sichimwi – Appeal No. 172/2014** where it stated that:

> *"We agree that the Court below misdirected itself by applying provisions of Section 26B of the EMPLOYMENT (AMENDMENT) ACT NO. 15 OF 1997; retrospectively to a redundancy that occurred in 1993. In the case of ZAMBIA CONSOLIDATED COPPER MINES V JACKSON MUNYIKA SIAME AND 33 OTHERS, we stated that there is always a presumption that legislation is not intended to operate retrospectively but prospectively."*

73. And, referring to holdings by His Lordship Mr. Justice A.M. Wood in the case of **Celtel Zambia Limited (T/A Zain Zambia) v Zambia Revenue Authority**, and the Supreme Court in the case of **ZCCM Investments Holdings v Cordwell Sichimwi**, counsel for the Appellant have argued, in summing up on this ground of appeal, that documents like annex 4 which was an alleged Sales Agreement between the Appellant and Nyiombo of 2006; annex 5 which was an email dated 24/2/2010; annex 7 an email dated 7/4/2010; annex 8 email dated 2/5/2010; annex 9 email dated 1/2/2010; annex 10 email dated 10/3/2010; annex 25 email dated 26/6/2010 and annex 19 a bid by Nyiombo dated 24/4/2009, all formed the basis upon which the Respondent held that the Appellant had been involved in market sharing and bid rigging contrary to the provisions of section 9 of the Act when all these documents pre-date the coming into effect of the Act; and that therefore they would expect this Tribunal to find that the finding by the Respondent was grossly erroneous.

74. In response, counsel for the Respondent in their submissions argued that the Respondent did not base its findings on conduct occurring prior to the commencement of the Act as alleged by the Appellant since the conduct in issue was captured during the subsistence of the Act. That the Respondent conducted investigations in this matter during the subsistence

of the Act. That the Respondent received a complaint against the Appellant and Nyiombo on the 3rd September 2012, two years after the Act was already in place. That the Respondent further carried out a dawn raid on 16th October 2012, and that in conducting its investigations as well as evidence gathering, the Respondent is not limited to evidence or information that should bear dates after the commencement of the Act. That the Respondent can use information and evidence that goes way back for assessment purposes, and that this evidence and information actually aid the Respondent in establishing cartelistic tendencies that parties are involved in and for how long they are likely to have been going on. That the Respondent was thus well within the ambit of the Act when it conducted its investigations

75. In their submissions in reply, counsel for the Appellant have reiterated that there is no evidence before this Tribunal to support the notion that the Appellant engaged in collusion and cartelistic behaviour. That even assuming that the Respondent is able to show a link between Omnia Small Scale Limitedand the Appellant, the documents relied upon by the Respondent in alleging breach by the Appellant pre-date the coming into effect of the Act. That in paragraph 12 of the Respondents submissions, a document dated 2007 is relied upon, whereas in 2007 the Act had not come into effect yet. That, similarly, the sales agreement referred to in paragraph 13 of the Respondents submissions pre-dates the coming into effect of the law being applied to find the Appellant culpable. In conclusion, counsel urged the Tribunal to allow this ground of appeal.

76. There is no dispute as to the well-established principle of statutory interpretation that a statute will have prospective application unless it is explicitly or implicitly clear that the legislature intended the statute to have retrospective effect. There are, of course, exceptions, such as statutory provisions on procedural or jurisdictional matters, but we are not concerned with those in this case. The Act, which commenced on 8th October 2010, per Statutory Instrument No. 83 of 2010, does not provide for retrospective application. We are also aware that the Act repealed and replaced the Competition and Fair Trading Act, No. 18 of 1994 (the repealed Act).

77. The general principle with respect to prospective application of statutes is especially strictly applied to penal legislation and is enshrined in the Constitution of Zambia with respect to criminal offences in Article 18 (4) in the following terms:

"(4) A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and a penalty shall not be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed."

78. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia further makes provision in section 14 with respect to the application of repealed laws as follows:

(1) ....

(2) ....

(3) Where a written law repeals in whole or in part any other written law, the repeal shall not-

(a) ....

(b) *affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed; or*

(c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or*

(d) *affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any written law so repealed; or*

(d) *affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.*

(As amended by No. 43 of 1970)

79. We note that the repealed Act made provision with respect to restrictive trade agreements, in particular horizontal agreements, in section 9 as follows:

(1) It shall be an offence for enterprises engaged on the market in rival or potentially rival activities to engage in the practices appearing in subsection (2) where such practices limit access to markets or otherwise unduly restrain competition;

Provided that this subsection shall not apply where enterprises are dealing with each other in the context of a common entity wherein they are under common control or where they are otherwise not able to act independently of each other.

(2) This section applies to formal, informal, written and unwritten agreements and arrangements.
(3) For the purposes of subsection (1), the following are prohibited:

(a) trade agreements fixing prices between persons engaged in the business of selling goods or services, or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services;

(b) *collusive tendering;*

(c) *market or customer allocation agreements;*

(d) *subject to the Coffee Act, allocation by quota as to sales and production;*

(e) *collective action to enforce arrangements;*

(f) *concerted refusals to supply goods and services to potential purchasers; or*

(g) *collective denials of access to an arrangement or association which is crucial to competition.*

80. Therefore, the Respondent would have been within the law if at the time charges were levelled against the Appellant in 2012, the same were brought under relevant provisions of the repealed Act in respect of conduct alleged to have been committed prior to the coming into force of the Act in 2010.

81. According to section 16 (1) of the repealed Act, contravention of the above or any other provision of the repealed Act constituted a criminal offence punishable on conviction by imposition of a fine not exceeding one hundred thousand penalty units or imprisonment for a term not exceeding five years or both. According to subsection (2), *"if the offence is committed by a body corporate, every director and officer of such body corporate, or if the body of persons is a firm, every partner of that firm, shall be guilty of that offence provided that no such director, officer or partner shall be guilty of the offence if he proves on a balance of probability that such offence was committed without his knowledge or consent, or that he exercised all due diligence to prevent the commission of the offence."*

    (As amended by Act No. 13 of 1994)

82. We have gone to great extent in drawing comparisons because we hold the view that where a provision of law has been reenacted without modification or with some minor modification that does not change the law materially, a charge, verdict of guilt and penalty omposed under an amending or repealing law may not be set aside merely on account that a wrong law was cited. If in actual fact the offence existed under a repealed law and has been proven to have been committed, justice cannot be defeated on account of a technicality that a wrong law was cited. We opine that this position is founded on the same principle pronounced by the Supreme Court in the case of **Shilling Bob Zinka v. The Attorney-General (1990 - 1992) Z.R. 73 (S.C.).** The Court held, *"...... if a power exists and its exercise can be traced to a legitimate source, then the fact that such power is incorrectly or erroneously exercised under a wrong source or power will not vitiate the exercise of the power in question."*

83. However, we merely give this view in passing. This is because, having compared the provisions of the repealed law with those of the Act, we conclude that, though similar in substance to a large extent, section 9 of the repealed Act and section 9 of the Act, under which the Appellant was charged, differ significantly, especially in that the former constituted a criminal offence while the latter constitutes both a criminal and a non-criminal regulatory offence. They also differed in the penalties.

84. Therefore, we conclude that in the present case, clearly, the Appellant could not be properly charged, found guilty and punished under section 9 of the Act on the basis of conduct, **of itself alone**, committed before the coming into force of the Act. Such a charge, verdict and punishment would not stand. However, in the present case, counsel for the Respondent have asserted, and it is apparent to us, that the evidence predating the coming into force of the Act is not the only evidence the Respondent relied upon. As we illustrate later, the issue therefore turns on the question of admissibility of evidence of similar facts. This is evidence of similar conduct or acts occurring or alleged to have occurred prior to the alleged offence. Such conduct or acts need not in themselves have been subject of any charges nor constituted an offence, but may be relevant to prove a matter that is alleged to have occurred later and is now under inquiry.

85. At common law, the principle of law against admissibility of evidence of similar facts is not absolute, both in criminal and civil law. Such evidence is admissible if relevant to the offence charged, i.e., if the evidence has probative (or even disprobative) value. This common law principle and exceptions thereto have made inroads into statutory law, particularly in criminal law. For instance, the Criminal Procedure Code, Chapter 88, states in section 157:

> *"157. Every person charged with an offence ... shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:*
>
> *Provided that-*
>
> *(i) ...;*
>
> *(ii) ...;*
>
> *(iii) ...;*
>
> *(iv) ...;*
>
> *(v) ...;*
>
> *(vi) a person charged and called as a witness, in pursuance of this section, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless-*
>
> *(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or*
>
> *(b) ...;*
>
> *(c) ....*

86. In practice, courts will evaluate the evidence of similar facts to determine whether its potential probative value justifies its admissibility, so that if it is found that the evidence has little or no value other than to prejudice the accused's case, it will be excluded. This was the holding of the High Court in the case of **Melody v. The People (1970) Z.R. 28** (Per Chomba, then Acting Judge of the Court):

> *"The evidence of bad character elicited from the appellant might have been helpful to the prosecution if it had been aimed at establishing similar facts or to show that the modus operandi employed in committing the past offences was the same as that used in perpetrating the offence wherewith he was charged. As I have observed earlier that evidence had no such tendency. In the result I come to the conclusion that it was wrong to allow the Public Prosecutor to cross-examine the appellant as to his (appellant's) character because the prejudicial effect of the evidence thus extracted from the appellant outweighed its evidential value.*

87. According to law and procedure in courts in England, evidence of similar facts is admissible if relevant to the offence charged or other issue before the court. The admissibility of such evidence has been reviewed and restated, e.g., in **the decision of the House of Lords in O'Brien v. Chief Constable of South Wales Police [2005] 2 AC 534 (the O'Brien case)** The House Lords observed that the test of admissibility of similar facts evidence often arose

in criminal jurisdiction[10] and rarely in civil matters. The Court held that the test for admissibility of similar facts evidence in civil proceedings is one of relevance only, and that though the test is the same as that applied in criminal proceedings, the standard of potential probative value should be less restrictive in civil proceedings. We quote excepts from the judgment. Per Lord Bingham (paragraphs 3-4):

> *"3 Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in R v Kilbourne [1973] AC 729, 756:*
>
>> *'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ... relevant (i e logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.'*
>
> *4 That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. If an accident investigator, an insurance assessor, a doctor or a consulting engineer were called in to ascertain the cause of a disputed recent event, any of them would, as a matter of course, inquire into the background history so far as it appeared to be relevant. And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. For while there is a need for some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters. Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the inquiry."*

88. Lord Bingham identified the second stage of inquiry into the question of admissibility (at paragraphs 5-6):

> *"5 The second stage of the inquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication*

[10] At that time, admissibility of evidence in criminal law was dealt with under the Criminal Justice Act 2003.

of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.

6 While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. This is an argument which has long exercised the courts (see Metropolitan Asylum District Managers v Hill (1882) 47 LT 29, 31, per Lord O'Hagan) and it is often a potent argument, particularly where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. It is, I think, recognition of these problems which has prompted courts in the past to resist the admission of such evidence, sometimes (as, perhaps, in R v Boardman [1975] AC 421) propounding somewhat unprincipled tests for its admission. But the present case vividly illustrates how real these burdens may be. In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties."

89. Per Lord Phillips in the same case, **the O'Brien case,** discussing some previous case law (at paragraph 50):

> *"50. In Steel v Commissioner of Police of the Metropolis (18 February 1993) the claimants were suing for wrongful arrest and malicious prosecution by three police officers. They had been convicted of conspiracy to rob and served sentences of 3 years imprisonment. Their convictions were subsequently quashed. At the heart of the claimants' case was the allegation that interview records of confessions had been fabricated at the particular instigation of a Detective Sergeant Day. They sought specific discovery of documents that they believed would establish that he had behaved in similar fashion in other cases. In giving the leading judgment Beldam LJ applied the test in DPP v P.... In ruling that the claimants were entitled to the discovery sought, he said:*
>
> > *"In my view conduct of this kind is so contrary to the expected standard of behaviour of an investigating police officer that, if proved, it is capable of rendering it more probable that the plaintiffs' alleged confession was not made and [proving] that D/Sgt Day had no sufficient belief in the grounds of, and an improper motive for, the prosecution of the plaintiffs."*

90. Lord Phillip then went on to discuss the merits and demerits of the holdings in the cited cases (paragraphs 51-57):

"51. In giving the judgment of the Court of Appeal, Brooke LJ said
"It follows that in civil proceedings, as opposed to criminal proceedings, the first question to be asked is whether the similar fact evidence is admissible. To be admissible it must be logically probative of an issue in the case, and the first part of the House of Lords' test in P must be applied to exclude evidence which is not sufficiently similar to the evidence in the case before the court."

52. I am inclined to think that, far from this test being too lenient a test of admissibility in civil proceedings, it was too restrictive. The test of admissibility of similar facts against a defendant in criminal proceedings, as propounded in DPP v P and in the 2003 Act, requires an enhanced relevance or substantial probative value because, if the evidence is not cogent, the prejudice that it will cause to the defendant may render the proceedings unfair. The test of admissibility builds in protection for the defendant in the interests of justice. It leads to the exclusion of evidence which is relevant on the ground that it is not sufficiently probative. So far as evidence of bad character that the defendant wishes to adduce against a police witness, the test of admissibility in both Edwards and section 100 of the 2003 Act requires an enhanced relevance in order to ensure that the ambit of the trial remains manageable.

53. I can see no warrant for the automatic application of either of these tests as a rule of law in a civil suit. To do so would build into our civil procedure an inflexibility which is inappropriate and undesirable. I would simply apply the test of relevance as the test of admissibility of similar fact evidence in a civil suit. Such evidence is admissible if it is potentially probative of an issue in the action.

54. This is not to say that the policy considerations that have given rise to the complex rules of criminal evidence that are now to be found in sections 100 to 106 of the 2003 Act have no part to play in the conduct of civil litigation. They are policy considerations which the judge who has the management of the litigation will wish to keep well in mind. CPR 1.2 requires the court to give effect to the overriding objective of dealing with cases justly. This includes dealing with the case in a way which is proportionate to what is involved in the case, and in a manner which is expeditious and fair. CPR 1.4 requires the court actively to manage the case in order to further the overriding objective. CPR 32.1 gives the court the power to control the evidence. This power expressly enables the court to exclude evidence that would otherwise be admissible and to limit cross-examination.

55. Similar fact evidence will not necessarily risk causing any unfair prejudice to the party against whom it is directed. It would not have done so in Metropolitan Asylum District Managers v Hill. It may, however, carry such a risk. Evidence of impropriety which reflects adversely on the character of a party may risk causing prejudice that is disproportionate to its relevance, particularly where the trial is taking place before a jury. In such a case the judge will be astute to see that the probative cogency of the evidence justifies this risk of prejudice in the interests of a fair trial.

56. …. …. ….

57. For these reasons I would reject the appellant's submission that similar fact evidence is only admissible in a civil suit if it is likely to be reasonably conclusive of a primary issue in the proceedings or alternatively if it has enhanced relevance so as to have substantial probative value."

(Underline and italics ours for emphasis)

91. We have further reviewed the subject under consideration in light of the nature of the offence alleged against the Appellant. The difficulty that competition authorities face in finding direct evidence in cases of cartel conduct, due to the secretive nature of such arrangements, is universally recognised. The problem and approaches that employ both direct and circumstantial evidence in prosecuting cartelistic enterprises are captured in a statement made by the Organisation for Economic Cooperation and Development (OECD) in a policy brief, and we find the statement instructive as similar facts evidence is a type of circumstantial evidence. The policy brief states as follows:

"Cartels are agreements among competitors fixing prices, allocating markets or rigging tenders (bids). They are the most harmful of all types of competition law violations and should be sanctioned severely. Cartel cases are unique. The most important part of a cartel case is simply proving that such an agreement existed. But getting direct evidence of a cartel agreement can be difficult. Cartel operators work in secret and often do not co-operate with investigators. In these circumstances, circumstantial evidence can play an important role in proving the agreement. Direct evidence of an agreement is that which identifies a meeting or communication between the subjects and describes the substance of their agreement. The most common forms of direct evidence are 1) documents (in printed or electronic form) that identify an agreement and the parties to it, and 2) oral or written statements by co-operative cartel participants describing the operation of the cartel. Circumstantial evidence ... includes evidence of communications among suspected cartel operators and economic evidence concerning the market and the conduct of those participating in it that suggests concerted action. Circumstantial evidence is accepted in cartel cases in every country. It may be employed exclusively to prove an agreement, but it can also be used to great effect together with direct evidence. Circumstantial evidence can be difficult to interpret, however. Economic evidence especially can be ambiguous, consistent with either concerted or independent action. The better practice is to consider circumstantial evidence in a case as a whole, giving it cumulative effect, rather than on an item-by-item basis .... The careful, intelligent use of circumstantial evidence can significantly advance a country's anti-cartel effort."[11]

92. Another author on the subject writes in an article in the **Competition Law Review**:

"... it is the inaccessibility of incriminating evidence that characterises a cartel. The clandestine character of cartels grants cartel participants a monopoly (over competition enforcers) regarding the possession of such evidence. On top of this, especially in view of today's increasing technological advancements,16 evidence detection is hardened and cartelists remain in full control over its existence and its elimination. Moreover, irrespective of their clandestine character, cartels are difficult to prove due to their varying and mutating characteristics. Cartels can be evidentially complex in the sense that the duration and intensity of participation and the subsequent anti-competitive conduct on the market of each individual undertaking may vary and

[11] OECD: Policy Brief, 2007 (Seen at https://www.oecd.org/competition/cartels/38704302.pdf on 25.11.2021 at 17:17 hrs).

take different forms. These specificities impose a near unbearable threshold for competition authorities to prove in detail an infringement ...."[12]

93. Counsel for the Respondent have, in their submissions argued, *inter alia,* that the Respondent did not base its findings on conduct occurring prior to the commencement of the Act as alleged by the Appellant since the conduct in issue was captured during the subsistence of the Act. That the Respondent conducted investigations in this matter during the subsistence of the Act, and that in conducting its investigations as well as evidence gathering, the Respondent is not limited to evidence or information that should only bear dates after the commencement of the Act. Further, that the Respondent can use information and evidence that goes way back for assessment purposes, and that this evidence and information actually aid the Respondent in establishing cartelistic tendencies that parties are involved in and for how long they are likely to have been going on.

94. In light of the principle that similar facts evidence is admissible if it has potential probative value in proving the offence in issue, as well as the universally recognised approaches to evidence gathering and prosecutions of offences of cartel conduct, the Respondent's arguments have force. We accept the approach adopted in the gathering of evidence and prosecution of offences in matters of cartel conduct, whereby evidence is evaluated and treated holistically rather than in a fragmented fashion.

95. The principle whereby similar facts evidence is admissible in courts of law if relevant, that is, if it has potential probative value to the issue before the court, and the approach taken in the gathering of evidence and prosecution of offences in matters of cartel conduct, whereby evidence is evaluated and treated holistically rather than in a fragmented fashion, take special significance in proceedings before this Tribunal. This is because in dispensing justice we are not constrained by rules of evidence and practice which are followed by courts of law. For instance, the Tribunal may order the parties or any of them to produce to the Tribunal such information as it considers necessary for purposes of the proceedings, and it may, *inter alia,* call for the production of documents or other material, pursuant to section 71 (1) (a) and (2) of the Act. Furthermore, Rule 15 (1) and (2) of the Competition and Consumer Protection (Tribunal) Rules, S.I. No. 37 of 2012 (Tribunal Rules) state:

"(1) *The Tribunal may receive, as evidence, any statement, document, information or other matter that may assist it to deal effectively with an appeal, whether or not the evidence would be admissible in a court of law.*

(2) The Tribunal may take judicial notice of any fact".

96. Rule 29 of the Tribunal Rules further enjoins us to *"hear all the evidence tendered and representations made by, or on behalf of parties"*.[13]

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[12] Andreas Scordamaglia, **"Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees"**. https://www. cartel-proof-imputation-and-sanctioning-in-european-competition-law.pdf.

[13] On a side note, we have previously had occasion to interpret this and other rules like it not to mean that parties are at liberty to introduce any document or material that was not produced before the Respondent. This is so as not to open proceedings of the tribunal to questionable evidence in the aftermath of the Respondent's proceedings, or to inquiries that may usurp the investigative functions of the Respondent. We have maintained that documents or other evidential material that was not subject of the Respondent's proceedings may be allowed only in deserving circumstances. (See our interlocutory rulings in the case of **Zambia Airports Corporation Limited v. Competition**

97. The import of these provisions of the law is that the Tribunal is not strictly governed by the system of evidence and procedure followed by our courts, and may in its conduct of proceedings be inquisitorial as opposed to strictly following the adversarial system whereby the choice and production of evidence is exclusively within the control of the parties appearing before the Tribunal. All evidence produced before the Tribunal qualifies to be considered if relevant to the determination of an issue before it (unless excluded on grounds, e.g., document or other material that was not produced in the proceedings before the Respondent).

98. Therefore, in considering the appeal and representations made on behalf of the parties, and in order to arrive at a fair and just decision, we have to evaluate the evidence before us and any other fact we may appropriately take notice of in terms of Rule 15 (2) of the Tribunal Rules, without strict observance of rules of evidence and procedure followed by courts of law. An evaluation of the evidence to determine its relevance and admissibility can only be properly done in the context of the specific grounds of appeal on which the evidence in question has or is alleged to have a bearing. In exceptional circumstances, however, such an evaluation and determination may be made in the course of the hearing, or at the stage of considering the decision of the Tribunal, as a preliminary issue raised in grounds of appeal. Such an evaluation may arise, for instance, where evidence is objected to as irrelevant or where an issue of possible prejudice is raised or implied, as in the present case. We accordingly make this preliminary evaluation, but, as we do so, we bear in mind the competing interests of justice.

99. We have to determine whether the alleged evidence predating the coming into force of the Act is admissible on the basis of the above outlined similar facts principle; the approach adopted in gathering evidence and prosecuting offences of cartel conduct, whereby the evidence is evaluated holistically rather than in a fragmented fashion; and the law cited above relating to proceedings of the Tribunal. We have thus evaluated the following evidence predating the coming into force of the Act (including that referred to by counsel for the Appellant) *vis-a-vis* that occurring during the currency of the Act, much of which evidence we have earlier outlined in our summary in the background part of this judgment.

(a) Complaint (on behalf of Greenbelt Fertilizer Ltd) reflected in minutes of meeting held on 3rd September 202, at page 3-5 of the RoP, and reported at pages 4-5 of the Amended RoP.

(i) Counsel have submitted that the person in his statement of complaint at the meeting alleged that Nyiombo and the Appellant had been supplying fertilizer under the FISP for the past 10 years. That he further submitted that there were serval issues regarding the tendering and eventual award of the contracts by the ZPPA that were in contravention of the Act. That he alleged that Nyiombo and Omnia were engaged into dividing the market horizontally.

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and Consumer Protection Commission and ZEGA 2016/CCPT/010/COM.; and in the case of **MRI, Tombwe & Precision v. Competition and Consumer Protection and 2 Others Appeal 2017/CCPT/001 -003/COM. (consolidated appeals)).**

(ii) In our view, these allegations of supply of fertilizers by the Appellant and Nyiombo for the past 10 years, and there being issues concerning tendering and award of contracts by ZPPA that were in contravention of the Act, as well the allegation that the two companies were engaged in dividing the market horizontally were historical as well as current, i.e., up to the time of complaint. The complaint included allegations of offences under the current Act, and historical evidence may have potential probative value in supporting the veracity of evidence of violations of the Act.

(b) Statement in Search Warrant

(i) Counsel submitted that the Respondent started investigations that culminated in a search warrant being issued against the Appellant on or about 18th October 2012. The said warrant stated in part that:

" INONGE MULOZI of the COMPETITION & CONSUMER PROTECTION COMMISSION, being duly sworn, complains that ***OMNIA FERTILISER ZAMBIA LIMITED*** *together with other known parties in the period 2007 to 2012, are* ***reasonably suspected to have participated of facilitated conditions resulting in allocation of markets and bid rigging in the tender of fertilizer contracts and the supply of fertilizer to the Government of the Republic of Zambia contrary to section 9(1)(b) and (c) of the Competition and Consumer Protection Act No. 24 of 2010."***

(ii) We hold the view that the statement in the search warrant makes an allegation of conduct against the Appellant spanning 2007-2012, in contravention of the Act. The historical conduct may help to establish whether a pattern of conduct between the Appellant and Nyiombo continued up to 2012; therefore assuming any such historical evidence (provisionally) to be true, it would have potential probative value.

(c) Evidential value of Annexes 1, 4, 5, 7, 8, 9, 10 and 19

(i) Counsel have further argued that it is clear that *Annex 1,* allegedly seized by the Respondents during its search on the Appellant's premises, is not signed by any party. That the unexecuted MoU was allegedly drawn up in 2007. That the Respondent applied the provisions of section 9 of the Act No 24 of 2010 and held that the Appellant had breached competition laws in Zambia, meaning the Act which only became operational on 26th August 2010.

(ii) And, referring to holdings by His Lordship Mr. Justice A.M. Wood in the case of **Celtel Zambia Limited (T/A Zain Zambia) v Zambia Revenue Authority** (supra), and the Supreme Court in the case of **ZCCM Investments Holdings v Cordwell Sichimwi (supra),** counsel for the Appellant have argued, in summing up on this ground of appeal, that documents like Annex 4 which was an alleged Sales Agreement between the Appellant and Nyiombo of 2006; Annex 5 which was an email dated 24/2/2010; Annex 7 an email dated 7/4/2010; Annex 8 email dated 2/5/2010; Annex 9 email dated 1/2/2010; Annex 10 email dated 10/3/2010; Annex 15 email dated 26/6/2010 and Annex 19 a bid by Nyiombo dated 24/4/2009, all

formed the basis upon which the Respondent held that the Appellant had been involved in market sharing and bid rigging contrary to the provisions of section 9 of the Act when all these documents all pre-date the coming into effect of the Act; and that therefore they would expect this Tribunal to find that the finding by the Respondent was grossly erroneous.

(iii) The Respondent in its assessment of the evidence stated in its Staff Paper that the MoU attached as Annex 1 to the Staff Paper **(see pages 25-27 of RoP)**, provided that the two companies would cooperate in the distribution and supply of fertiliser in Zambia and that the primary objective was for each company to focus on supplying and distributing fertiliser in the allocated zones where it had sustainable competitive advantage. That a plausible argument that the MoU could not be used as evidence because it was not signed was not tenable as in cartels what was important to establish was the intention and *consensus ad idem.* That the agreement did not need to be signed to fall within the dominion of section 9 (1) of the Act, and that the definition in section 2 of the Act was instructive and also referred to oral agreements, which are incapable of being signed.

(iv) In our discussion of grounds 1 and 2 of appeal, we have shown evidential value of Annexes 1, 2, and 4. We have said the MoU in respect of the 2006/2007 agricultural season between Nyiombo and Omnia Small Scale Limited, attached to the Staff Paper as Annex was not signed. However, a signed document called Addendum No. 1 of 2007, signed on 14th September 2007, attached to the Staff Paper as Annex 2, in the heading, referred to the MoU dated 19th July 2007 between the signing parties (Nyiombo & Omnia Small Scale Limited). This Addendum No. 1 was signed by V. Mkuyamba as General Manager for Omnia Small Scale Limited. The said V. Mkuyamba (Vincent Mkuyamba) appears in another document, namely a sales agreement dated 1st August 2006, between the said two parties, which he witnessed and signed as General Manager of Omnia Small Scale Limited. (See Annex 2 at page 28; and sale agreement Annex 4 at pages 32 - 35).

(v) We have further noted that this Vincent Mkuyamba was according to PACRA records referred to by the Respondent and not disputed a director of the Appellant. And that he was the same person who by handwritten note dated 19th October 2012, at page 11 of the RoP, confirmed that the Appellant had that morning been served with search warrants by officers of the ACC and CCPC (Respondent herein). He also confirmed that the search and seizures had been carried out in accordance with their mandate and professionally. He signed as General Manager for the Appellant as follows:

"SIGNED FOR OMNIA FERTILISER (Z) LIMITED

(Signature)
VINCENT MKUYAMBA
GENERAL MANAGER"

(vi) Apart from the aforementioned evidential value, which we established concerning Annexes 1, 2, and 4 we are of the view that most of the Annexes have

additional potential probative evidential value in that the agreements illustrate that the Appellant and Nyiombo were engaged in supplying fertilisers under FISP, which status allegedly continued in 2010 and beyond, as implied in emails Annex 5 dated 24th February 2010; Annex 6 dated 23rd March 2011; Annex 8 dated 2nd May 2010; Annex 9 (email dated 1st March 2010; Annex 10 dated 10th March 2010; Annex 11 dated 11th January 2011; Annex 12 dated 11th January 2011; and Annex 13 dated 17th October 2012. The contents of these emails are summarized below and tend to illustrate inter alia that the Appellant and Nyiombo were both engaged in supplying fertilisers under the FISP in their respective areas and that they therefore would normally be actual or potential competitors up to the material time during the subsistence of the Act.

(vii) Similarly, the above Annexes **1, 2, 4, 5, 8, 9 and 10** containing evidence predating the coming into force of the Act, and some other Annexes not mentioned above have other potential probative evidential value. This is because the Annexes, assuming (provisionally) the contents to be true, may tend to illustrate that the same alleged pattern, of coordination or collusive behaviour, between the Appellant and Nyiombo allegedly continued into the period beyond the coming into force of the Act, as evidenced in Annexes 6, 11, 12 and 13 (Annex 13 dated 17th October 2012, at page 38 of the RoP).

(xiv) Below, we further elaborate the contents of some of these Annexes to illustrate our position.

HISTORICAL DOCUMENTS SHOWING VARIOUS FORMS OF COOPERATION BETWEEN APPELLANT AND NYIOMBO

Annex 1, an unsigned MoU dated 2006 intended for implementation in the 2006/2007 agricultural season, whereby the two companies decided and agreed, inter alia, that:

Preamble

A. *"... (they had) decided to cooperate in the supply and distribution of fertilizer in Zambia for their mutual benefit ...."*

B. *"The cooperation would rationalize the logistics involved in supply and distribution of fertilizer across all four zones ...."*

C. *"The two companies would utilize their joint expertise ... in input delivery to the beneficiary farmers under the Fertilizer Support Program."*

Operative - Article II

D. *"The primary objective for each company to focus on supplying and distributing fertilizer in the allocated zones where it has sustainable competitive advantage in the form of staff, infrastructure and logistics."*

E. *"Each company will endeavour where possible to support the efforts of the other in the respective zones if requested."*

F. *"If Omnia Small Scale is successful in being allocated zone 2, it is mutually agreed between the parties that Omnia Small Scale will subcontract Nyiombo Investments to supply and distribute Urea fertilizer in Central and Western Provinces excluding Sesheke. All documentation for subcontracted area will be done using Omnia Small Scale stationery. In addition, Omnia Small Scale will be responsible for invoicing government. Once paid for the urea fertilizer supplied and distributed in zone 2 … Omnia will then pay Nyiombo Investments for the portion subcontracted. … Nyiombo undertakes to provide timely information for purposes of invoicing."*

G. *"Omnia Small Scale undertakes to supply 3000mt of D Compound to Nyiombo. …. …. The stock shall remain property of Omnia Small Scale until fully paid for …."*

H. *"The 3000mt D compound is being positioned for supply and distribution into the government tender for the Zones that Nyiombo Investments is successfully awarded"*

Article Four

I. *They (the two companies) "… shall have a common negotiating approach to government with regard to payment modalities for fertilizer supplied and distributed"*

J. *"The contents of this agreement shall remain confidential."*

Article Five

K. *"Nyiombo Investments undertakes to buy all the extra compound D above NCZ supplies for its allocated zones from Omnia Small Scale Limited."*

(See pages 25-27 of the RoP; also the analysis and findings in the Staff Paper at page 12 paragraph 1.1 of the Amended RoP, as well as in the Decision at page 74 paragraph (iii) of the RoP)

Annex 4: A sale agreement signed between the two enterprises on 1st August 2006 refers to an MoU dated 16th May 2006 and indicates that the two enterprises agreed to buy specified amounts of D compound fertilizer and urea fertilizer from each other respectively. **(See pages 32-35 of the RoP, also the analysis and findings in the Staff Paper at page13 paragraph 1.3 of the Amended RoP; also in the Decision at page 75 paragraph (v) of the RoP)**

Annex 2 (signed on 14th September 2007 between the two enterprises is titled "Addendum 1") - In the heading, the Addendum refers to the MoU dated 19th July 2007 between the signing parties (Nyiombo & Omnia Small Scale Limited) and signed as witness by V. Mkuyamba as General Manager for the latter company. In the Addendum, the latter appointed Nyiombo to supply and deliver some fertilisers under FISP for Western Province as per tender allocation for 2007/8 done by the Ministry of Agric & Cooperatives, with exception of Sesheke only. Omnia undertook to pay for the service.

Similarly, Nyiombo appointed Omnia Small Scale Ltd to supply and deliver some fertilisers for Eastern Province as per tender allocation by the Ministry and undertook to pay Omnia for the service.

(See page 28 of the RoP, and analysis and findings in the Staff Paper at page 13 paragraph 1.2 of the Amended RoP; also in the Decision at pages 74-75 paragraph (iv) of the RoP)

In summary, the Respondent's findings concerning the Annexes 1, 2, 4 and Annexes 5, 8, 9, and 10 (contents shown below), all of which predated the coming into force of the Act, were that they expressly stated that the two enterprises would cooperate in the supply and distribution of fertilizer in Zambia and that the primary objective was for each enterprise to focus on supplying and distributing fertilizer in the allocated zones where it has sustainable competitive advantage; that the two were colluding; that the agreement for the sale of fertiliser between the two implicitly increased the price of the fertilizer as one acted as a middle player; and that the emails some of which were dated post coming into force of the Act (Annexes 11, 12, 6 and 13) confirmed the market allocation and collusion between the two enterprises.

We further provide some details of contents of Annexes 5, 6, 8, 9, 10, 11, 12 and 13, as well and the Respondent's findings below.

MARKET ALLOCATION (in which the Respondent included Annexes 1, 2, and 4 reflected above)

Annex 5, email (dated 24th February 2010) from Kwazi Dlamini of Nyiombo to Vincent Mkuyamba, General Manager of Omnia Small Scale Limited, reading as *"Forwarded by Vincent Mkuyamba Zambia Omnia group on 25.02.2010..."*), as. Quoting the email stating, *"Kindly forward me your latest receipts in your areas. Also be advised that the Lundazi cargo will be received by you by Friday .... More details to follow after I confirm with the guys at the loading point. Thus far the first lot of cargo that will be coming in will be 240mt of Urea. I will keep you updated over the same."* The Respondent in its analysis of the ingredient of **"Market allocation"** asserted that this kind of correspondence confirmed market allocation and virtually eliminated any contrary position. **(See Annex 5 of the RoP; and the analysis and findings in the Staff Paper at page 13 paragraph 1.4 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)**

Annex 6 (dated 23rd March 2011), email from Kwazi Dlamini of Nyiombo sent to one Idris Mulla; Vincent Mkuyamba at Omnia; and Collins Nanjaya, but addressed to "Idris and Vincent"). The email subject matter was *"Urea allocations into Southern"* and in the body it stated *"Find attached Urea allocations for Omnia"* and proceeded to give the allocations for Monze, Kalomo, Choma, Mazabuka, Lusaka, and Livingstone. The email went on to state *"For the second consignment Ayia Mariner will be sending qtys to the following"* and provided these quantities for Lusaka and Kapiri and further stated *"From Judi Alamar we have 1500mt in Mbeya for Lundazi. ..."* The attachment to the email continues with D compound

allocations to Chipata, Katete, Petauke, Nyimba, Lusaka, Kaoma, Choma, Livingstone, Monze and Lundazi. The Respondent's finding was that the email further showed market allocation and collusion by the two companies discussing their allocations in the respective regions. **(See Annex 6 at 39-40 of RoP; and analysis and finding in the Staff Paper at page13 paragraph 1.5 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)**

Annex 8, email (dated 2nd May 2010) from Kwazi Dlamini of Nyombo sent to Vincent Mkuyamba among others on the subject *"Nyiombo ... offloading in Chipata"*, asking Vincent to *"assist with the needful...."*; **(See page 46 RoP, also the analysis and findings in the Staff Paper at page13 paragraph 1.3 of the Amended RoP; also, in the Decision at page 75 paragraph (v) of the RoP)**

Annex 9 (email dated 1st March 2010) from Kwazi Dlamini on Nyiombo receipts update, attaching an email from Mulonda Mubita at Omnia to Kwazi at Nyiombo with copy to V. Mkuyamba at Omnia, requesting for reports and providing that *"attached is a file of summaries of the stock received in Chipata, Petauke a and Katete as at 26th February 2010. ..."*; an email dated 24th February 2010 from Kwazi Dlamini at Nyiombo to V Mkuyamba at Omnia asking Vincent to forward *"your latest receipts in your areas"* (same email in Annex 5);

Annex 10 (email dated 10th March 2010) from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia, and others, with copy to V Mkuyaba at Omnia and others asking Mubita if he had an update to the last report and advising that D compound would *"start to be received within your areas within the first to second week of April"*;

Annex 11 (email dated 11th January 2011) correspondence between Kwazi Dlamini of Nyiombo and V Mkuyamba of Omnia informing Vincent of trucks to be received by latter for Eastern Province, and latter requesting the former to advise as to when the **"Eastern deliveries"** would be concluded and to revert urgently *"as the Minister is expecting my feedback this afternoon"*;

Annex 12 (dated 11th January 2011 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia with copy to V Mkuyamba at Omnia requesting Omnia to *"send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries"*; and

Annex 13 (dated 17th October 2012 from Kwazi Dlamini of Nyiombo to others of Nyiombo with copy to Vincent Mkuyamba of Omnia asking to *"facilitate Omnia with receiving 800 bags of urea and 1200 bags of NPK"*, to *"facilitate with the needful"* and that Vincent would *"call over the same"*.

(See Annex 8 at page 46, Annex 9 at page 47, Annex 10 at page 49, Annex 11 at page 50, Annex 12 at page 51, and Annex 13 at page 38 of the RoP; together with analysis and findings in the Staff Paper at page 13 paragraph 1.5 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)

In our view, all the Annexes (1, 2, 4, 5, 8, 9, and 10) predating the coming into force of the Act have potential probative value in proving the alleged conduct in contravention of section 9 of the Act in that the Annexes reflect a history of similar dealings as that allegedly reflected explicitly or implicitly in emails exchanged between the parties during the subsistence of the Act, notably emails in Annexes 6, 11, 12 and 13 dated 23rd March 2011, 11th January 2011 and 17th October, 2012 respectively. The similarity in the dealings suggest a probability that the Appellant continued with the same pattern of conduct.

An objection has been raised repeatedly in the submissions concerning Annex 4. We find Annex 4 to have potential probative value to a number of issues, such as the relationship between the Appellant and its affiliate or associate enterprise, Omnia Small Scale Limited, which we dealt with under ground 1; and the question whether the Appellant and Nyiombo would be regarded as competitors which we consider under ground 8. The Respondent has not made any reference to Annex 7 (at page 41 of the RoP). Neither do we see any relevance that it may have in our determination of the appeal. We accordingly exclude Annex 7 from consideration.

Annex 14, though referred to in the Staff Paper and Decision is missing from the RoP.

PRICE INFORMATION SHARING

Annex 15, email (dated 26th June 2007 from Idris Mullar of Nyiombo to Vincent Mkuyamba of Omnia providing the latter Nyiombo prices in Western Province). The Respondent's finding was that Omnia had bid and won the tender for the province for that season but Nyiombo provided its pricing.
(See Annex at page 54-55 of the RoP, also the analysis and findings in the Staff Paper at page 13-14 paragraph 1.6 of the Amended RoP, also in the Decision at page 75 paragraph (vii) of the RoP).

In our view, Annex 15 has potential probative value in proving the alleged offence because its contents tend to show some consistency not only with the other historical agreements for cooperation and the agreements between the parties earlier described per Annexes 1, 2 and 4 (including subcontracting each other in the supply and distribution of fertilizers). The contents of Annex 15 also tend to be consistent with the two enterprises' collaborative dealings in the supply and distribution of fertilizers allegedly reflected explicitly or impliedly in emails Annexes 6, 11, 12 and 13 dated 23rd March 2011, 11th January 2011 and 17th October, 2012 respectively (post the coming into force of the Act). We therefore have no doubt as to the potential probative value of Annex 15 to the issues in this appeal.

BID RIGGING

Annex 19 (see page 56 RoP) dated 24th April 2009 is a tender bid addressed to the National Tender Board by Nyiombo for the supply of some fertilizers, quoting prices. It contains evidence predating the coming into force of the Act.

The Respondent found that in 2009, both enterprises bid in two zones (Zone 9 - Western Province and Zone 3 – Eastern Province), but that as usual, Omnia won the tender for Zone 9 while Nyiombo won the tender for Zone 3. Further, that the differences between their bid prices were very minimal. That in Zone 9, Nyiombo's bid price was USD3,669,047.27, while Omnia's was USD3,734,526; and in Zone 3 Nyiombo's bid price was USD15,740766.08, while Omnia's price was USD15,045, 888. That this information was properly elucidated in Tender Document TB/ORD/008/09 attached as Annex 19 (dated 24th April 2009). That further it was difficulty to see why Nyiombo was not bidding for Eastern, Lusaka, and Southern Provinces when it was the one supplying Omnia with fertilisers destined for these areas. That in addition, it was demonstrated that Nyiombo had the capacity to supply and distribute in the said areas if it could supply in far flung areas like western Province.

We do not find any potential probative value of Annex 19 in proving the allegation of bid rigging by the two enterprises by tendering marginally different prices; we see no tender nor any price list by the Appellant. We also do not see any potential probative value Annex 19 may have in proving that one of the two enterprises won this and the other won that zone as alleged, as the Annex reflects no such information. In our view, are other pieces of evidence presented elsewhere in the RoP that may relate to bid rigging, rather than Annex 19.

However, Annex 19 still has potential probative value that may assist the Tribunal, for instance, on the question whether contracts under the FISP were by tender, evidence of which may also be corroborative of other historical documents such as Annexes 1 and 2 as well by other documents generated post the coming into force of the Act. We do not see any prejudice that admitting this document would cause the Appellant. In any case, it is a Nyiombo tender document. We therefore retain it as it has potential use in helping us resolve some issues in the appeal.

100. In the result, we have decided to treat all the documentary evidence in the RoP (including the Amended RoP), with the exception only of Annex 7, as admissible, as the same may help the Tribunal to fairly and justly determine issues before it. For the avoidance of doubt, we hasten to make it clear that the admission of the contested documents only allows us to treat these documents as open for use in our evaluation and determination of the appeal. As in any adjudication proceedings, the true value of any admissible evidence may only be conclusively evaluated in the context of the matters to which it relates, in this case the substantive grounds of appeal which we deal with later. The sixth ground of appeal thus substantially fails.

101. We move to the next grounds of appeal some of which we conveniently deal with together in clusters as we consider them to be related. That is, we deal with the grounds of appeal in clusters regardless of the order in which they have been argued by the Appellant and the Respondent respectively. In this regard, we must point out that in some cases grounds of appeal are repetitive and overlap to such an extent that we have found ourselves repeating the same issues. We also found it convenient to deal with grounds 3, 4 and 7 much later in the judgment because, in our view, whether the Respondent erred in its finding that the Appellant engaged in collusion or cartelistic behaviour in contravention of the Act; whether the Respondent erred in failing to properly investigate the matter; whether the Respondent erred in grossly misapprehending the facts relevant to this matter; whether the Respondent relied on inaccurate and extraneous evidence in ignoring crucial facts cannot be determined on their own. This is because such conclusions can only be reached after determining the substantive grounds of appeal directly relating to the alleged contravention of section 9 of the Act. In the same vein, we found it convenient to deal with ground 8 immediately because it is closely related to other grounds of appeal that directly deal with ingredients of the offence in section 9 of the Act.

102. Ground 8 reads as follows:

Ground 8: The Respondent erred in relying on a report marred with manifest errors, including, without limitation in relation to whether the Appellant and Nyiombo were competitors in the relevant geographic market /s, and what the proper economic and legal test to evaluate this is; (underlined parts)

103. The first part of ground 8 makes a general allegation that the Respondent erred in relying on a report marred with errors (which issue is somewhat a repetition of ground 7 which we deal with later), while the rest of this ground of appeal alleges that this reliance includes the Respondent's finding which raises the question whether or not the Appellant and Nyiombo would be normally be actual or potential competitors in the relevant market under consideration, and whether the Respondent applied the correct test in arriving at its finding.

104. Counsel for the Appellant have not argued this ground in specific terms. However, of what we can distill from their arguments under grounds 3, 4, 7, 8, and 13 combined, it is their position that the Respondent relied on extraneous matters in reaching its finding. Counsel have cited Annex 22, a 'verbatim' compilation by the Respondent of articles from the Post Newspaper (dated 23rd June 2010, 25th August 2012, and 3rd August 2012); and from Farmers Gazette of November 2009. The quotes from the Post Newspaper indicate inter alia an announcement by the Minister of Agriculture, then Honourable Emmanuel Chenda, that the Appellant and Nyiombo had been awarded tenders to supply basal and top dressing fertilisers for the 2012/2013 farming season; and an allegation by the newspaper that for the past seven years (as at 3rd August 2012), the supply of fertilisers had been dominated by the two companies, with one buying from the other. That this was virtually a cartel business with the government as the principal or main customer. The Farmers Gazette issue of November 2009 was quoted as having announced the results of the tender to supply and deliver fertilisers under the FISP, to the effect that only the Appellant and Nyiombo were awarded, as usual. **(See Annex 22 at pages 58- 62 of the RoP)**

105. Counsel for the Appellant have argued that there is no evidence to show steps taken by the Respondent to verify the information in the newspapers. Further, that this Tribunal surely cannot allow the Respondent to make a case with the aid of cuttings from newspapers which are, at best, unverified and hearsay evidence. Furthermore, to the extent that Counsel for the Appellant have also argued that Annex 1 is an unexecuted agreement, it may be implied that this argument extends to the fact that Annex 1 purports to have been an agreement for cooperation between the Appellant and Nyiombo in the supply and distribution of fertilisers under the FISP; and that, therefore the Respondent concluded therefrom that the two enterprises were competitors.

106. Counsel for the Appellant have argued that the effects of an unsigned document remain the same no matter the context in issue. That there are many reasons for this, the most cardinal, perhaps, being that until signed, the document is no more than words that cannot be attributed to anyone, let alone in a manner that places legal liability. That the rules of evidence simply cannot be abandoned in the fashion proposed by the Respondent. Further, that the Respondent implies that what is necessary is showing intent. That **section 9(1)** cannot be reconciled with this suggestion **as the section** prohibits horizontal agreements, as, according to counsel, this section does not create liability on the basis of intent, but only when there is actually an agreement in place.

107. Counsel for the Appellant have also assailed the use of Annex 4 which they have described as merely a sale agreement for the supply of fertilisers between the parties with no evidential value for purposes of section 9 of the Act. We have quoted the contents of Annex 4 in our determination of ground 6 of appeal. The contents show that the two enterprises agreed to buy specified amounts of D compound fertilizer and urea fertilizer from each other respectively.

108. Counsel for the Respondent argued against ground 8 together with grounds 7 and 9. Whilst not making direct reference to the issue of the Appellant and Nyiombo being competitors, what we can distill from the combined arguments as relevant to this ground of appeal is that counsel have asserted that evidence to prove a cartel case can either be direct or circumstantial citing the **OECD paper on Prosecuting Cartels without Direct Evidence DAF/COMP/GF 2006**; page 20, paragraph 2. Inter alia that circumstantial evidence includes firm conduct, market structure, etc.

109. Counsel have further argued that the Respondent seized various items from both the Appellant's and Nyiombo's premises. That amongst these documents was an MoU. That the said MoU expressly stated that the two companies shall cooperate in the distribution and supply of fertiliser in Zambia and that the primary objective is for each company to focus on supplying and distributing fertilizer in the allocated zones where it has sustainable competitive advantage. That this MoU is evidence of the existence of an agreement between the Appellant and Nyiombo. That the said MoU may not have been signed but this does not take it out of the realm of definition of agreement as per the Act. That this is because the definition of agreement under the Act includes both agreements that are implemented or intended to be implemented. That therefore, the absence of signatures from the said MoU does not absolve the parties from liability under the Act.

110. Counsel for the Respondent have gone on to argue that on page 28 of the Record of Proceedings is a document titled Addendum No.1 marked as Annex 2. That the document showed that there was an agreement between the Appellant and Nyiombo to supply respective market regions even before tendering. That, for instance, Omnia tenders on its own and wins in Eastern Province but the addendum states that Nyiombo had appointed Omnia to supply and deliver fertiliser in the Eastern Province. That further Annex 4 is a Sale Agreement between the Appellant and Nyiombo for the supply of fertiliser under the FISP. That the said agreement provides that Omnia would purchase fertiliser from Nyiombo. And that a perusal of the RoP will show a number of emails which clearly exhibit collusion between the Appellant and Nyiombo.

111. In reply, counsel for the Appellant have argued, in so far as their argument implicitly relates to this ground of appeal, that the evidence relied upon by the Respondent, circumstantial as it may be, was insufficient to show culpability on the part of the Appellant. That whilst they agree with the basic evidential approach proposed in the OECD paper cited in paragraph 19 of the Respondents submissions with respect to circumstantial evidence, there is no evidence before this Tribunal to support the Respondents (findings). That, as already argued, the documents relied upon by the Respondent, set out in paragraph 20 of the Respondent's submissions, are not helpful to the Respondent because all of the evidence relied upon is not current but goes as far back as five years before the law the Respondent placed reliance upon was enacted, which law, as already argued, has no retrospective effect.

112. The question that we need to determine under this ground of appeal is whether or not there is evidence to support the Respondent's finding that the Appellant and Nyiombo would be regarded as competitors in the relevant market, at the material time, as an ingredient of section 9 (1) of the Act that requires determination. The subsection reads in the relevant part (the *chapeau*):

> *"A horizontal agreement between enterprises is prohibited per se, and void, if the agreement –"*

113. The term "horizontal agreement" is defined in section 2 (1) if the Act as *"means an agreement between enterprises each of which operates, for the purpose of the agreement, <u>at the same level of the market and would normally be actual or potential competitors in that market;</u>"* (underline ours) The Respondent defined the relevant product market as the supply of fertilizer under the Government FISP, while the relevant geographical market was defined as including Eastern, Lusaka, Western and Southern Provinces where most of the fertilizer was supplied under the FISP by the Appellant and Nyiombo. The Respondent's findings were that:

> *"(a) The two companies were independent of each other, and both companies were involved in the supply of fertilisers with both companies bidding to supply the product to the GRZ under the FISP.*
>
> (b) *The two companies could therefore be regarded as competitors as they were competing to be awarded the Government contract under the FISP."*
>
> **(See page 12 Amended RoP paragraph 5.2.2 of Staff Paper; also in the Decision at pages 73-74 of RoP paragraph 5.2.2)**

114. With respect to counsel for the Appellant's argument concerning the newspaper articles, our position is that the contents of these articles cannot be proof of what they allege. They

remain mere allegations unless proven otherwise. Evidently, from the record, there is no indication that in its Investigation, the Respondent made any effort to verify the allegations, including the statement attributed to the Minister to the effect that they had awarded tenders for supply of basal and top dressing fertilisers for the 2012/2013 farming season to Nyiombo and the Appellant. We appreciate difficulties encountered in gathering evidence in cases of cartel conduct, a fact which we have earlier stated and which we do take into account, as appropriate. However, dereliction of duty is inexcusable. It is incumbent upon the Respondent to make every effort within its means to investigate and obtain whatever evidence is accessible to it and to demonstrate such efforts. We have previously said now and again that the Respondent's failure to conduct thorough investigations is at its own peril.

115. Having said that, we note that in its Staff Paper and the Decision, the Respondent did not state that it relied on the newspaper articles in its finding that the Appellant and Nyiombo would be regarded as competitors in the relevant market. The Respondent explicitly arrived at that conclusion because the two enterprises *"were independent of each other, and both ... were involved in the supply of fertilisers with both companies bidding to supply the product to the GRZ under the FISP"*. The allegation by the Appellant in its ground of appeal under consideration that the Respondent relied on a report marred with manifest errors, and the argument by counsel that the newspaper article had a considerable bearing on the decision taken by the Respondent are matters to be determined on the totality of the evidence.

116. Annex 1, whose key terms we have earlier outlined, is an unsigned agreement purportedly between the two enterprises in which the two agreed to cooperate for their mutual benefit in the supply and distribution of fertilisers in allocated zones under the FISP. As we have alluded to before, the authenticity of this document cannot be doubted having been seized from one of the two enterprises. Neither has it been disputed. The Appellant's argument that Annex 1 is an unsigned document, and that expression of intent cannot amount to an agreement let alone liability under section 9 (1) of the Act will be determined later under appropriate grounds of appeal.

117. For purposes of determining the question whether the two enterprises would normally be actual or potential competitors, the fact that this document (Annex 1) implicates the two enterprises as suppliers of fertilisers to allocated zones by tender under the FISP sufficiently establishes that the two would normally be actual or potential competitors in the relevant market. This is because in the definition of "horizontal agreement", the Act accords recognition to situations of restrictive agreements, such as cartel conduct alleged in this case, where enterprises that should normally operate as competitors enter into arrangements whereby they cooperate and operate collusively (as if they are one unit) instead of operating as competitors. Hence the language in the definition "... at the same level of the market and *would normally be actual or potential competitors in that market*".

118. For example, in EU case of **Societe Techinque Miniere v Maschinebau Vim Case 56/65/1996/ECR23, 249**, the concept of competition was defined by the Court to the effect that competition, for the purposes of the application of Article 101(1) TFEU, must be understood as that competition which would have existed in the absence of the practice

under consideration. Furthermore, potential competitor is one that is likely to enter the market at the same level. An OECD paper, **The Concept of Potential Competition (2021)**, puts it this way: "*… a potential competitor may currently be selling products that do not compete, or it may not be selling at all. In either case, if the possibility that it will enter is already affecting a firm's behaviour, then the constraint is an existing one. Focussing on existing constraints, whether from existing rivals or potential entrants, should be much easier since their impact should be observable within existing market data and internal documents (that is the market should already have priced these in).*"[14] (at page 9, paragraph two)

119. In this case, the fact that the two enterprises decided to cooperate in the supply and distribution of fertilisers under the FISP, or even the mere fact of expressing an intention to do so, as suggested by counsel for the Appellant, gives credence to their status as enterprises that would normally be actual or potential competitors in the relevant market, contemporaneously (at the time the document was prepared) or prospectively (in the future). How far into the future, in light of the document predating the coming into force of the Act, is a matter to be construed by looking at other pieces of evidence, which we do later.

120. Annex 2 is a 2007 agreement in which the Appellant appointed Nyiombo to supply and deliver some fertilizer under the FISP in Western Province per the tender allocations for 2007/2008 by the Ministry of Agriculture and likewise Nyiombo appointed the Appellant to supply and deliver fertilizers under the FISP in Eastern Province per the tender allocations for 2007/2008 by the Ministry of Agriculture. Like Annex 1, this document reveals that the two enterprises were suppliers of fertilizers in the relevant market, and therefore would normally be actual or potential competitors. However, in this case too, how far this relationship which predated the coming into force of the Act would continue is a matter to be construed from other evidence.

121. Annex 4 is a 2006 agreement between the two enterprises for sale of specified fertilisers to each other. This document predates both Annex 1 and Annex 2, and in our view indicates the fact that the two enterprises were in the business of supplying fertilisers, and that therefore they were actual or potential competitors in the relevant market, which status became more concrete with Annexes 1 and 2, discussed above. In view of its date and the dates of Annexes 1 and 2, more evidence is required to confirm the relationship between the two enterprises at the material time post the coming into force of the Act. The emails we outline below whose dates range from the first half of 2010 to October 2012 indicate that the two firms continued to collaborate and were both involved in the supply of fertilizers under the FISP. Annexes 5, 6, 8, 9, 10, 11, 12 and 13 are summarised in their content, as we have outlined earlier in the background and in our discussion of ground 6, as follows:

(a) Annex 5, an email (see page 36 RoP), (dated 24th February 2010 (from Kwazi Dlamini of Nyiombo to Vincent Mkuyamba, General Manager of Omnia Small Scale Limited, reading as "Forwarded by Vincent Mkuyamba Zambia Omnia group on 25.02.2010…"),. The email stating, "*Kindly forward me your latest receipts in your areas. Also be advised that the Lundazi cargo will be received by you by Friday …. More details to*

[14] https://www.oecd.org/daf/competition/the-concept-of-potential-competition-2021.pdf. (Seen on 29th November 2021 at 21:20 hours).

follow after I confirm with the guys at the loading point. Thus far the first lot of cargo that will be coming in will be 240mt of Urea. I will keep you updated over the same." The Respondent's finding was that this kind of correspondence confirmed market allocation and virtually eliminated any contrary position.

(b) **Annex 6,** an email (see pages 39-40 RoP) (dated 23rd March 2011, from Kwazi Dlamini of Nyiombo sent to one Idris Mulla; Vincent Mukuyamba at Omnia; and Collins Nanjaya, but addressed to "Idris and Vincent"). The email subject matter was *"Urea allocations into Southern"* and in the body it stated *"Find attached Urea allocations for Omnia"* and proceeded to give the allocations for Monze, Kalomo, Choma, Mazabuka, Lusaka, and Livingstone. The email went on to state *"For the second consignment Ayia Mariner will be sending qtys to the following"* and provided these for Lusaka and Kapiri and further stated, *"From Judi Alamar we have 1500mt in Mbeya for Lundazi. ..."* The attachment continues with D compound allocations to Chipata, Katete, Petauke, Nyimba, Lusaka, Kaoma, Choma, Livingstone, Monze and Lundazi. The Respondent's finding was that the email further showed market allocation and collusion by the two companies discussing their allocations in the respective regions.

(c) **Annex 8, email** (see page 46 RoP) dated 2nd May 2010 from Kwazi Dlamini of Nyombo sent to Vincent Mkuyamba among others on the subject *"Nyiombo ... offloading in Chipata"*, asking Vincent to *"assist with the needful...."*;

(d) **Annex 9,** email (see page 47-48 RoP) dated 1st March 2010 from Kwazi Dlamini on Nyiombo receipts update, attaching an email from Mulonda Mubita at Omnia to Kwazi at Nyiombo with copy to V. Mkuyamba at Omnia, requesting for reports and providing that *"attached is a file of summaries of the stock received in Chipata, Petauke a and Katete as at 26th February 2010. ..."*; and an email dated 24th February 2010 from Kwazi Dlamini at Nyiombo to V Mkuyamba at Omnia asking Vincent to forward *"your latest receipts in your areas"* (same email in Annex 5);

(e) **Annex 10,** email (see page 49 RoP) dated 10th March 2010 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia, and others, with copy to V Mkuyamba at Omnia and others asking Mubita if he had an update to the last report and advising that D compound would *"start to be received within your areas within the first to second week of April"*;

(f) **Annex 11,** email (see page 50 RoP) dated 11th January 2011 correspondence between Kwazi Dlamini of Nyiombo and V Mkuyamba of Omnia informing Vincent of trucks to be received by latter for Eastern Province, and latter requesting the former to advise as to when the "Eastern deliveries" would be concluded and to revert urgently *"as the Minister is expecting my feedback this afternoon"*;

(g) **Annex 12,** email (see page 51 RoP) dated 11th January 2011 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia with copy to V Mkuyamba at Omnia requesting Omnia to send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries;

(h) **Annex 13,** email (see page 38 RoP) dated 17th October 2012 from Kwazi Dlamini of Nyiombo to others of Nyiombo with copy to Vincent Mkuyamba of Omnia asking to *"facilitate Omnia with receiving 800 bags of urea and 1200 bags of NPK"*, to *"facilitate with the needful"* and that Vincent would *"call over the same"*.

122. Therefore, the evidence contained in Annexes 1, 2, and 4 and emails Annexes 5, 6, 8, 9, 10, 11, 12 and 13, most of which are dated post the coming into force of the Act, all put together show that both the Appellant and Nyiombo were engaged in the supply of fertilizers under the FISP not only during the period before but during the years 2010 to 2012, when the Act was in force and the investigations were conducted.

123. We also take notice of facts contained in public documents, part of which we have earlier stated, that is; a Ministerial Statement issued by the Minister of Agriculture during parliamentary debates in the National Assembly on 19th October 2010; debate in National Assembly proceedings by Honourable Kalima, M.P., on 8th November 2012 concerning the current status of supply of fertilizers under the FISP by the Appellant and Nyiombo; answer given in the National Assembly proceedings by Dr. Guy Scott, then Vice President of Zambia, on 22nd February 2013 concerning late delivery of fertilizers by the Appellant and Nyiombo.[15]

124. We take notice of facts in those statements pursuant to Rule 15 (2) of the Tribunal Rules. The Minister made the following statement:

"Debates- Tuesday, 19th October, 2010

DAILY PARLIAMENTARY DEBATES FOR THE FIFTH SESSION OF THE TENTH ASSEMBLY

Tuesday, 19th October, 2010

The House met at 1430 hours

MINISTERIAL STATEMENT

2010/2011 FARMING SEASON FARMER INPUT SUPPORT PROGRAMME

The Minister of Agriculture and Co-operatives (Dr Kazonga): Madam Speaker, I want to thank you for giving me this opportunity to give a ministerial statement on the Farmer Input Support Programme (FISP) for the 2010/2011 farming season. In doing so, I will firstly give a brief background to the programme and then move to the details of the preparations for the 2010/2011 farming season.

Madam Speaker, in 2002, the Government introduced the Fertiliser Support Programme (FSP) with a view to improving access to inputs by small-scale farmers. The other major objective of the

[15] See National Assembly website https://www.parliament.gov.zm

programme was to enhance the participation and competitiveness of the private sector in the supply and distribution of agricultural inputs in a timely and effective manner. …

Madam Speaker, as part of the revision, the programme was renamed the FISP. …

….

…. …. ….

Procurement and Distribution of the Inputs for the 2010/2011 Farming Season

Madam Speaker, allow me now to inform this august House about the procurement process and distribution of the inputs during the 2009/2010 agricultural season. In the 2009/2010 agricultural season, the Government procured and distributed 106,836 metric tonnes of fertiliser and 5,441.9 metric tonnes of maize seed. Out of the above stated fertiliser quantity, 6,836 metric tonnes were donated by the Japanese Government, under the grant assistance for the underprivileged farmers in Zambia. The total inputs that were procured assisted 534,000 small-scale farmers countrywide.

Madam Speaker, with respect to the preparations for the 2010/2011 farming season, the Government has increased the quantity of inputs, under the programme, from 106,836 metric tonnes of fertiliser in the 2009/2010 farming season in order to further increase agricultural production. This is, indeed, what the Government is aiming at achieving.

…. …. ….

Madam speaker, …. The second lot consisted of 50,000 metric tonnes of fertiliser and 2,397.5 metric tonnes of maize seed to benefit about 250,000 farmers. This gives a total of 888,500 farmers to benefit from the FISP during the 2010/2011 farming season.

Madam Speaker, in line with the programme objective of building the capacity of the private sector in agricultural inputs distribution, the ministry procured fertiliser from three suppliers. The procurement was through direct sourcing from the Nitrogen Chemicals of Zambia (NCZ) and competitive bidding for Nyiombo Investments Limited and Omnia Small-Scale Limited. The NCZ was awarded a contract on direct sourcing to kick start the production of fertiliser after the rehabilitation of the Nitrogen-Phosphorous-Potassium (NPK) Plant. The quantities awarded to respective suppliers were as follows:

Supplier	*Quantity (Metric Tonnes)*
NCZ	*20,000 of Compound D*
Nyiombo Investments MTD	*63,779 of both Compound D and Urea*
Omnia Small Scale LTD	*44,221 of both Compound D and Urea*

Madam Speaker, the tendering for the supply of fertiliser was done in the month of March, 2010 …. ….

Madam Speaker, in the second allocation, the ministry was given a waiver to source the additional fertiliser from the two private companies that were successful during the first tendering. This exclusive approach was used in order for the programme to catch up with time because normal tendering would have prolonged the procurement process which would have impacted negatively on the timeliness of the distribution exercise. In view of this, the suppliers were offered tenders as follows:

Supplier	*Quantity (Metric Tonnes)*
Nyiombo Investments MTD	*28,257 of both Compound D and Urea*
Omnia Small-Scale LTD	*21,743 of both Compound D and Urea.*

The tendering for the supply of the second fertiliser consignment was done in June, 2010.

…. ….

Madam Speaker, allow me to update this august House on the progress made, so far, on the distribution of inputs countrywide. The procurement and distribution of agricultural inputs for the 2010/2011 farming season has been done in a timely manner. By the end of September, 2010, about 90 per cent of the procured fertiliser from the initial tender was already delivered to the district central points.

…. …

…. ….

….

…. …. ….

Madam Speaker, the ministry expects that all inputs would have been delivered to the district central points by the end of October, 2010. If the farming community responds positively, the distribution exercise should be concluded within November, 2010.

Madam Speaker, I thank you."

125. Honourable Kalima, M.P., raised the following during debate in the National Assembly:

"Debates- Thursday, 8th November, 2012

DAILY PARLIAMENTARY DEBATES FOR THE SECOND SESSION OF THE ELEVENTH ASSEMBLY

Thursday, 8th November, 2012

The House met at 1430 hours

"QUESTIONS FOR ORAL ANSWER

Ms Kalima: On a point of order, Sir.

Mr Speaker: A point of order is raised.

Ms Kalima: Mr Speaker, I thank you for allowing me to raise a point of order. In today's Daily Nation Newspaper, on the front page, is a story entitled, "Omnia, Nyiombo will not Distribute Unless ..." Allow me to give a bit of some background to the story before I can quote the paper, which I will lay on the Table.

Mr Speaker, a week before closing the Farmers Input Support Programme (FISP) tender, the Permanent Secretary in the Ministry of Agriculture and Livestock called for a meeting at which twenty applicants to the tender were in attendance. This was to analyse the tender in the hope of removing what were termed discriminatory conditions. Among the conditions removed or viewed to favour Omnia and Nyiombo was experience. This meant the removal from the tender document of the part that stated that the contract would not be awarded to those who had never supplied to the ministry before or did not have experience. Any new-comer, who was ready, was welcome to bid.

The other condition, among the many which were removed, was the need to have a warehouse. You would want to note, Mr Speaker, that warehouse management in the supply of fertiliser is very cardinal. However, in this meeting, with the agreement of all the participants, this was abolished. It was said that they wanted to remove the conditions that favoured Nyiombo and Omnia to level the playing field and allow new bidders.

Mr Speaker, after closure of the tender, Omnia and Nyiombo still emerged competitive at the price that they tendered. On 21st September 2012, Omnia and Nyiombo signed the contract which stated that 25 per cent of the contract value was to be released by the Government before supply and this was to be done by 21st October, 2012. However, instead of the companies being paid on 21st October, on 19th October, the offices for Nyiombo and Omnia were visited by the Anti-Corruption Commission (ACC), and it was even in the papers that they were corrupt and were awarded the tender corruptly. Documents and computers were confiscated and, to date, have not been returned to Omnia and Nyiombo.

Mr Speaker, allow me now to quote the story on page 1, as referred to above:

"The two fertiliser firms facing corruption charges, Omnia and Nyiombo, will not release the fertiliser for the 2012/13 season under FISP until the Government looks for money to pay for it. The firms won a tender to supply fertiliser to farmers under FSIP, but were currently under investigations by the ACC for unsound business conduct over the same bid. According to the senior officials at the two firms, the two entities will not supply the inputs to small-scale farmers

because the PF Government was not certain with the investigation of corruption and unsound business conduct of both private companies."

Mr Speaker, the story continues to page 4 as follows:

"Three weeks ago, a combined team of investigators from ACC and Consumer Competition Protection Commission (CCPC) launched investigations instigated by a named Minister in the PF Government after his relatives or in-laws failed to win the tender to supply 200,000 metric tonnes of fertiliser under FISP."

Hon. Opposition Member: Aah, bamalukula,imwe.

Ms Kalima: Mr Speaker, is the hon. Minister of Agriculture and Livestock, who I cannot see, but his deputies are here, in order ...

Mr Mbewe: Guy Scott is there.

Ms Kalima: ... not to come to this House to inform the nation and the farmers, particularly those in Kasenengwa, about this situation regarding FISP, which has been talked about so much in the House and contributed greatly to the growth of the economy of this country? Is this Government in order not to that, when this is November, and the rains are around the corner? Is this Government in order not to attend to the FSIP when the cotton prices were so bad that every farmer ran to growing maize? Is this Government in order to put the food security of this country on the line when the unemployment levels are so high?

I seek your ruling, Sir.

Hon. Opposition Members: Hear, hear!

Mr Speaker: Order!

Clearly, this is a very complex point of order. Nonetheless, according to the information supplied to my office, some of the matters that have been referred to may be, and I emphasise, may be, before the courts of law. However, assuming that that information is not correct, I would urge that, to the extent that the point of order raised concerns matters relating to the supply and distribution of fertiliser, an appropriate question be put to the hon. Minister so that we can have a clear and meaningful response.

I must hasten to add that we are at a point when we are considering equally urgent and important business, namely the Budget. For those of you who have specific issues or questions, I would encourage you to take advantage of the facilities of urgent questions. It is a speedier way of dealing with the business of the House.

That is my ruling."

126. The Right Honourable Vice President said the following in answer to a question:

Debates- Friday, 22nd February, 2013

DAILY PARLIAMENTARY DEBATES FOR THE SECOND SESSION OF THE ELEVENTH ASSEMBLY

Friday, 22nd February, 2013

The House met at 0900 hours

"HIS HONOUR THE VICE -PRESIDENT'S QUESTION TIME

Ms Kalima (Kasenengwa): Mr Speaker, what is the position of the Fertiliser Input Support Programme (FISP), that is, on the distribution of fertiliser? How many farmers are yet to receive the fertiliser and what type of fertiliser is yet to be distributed? As His Honour the Vice-President answers, I would like him to know that I know that some of the people in Kasenengwa have not received the fertiliser yet.

The Vice-President (Dr Scott): Mr Speaker, the fertiliser distribution exercise has, to all functional purposes, been completed. If anybody has not received the fertiliser, they are not going to receive it because it is now too late. The problems with FISP were many, but the main one was the legal injunction that was obtained by a bidder against Nyiombo Investments, Omnia Fertiliser Limited and Nitrogen Chemicals of Zambia (NCZ). The result was that computers and records were taken out of the offices. Thus, we were not able to begin the distribution exercise until November, 2012. That was unfortunate. It is a case in which transparency, which, by the way, saved us US$20 million, turned and bit us where it hurt most. I think, we have to pursue changes. The new hon. Minister of Agriculture and Livestock, who calls himself 'the accountant' will be very good at telling us how he can do things better. This situation is unfortunate and we just have to make sure that it does not happen again.

I thank you, Sir."[16]

127. We further take notice of a December 2012 World Bank report on Zambia which included FISP and fertilizer supply and distribution. The report stated as follows (at page 13)[17]:

"3.2 FISP and Fertilizer Supply and Distribution in Zambia

Under FISP, fertilizer is distributed through district-level government authorities to members of independent farmer co-ops. Many of these co-ops have a decades-long history, whereas others

[16] See Parliamentary Debates for 22nd February 2013, 9:00 hours at National Assembly website https://www.parliament.gov.zm.

[17] World Bank, AGRIBUSINESS INDICATORS: Zambia (December 2012) https://openknowledge.worldbank.org/bitstream/handle/10986/26224/825080WP0ABIZa00Box379865B00PUBLIC0.pdf?sequence=1 (Seen on 5th December 2021 at 16:00 hours).

were established more recently, sometimes for the purpose of gaining access to FISP inputs. In some cases, co-ops not specifically involved with maize production, such as dairy marketing groups or associations of vegetable producers, have also benefitted from FISP inputs, since their members also grow maize. Historically, the FISP and its precursor, the Fertilizer Support Program (FSP), have had a poor record of delivering inputs on time. An assessment of the 2007/08 program found that almost 70 percent of farmers did not get their inputs until after the start of the rains, and 33 percent received their inputs more than two months late (World Bank 2010). Annually, the procurement of fertilizer is handled by the government through an open tender. Despite these competitive arrangements, all fertilizer contracts have been awarded to the same three companies since the program's inception, namely to the state-owned manufacturer (Nitrogen Chemicals of Zambia), Omnia Small Scale Limited, and Nyiombo Investments Limited. Program administrators have reported that the main reason for this outcome is that the other fertilizer companies were judged to lack the physical capacity to deliver the required volumes and/or could not mobilize the necessary finance.[18] Unsurprisingly, the awarding of fertilizer contracts to the same private companies each year has led to complaints by firms excluded from the program. Some companies say that the tender specifications were designed specifically to prevent them from winning a contract. One such rule, for example, has been the requirement to supply granular (composite) fertilizer that is produced only overseas rather than blended fertilizer, which is manufactured locally from imported ingredients. Another requirement has been that suppliers had to have 50 percent of the fertilizer tendered for already in the country at the time of making their bid, which is impractical for small firms or indeed for any company that is not very certain of winning the government contract. Both rules on fertilizer procurement have been dropped from the current 2012/13 tender. Private sector companies estimate that in recent years, FISP has accounted for more than 95 percent of fertilizer supplied to smallholder farmers."

128. The contents of the above quoted National Assembly proceedings, and the World Bank report, are consistent with the contents of the Annexes we have discussed above, in that they show that the two enterprises were engaged in the supply of fertilizers (under tender) in the relevant market. This was not only during the period predating the coming into force of the Act in 2010, but post that and right into the 2012/2013 farming season.

129. We have no basis upon which we would conclude that, in its finding, the Respondent relied on a report marred with manifest errors or that it did not apply the proper economic and legal test to evaluate this. Even though the Respondent did not verify the information alleged in the newspaper articles appearing in Annex 22, we are not persuaded that it placed reliance on these articles in reaching its findings. In any case, to the extent that the Post newspaper article of 25th August 2012 alleged that the Appellant had been awarded tenders for the supply of fertilisers for the 2012/2013 farming season, this statement is true. We say so because it is consistent with the statement made by the Right Honourable Vice President, then Dr. Guy Scott, later on 22nd February 2013 in National Assembly proceedings, which statement we have taken notice of and quoted above.

130. On the totality of the evidence and the law we have reviewed, we are firm in our finding that the Appellant and Nyiombo would normally be actual competitors in the relevant

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[18] World Bank (2010).

market at the material time during the subsistence of the Act for purposes of a horizontal agreement per the definition of "horizontal agreement" in section 2 (1) (when read together with section 9 (1) of the Act). Ground 8 of appeal therefore fails too.

131. We move to consider grounds 10, 11, 12, 13, 14 and 15, which we find inextricably related and, in some instances, repetitive.

Ground 10: The Respondent erred in failing to distinguish between the per se offences in section 9 (1) of the Act and agreements that have the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia;

Ground 11: The Respondent erred in finding that the conduct engaged in by the Appellant constituted "Per se" offences in terms of section 9 (1) of the Act;

Ground 12: The Respondent erred in finding that the Appellant entered into horizontal agreement with Nyiombo to divide markets by allocating geographic territories in contravention of section 9 (1) (b) of the Act and in failing to determine whether such agreement had the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods in Zambia;

Ground 13: The Respondent erred in in finding that the Sale Agreement between the Appellant and Nyiombo confirms that the Appellant and Nyiombo were engaged in Market Allocation;
Ground 14: The Respondent erred by in finding that the Appellant and Nyiombo breached the provisions of section 9 (1) (a) of the Act by sharing information on prices;

Ground 15: The Respondent erred by in finding that the Appellant breached the provisions of section 9 (1) (c) of the Act by engaging in bid rigging;

132. Counsel for the Appellant have argued in respect of grounds 10 and 11 that According to **Black's Law Dictionary 10th edition, Thomas Reuters 2009, by Bryan A Garner,** *per se* is defined at page 1323 as standing alone, without reference to additional facts. That the phrase denotes that something is being considered alone, not with other collected things. That paragraph 5.2.4 of the Decision, at page 76 of the Record of Proceedings, the Respondent concludes that the conduct of the Appellant is captured under section 9 of the Act. That the Respondent further suggests that once such conduct is proved there is no justification. That counsel's understanding of section 9 (1) of the Act is that there is a variety of Horizontal agreements that are prohibited *per se*. That in fact, the Act provides that an agreement is prohibited *per se* if the agreement fixes a purchase or selling price or other trading conditions; or divides markets by allocating customers or territories. That hence, in order for the Appellant to be said to have offended section 9(1), the above would need to be proved by the Respondent.

133. Counsel have argued that the Respondent has not proved the existence of any of the requirements set out in section 9 (1) of the Act. That the RoP does not contain any evidence to show that the Appellant engaged in price fixing, set trading conditions or that it divided the market by allocating customers to territories.

134. In respect of ground 13, counsel for the Appellant have argued that the Respondent relied on the sale agreement to show that the Appellant was involved in Market Allocation

of fertilizer. That this is evident from paragraph 5.2.3 (v) at **page 74 of the RoP**. That careful reading of Annex 4 will show that the document is no more than a sale agreement for fertilizer, that it conveys nothing more than an agreement to buy and sell a product. Further, that the document appearing between the cover page and the body of the agreement has been inserted in the document by the Respondent and is not a part of the document.

135. In response with respect to grounds 10, 11 and 12, counsel for the Respondent have argued (in respect of ground 10) that the Appellant's grounds of appeal are a total misdirection at law in that there was no error on the part of the Respondent when it determined the matter under section 9 (1) of the Act as the result is the prevention, distortion and restriction of Competition. That in respect of ground 11 the Respondent did not err in finding that the conduct engaged in by the Appellant constituted a *per se* violation in terms of Section 9 (1) as the said conduct was adequately captured under Section 9 (1). Further, that contrary to the Appellant's assertion in ground 12, the Respondent in proving the conduct against the Appellant, satisfied all the elements of the offence and properly determined that the agreement between the Appellant and Nyiombo in fact had the effect of preventing, distorting or restricting competition and substantially lessening competition to an appreciable extent.

136. That the nature of the conduct that is captured under Section 9 is prohibited *per se*. Counsel cited the decision of the Tribunal in the case of **Top Gear and Nine (9) others vs Competition and Consumer Protection Commission 2013/CCPT/003,** that the Tribunal stated at page 8 paragraph 3 that, *"...we find that the nature of the issues raised in this matter are such that there was no need to call for witness at the hearing or to call the Appellants to make representations or to hear in view of the fact that a horizontal agreement was established which was prohibited per se and thus the law had been violated..."*

137. Counsel have further argued that the conduct that the Appellant engaged in ranged from sharing information on pricing, market allocation and bid rigging. That all this conduct is prohibited per se under section 9 of the Act. That section 2 of the Act defines "bid rigging", *"means a horizontal agreement between enterprises where-*

(a) one or more parties to the agreement agrees not to submit a bid in response to a call for bids; or

(b) the parties to the agreement agree upon the price, terms or conditions of a bid to be submitted in response to a call for bids;"

138. Counsel have further submitted that it is evidence from the record that the Appellant and Nyiombo engaged in horizontal agreements, and that their conduct was endemic. That, for instance, in terms of bid rigging, in 2009, the two firms both bid in two zones called zone 9 and zone 3, this was more of a cover up of their market allocations because the very firm that would always win in the said zones emerged victorious. That further, Annex 19 at page 56, of the Record of Proceedings, which is an excerpt of the tender documents will show that the difference in their bid prices were very minimal in that Nyiombo's price was US$3,669,047.27 compared to Omnia's price of US$3, 734, 526. That in all this, Nyiombo won Western Province and supplied it as they had always done. The situation was the same for zone 3 which was Eastern Province where Nyiombo's price was US$15, 740, 766 while Omnia's price was US$15,045,888 and hence Omnia won in Eastern Province as always.

139. Counsel submitted that the Respondent did satisfy all the elements of the offence under section 9 of the Act. That *per se* offences are restrictions of competition by object. That agreements falling under the *per se* rule are unlawful in and of themselves and it is not necessary to assess their impact on competition in the relevant market. Counsel cited the Tribunal's pronouncement in its decision in the case of **Insurers Association and 15 Others v Competition and Consumer Protection Commission 2018/CCPT/022/COM (the Insurers case)**, at page 21 of the judgment.

140. Counsel concluded their argument with respect to ground 12 by reiterating that the conduct engaged in by the Appellant was captured under Section 9 and therefore the Respondent did not need to continue analysing the mischief as it is a *per se* offence.

141. With respect to ground 13, counsel for the Respondent argued that contrary to the Appellant's assertion in Ground 13, the sale agreement between the Appellant and Nyiombo among other documents showed consensus and a meeting of minds between the two entities as regards the supply and distribution of fertilizer in their agreed allocated zones. That the record shows that, and as counsel for the Respondent have submitted above, there is more than enough documentation that shows that the Appellant and Nyiombo had a consensus or meeting of minds as regards the supply and distribution of fertiliser in their agreed allocated zones. That therefore, counsel reiterate their earlier submission as pertains to the issue of market allocation. Like counsel for the Appellant, counsel for the Respondent have made no submissions with respect to grounds 14 and 15, which is understandable in view of the grounds being repetitive of ground 11, as we have already pointed out.

142. In reply to counsel for the Respondent, counsel for the Appellant have argued in respect of grounds 10, 11 and 12 that the Respondent has misunderstood the thrust of the Appellant's case in ground ten. That it is the Appellant's argument that there is no evidence before this Tribunal to show that the Appellant breached section 9 (1) of the Act. Further that as was argued in the Appellant's main submissions, the Act provides that an agreement is prohibited *per se* if the agreement fixes a purchase or selling price or other trading conditions; or divides markets by allocating customers or territories. That if the above were proved, the Appellant would *per se* be liable. That it is the Appellant's case that the Respondent has not demonstrated, based on the existence of evidence existing post enactment of the Act, that the Appellant entered into any agreement with a third party to fix a purchase or selling price or other trading conditions. That, similarly, no evidence can be pointed at to support the allegation that the Appellant engaged in dividing the market by allocating customers or territories.

143. We have not seen any arguments by counsel for the Appellant in respect of grounds 12, 14 and 15. In actual fact, grounds 14 and 15 are a repetition of ground 11. This is because in grounds 14 and 15, the Appellant is simply asserting that the Respondent erred in finding that the Appellant (and Nyiombo in the case of ground 14) breached paragraphs (a) and (c) of section 9 (1), respectively. The assertion in paragraph 11, on the other hand, challenges the Respondent's findings that the Appellant's conduct constituted *per se* offences per section 9 (1) of the Act. Similarly, ground 12 is a repetition of ground 11 to the extent that it states that the Respondent erred *"in finding that the Appellant entered into horizontal agreement*

with Nyiombo to divide markets by allocating geographic territories in contravention of section 9 (1) (b) of the Act"

144. These grounds of appeal raise basically two issues: (a) *Whether in its findings the Respondent failed to distinguish between per se offences in section 9 (1) of the Act, on the one hand, and agreements that have the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia, as contemplated in section 8 of the Act, on the other hand;* and (b) *Whether the Respondent erred in its findings that the Appellant violated section 9 (1) (a), (b) and (c) of the Act.* We deal with the issues accordingly.

(a) *Whether in its findings the Respondent failed to distinguish between per se offences in section 9 (1) of the Act, on the one hand, and agreements that have the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia, as contemplated in section 8 of the Act, on the other hand.*

145. We do not view this aspect of the grounds of appeal as serious enough to deserve much of our consideration. This is because first and foremost the offence with which the Appellant was charged is not violation of section 8. Furthermore, the Respondent in its analysis and findings only referred to section 8 of the Act by way of contrasting the assessment required to determine a violation of section 8 with that required to determine a violation of section 9 (1) of the Act. The Respondent discussed the implication of the *per se* prohibition and its interpretation in related case law. In sum, the Respondent concluded that once a horizontal agreement is found to exist in terms of section 9 (1) of the Act, because the offences are prohibited *per se*, and void, it is unnecessary for the Respondent to assess the impact of the conduct on competition in the relevant market. Concluding parts of the Respondent's analysis and findings read as follows:

(vi) *"Per se rules that are applied under section 9 of the Act where the alleged conduct ... fall are also applied in the United States of America .... Per se rules in US anti-trust law was described by the Supreme Court in* ***Northern Pacific Railway Co. v. United States*** *in following terms:*

'There are certain agreements or practices which because if their pernicious effect in competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'[19]

(vii) *Agreements falling under a per se rule are "unlawful in and of themselves" and it is not necessary to assess their impact on competition in the relevant market. The rational behind the development of per se rules is that is to avoid the 'necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved*[20]*.*

(viii) *The report has laboured to explain and analyse such agreements in both the context of (the Act) and practice in other jurisdictions. What is evident is that per se offenses and*

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[19] 356 US 1, 5 (1957).

[20] Citing reasoning given in the case of United States v. Addyston Pipe & Steel Co., 85 F 271 (6 Cir. 1898).

restrictions by object as the European Union call such agreements have very little or no prospect of having beneficial effects. The conduct by the Omnia and Nyiombo has been expressly captured under section 9 and there is no need for further analysis of the mischief as it is a per se offence."

(See pages 14-16 of the Staff Paper in the Amended RoP; and the Decision at page 78 paragraphs (vi)-(vii) of the RoP)

146. Secondly, counsel for the Appellant have not offered any arguments in support of ground 12 of appeal to explain in what way the Respondent failed to distinguish between *per se* offences in section 9 (1) of the Act, on the one hand, and agreements that have the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia, as contemplated in section 8 of the Act, on the other hand. And counsel for the Respondent in part went off track when they submitted on the point by arguing, *"contrary to the Appellant's assertion in ground 12, the Respondent in proving the conduct against the Appellant, satisfied all the elements of the offence and properly determined that the agreement between the Appellant and Nyiombo in fact had the effect of preventing, distorting or restricting competition and substantially lessening competition to an appreciable extent."* To sum up the arguments, we note that in reply to counsel for the Respondent's arguments, counsel for the Appellant have indirectly conceded the argument that *per se* horizontal agreements in section 9 (1) once established to exist do not require any inquiry into their impact on competition in the relevant market. Counsel for the Appellant have ingeniously claimed that the Respondent had misunderstood the Appellant's argument.

147. As it has turned out, apparently the issue is no longer in contention. However, for the avoidance of doubt, we repeat what we have previously held in other cases in which the issue fell to be determined. While a horizontal agreement (as defined by section 2 (1) of the Act) that falls in the classifications found in section 9 (1) can also be caught by section 8 if it is demonstrated that it has as its object or effect the prevention, restriction or distortion of competition to an appreciable extent in Zambian, such a horizontal agreement does not need proof of these restrictive features stipulated in section 8. The prohibition in section 9 (1) is not conditioned on such proof, hence the *"per se"*. Thus, we held in **the Insurers case** (which holding has been cited and quoted by counsel for the Respondent in their arguments) that:

> *"In the case of Section 9 of the Competition Act, any horizontal agreement which falls into any of the specified classifications is prohibited per se and void. Our understanding is that an assessment is required to establish whether (i) a horizontal agreement exists per the definition in the Competition Act, and (ii) whether the agreement falls into any of the classifications. As opposed to section 8, no further assessments are required, for instance as to whether or not they have the object or effect (actual or potential) on competition, whether by prevention, restriction or distortion, let alone to an appreciable extent in Zambia. Serious anti-competitive impact is presumed to be inherent in the kind of horizontal agreements classified in section 9, hence the prohibition per se."*[21]

[21] See paragraph 36. We quoted this holding in our judgment in the subsequent case of **Pangaea Securities Ltd v. Competition and Consumer Protection Commission APPEAL No. 2017/CCPT/005/COM**, under paragraph 18.

148. We now proceed to consider the other issue: ***Whether the Respondent erred in its findings that the Appellant violated section 9 (1) (a), (b) and (c) of the Act.***

149. To recap, counsel for the Appellant have argued that there is no evidence before this Tribunal to show that the Appellant breached section 9 (1) of the Act. That the Act provides that an agreement is prohibited *per se* if the agreement fixes a purchase or selling price or other trading condition; or divides markets by allocating customers or territories. That the Respondent has not demonstrated, based on evidence existing post enactment of the Competition and Consumer Protection Act, 2010, that the Appellant entered into any agreement with a third party to fix a purchase or selling price or other trading conditions. That, similarly, no evidence can be pointed at to support the allegation that the Appellant engaged in dividing the market by allocating customers or territories.

150. In more specific terms, the Appellant's position is that no horizontal agreement in the terms of section 9 (1) was established to exist post the date of coming into effect of the Act, i.e., a horizontal agreement fixing, directly or indirectly, a purchase or selling price or any other trading condition; dividing markets by allocating customers, supplies or territories for specific types of goods or services; or involving bid rigging. Counsel have alleged that the Respondent relied on Annex 4 which is a mere sale agreement for buying and selling fertiliser. That the Respondent's reliance on this document is evident from paragraph 5.2.3 (v) at **page 74 of the RoP**. Counsel have further alleged that the document appearing between the cover page and the body of the agreement has been inserted in the document by the Respondent and is not a part of the document.

151. In summary, counsel for the Respondent have further argued that the conduct that the Appellant engaged in ranged from sharing information on pricing, market allocation and bid rigging (quoting the definition of "bid rigging" in section 2 (1) of the Act). Counsel have further submitted that it is evidence from the record that the Appellant and Nyiombo engaged in horizontal agreements, and that their conduct was endemic.

152. At the outset, we reject the argument by counsel for the Appellant suggesting that a certain page was inserted in Annex 4 by the Respondent. We have not seen that page and we cannot entertain evidence coming from the Bar. If the Appellant wanted to challenge the alleged document, they should have done so by bringing a witness or witnesses to testify.

153. Our starting point in determining the issue at hand is the text of section 9 (1) (a), (b) and (c) of the Act. We have earlier in this judgment quoted the text; It reads:

> *"A horizontal agreement between enterprises is prohibited per se, and void, if the agreement –*
>
> *(a) fixes, directly or indirectly, a purchase or selling price or any other trading condition;*
>
> *(b) by allocating customers, suppliers or territories specific (sic) types of goods or services;*
> *(c) involves bid rigging, unless the person requesting the bid is informed of the terms of the terms of the agreement prior to the making of the bid;*

154. Section 2 (1) of the Act defines "agreement" as *"means "any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in*

Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises;" Further, the same section defines "horizontal agreement" as *"means an agreement between enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market;"* Furthermore, the section defines "bid rigging" as *"means a horizontal agreement between enterprises where-*

(a) one or more parties to the agreement agrees not to submit a bid in response to a call for bids; or

(b) the parties to the agreement agree upon the price, terms or conditions of a bid to be submitted in response to a call for bids;"

155. Under ground 8, we extensively discussed the question whether the Appellant and Nyiombo *would normally be actual or potential competitors in the relevant market,* per what is stated in the definition of "horizontal agreement". We firmly concluded in the affirmative, that they *would normally be actual competitors in the relevant market.* We should therefore proceed to consider whether there was a horizontal agreement between the two enterprises and whether, if so, the agreement was in the three, or any of the three, categories specified in paragraphs (a), (b) and (c) of section 9 (1) of the Act.

156. Primarily, we have looked at the alleged conduct, per the evidence presented, relating to the period post the coming into force of the Act. We have in our consideration of grounds 6 and 8 reviewed this evidence and we outline it chronologically according to the dates as follows:

(a) **Annex 11** dated 11th January 2011 correspondence between Kwazi Dlamini of Nyiombo and V Mkuyamba of Omnia informing Vincent of trucks to be received by the latter for Eastern Province, and the latter requesting the former to advise as to when the **"Eastern deliveries"** would be concluded and to revert urgently *"as the Minister is expecting my feedback this afternoon"*;

(b) **Annex 12** (dated 11th January 2011 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia with copy to V Mkuyamba at Omnia requesting Omnia to *"send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries"*;

(c) **Annex 6:** (dated 23rd March 2011, is an email from Kwazi Dlamini of Nyiombo sent to one Idris Mulla; Vincent Mkuyamba at Omnia; and Collins Nanjaya, but addressed to "Idris and Vincent"). The email subject matter was *"Urea allocations into Southern"* and in the body it stated *"Find attached Urea allocations for Omnia"* and proceeded to give the allocations for Monze, Kalomo, Choma, Mazabuka, Lusaka, and Livingstone. The email went on to state *"For the second consignment Ayia Mariner will be sending qtys to the following"* and provided these quantities for Lusaka and Kapiri and further stated *"From Judi Alamar we have 1500mt in Mbeya for Lundazi. ..."* The attachment to the email continues with D compound allocations to Chipata, Katete, Petauke, Nyimba, Lusaka, Kaoma, Choma, Livingstone, Monze and Lundazi. The Respondent's finding was that the email further showed market allocation and collusion by the two companies discussing their allocations in the respective regions. **(See Annex 6 at 39-40 of RoP; and analysis and finding in the**

Staff Paper at page13 paragraph 1.5 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)

(d) **Annex 13** (dated 17th October 2012 from Kwazi Dlamini of Nyiombo to others of Nyiombo with copy to Vincent Mkuyamba of Omnia asking to *"facilitate Omnia with receiving 800 bags of urea and 1200 bags of NPK"*, to *"facilitate with the needful"* and that Vincent would *"call over the same"*.

(See Annex 11 at page 50, Annex 12 at page 51, and Annex 13 at page 38 of the RoP; together with analysis and findings in the Staff Paper at page 13 paragraph 1.5 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)

157. We have determined that Annex 3, while prepared by the Respondent during the subsistence of the Act and cited as supporting the finding of market allocation between the two enterprises, is unreliable and of no evidential value to issues before us. This is because the tender documents from which the information was allegedly extracted have not been produced.

158. We recalled from our earlier consideration of grounds 1 and 2 and the findings we reached that Vincent Mkuyamba was the Appellant's director and General Manager and Omnia Small Scale Limited General Manager. We further recalled our conclusions in our consideration of ground 8, wherein we took notice of a public documents, namely, a Ministerial Statement issued by the Minister of Agriculture to the National Assembly during its proceedings on 19th October 2010, a question raised by Honourable Kalima, M.P., during debate on the status of FISP on 8th November 2012; and answer given by the Right Honourable Vice President on 22nd February 2012. We also took notice of a World Bank report on Zambia (December 2012) on the subject of FISP and fertilizer supply and distribution. We concluded from these documents that that both the Appellant and Nyiombo were awarded tenders to supply fertilizers under the FISP for the farming seasons 2010/2011 right up to 2012/2013 when the investigations were launched and that they would therefore normally be competitors for the supply of fertilizers under the FISP. The following questions beg answers:

(a) Why would Nyiombo inform the Appellant's General Manager of trucks to be received by the latter for Eastern Province, and the latter request the former to advise as to when the **"Eastern deliveries"** would be concluded and to revert urgently *"as the Minister is expecting (the latter's) feedback this afternoon"*? (This is per Annex 11).

(b) Why would Nyiombo be requesting the Appellant to *"send a report for all the receipts into the Omnia areas so as to analyse and follow up on the status of deliveries"*? (This is per Annex 12)

(c) Why would Nyiombo communicate to the Appellant on the subject matter *"Urea allocations into Southern"* and convey allocations for Southern Province? Why would Nyiombo communicate to the Appellant that a *consignment for some designated districts would follow* and provide allocations of fertilizers to designated districts in Eastern and Southern Provinces? (This is per Annex 6)

(d) Why would Nyiombo *"facilitate Omnia with receiving 800 bags of urea and 1200 bags of NPK"*? (This is per Annex 13)

159. The only reasonable inference we draw is that the Appellant had the tender for the supply and delivery of fertilizers for those areas (Omnia areas or zones), such as Eastern and Southern Provinces, when in actual fact the secret arrangement between the two enterprises was that they decided who actually supplied which zone. Meaning that, secretly, the two enterprises conducted themselves as if they were one unit.

160. The National Assembly proceedings we earlier took notice of indicate that the tenders for the supply of fertilizers under the FISP were awarded to the Appellant and Omnia respectively during the farming seasons 2010/2011 to 2012/2013. The information reflected in the above-cited Annexes in January 2011, March 2011 and October 2012 constitute evidence of a classic case of dividing markets, i.e., territories for the supply of fertilizers under the FISP by an arrangement whereby the two enterprises secretly colluded to supply allocated zones according to how they divided the zones between them for their mutual benefit. Any shadow of doubt would be dispelled because the story these emails convey is similar to the contents of the emails exchanged between the two enterprises in 2010, namely, Annexes 5, 8, 9 and 10. Furthermore, other historical documents, namely Annexes 1 and 2 reflect the same pattern of behaviour.

161. While in themselves not constituting evidence of an offence per section 9 (1) of the Act, yet the documents predating the coming into force of the Act, do attest to the obvious; that the close cooperation between the Appellant and Nyiombo continued into the period when the Act was in force, at least up to October 2012 when the investigations were launched (see date of Annex 13). Therefore, we are left in no doubt as to the continuance of the relationship between the two enterprises, as far as allocation of markets is concerned. We demonstrate this by restating elements of the Annexes predating the coming into force of the Act as follows:

Annex 1 – unsigned MoU

Preamble

L. *"... (they had) decided to cooperate in the supply and distribution of fertilizer in Zambia for their mutual benefit ...."*

M. *"The cooperation would rationalize the logistics involved in supply and distribution of fertilizer across all four zones ...."*

N. *"The two companies would utilize their joint expertise ... in input delivery to the beneficiary farmers under the Fertilizer Support Program."*

Operative – Article II

O. *"The primary objective for each company to focus on supplying and distributing fertilizer in the allocated zones where it has sustainable competitive advantage in the form of staff, infrastructure and logistics."*

P. *"Each company will endeavour where possible to support the efforts of the other in the respective zones if requested."*

Q. *"If Omnia Small Scale is successful in being allocated zone 2, it is mutually agreed between the parties that Omnia Small Scale will subcontract Nyiombo Investments to supply and distribute Urea fertilizer in Central and Western Provinces excluding Sesheke. All documentation for subcontracted area will be done using Omnia Small Scale stationery. In addition, Omnia Small Scale will be responsible for invoicing government. Once paid for the urea fertilizer supplied and distributed in zone 2 ... Omnia will then pay Nyiombo Investments for the portion subcontracted. ... Nyiombo undertakes to provide timely information for purposes of invoicing."*

Article Four

R. *They (the two companies) "... shall have a common negotiating approach to government with regard to payment modalities for fertilizer supplied and distributed"*

S. *"The contents of this agreement shall remain confidential."*

Annex 2 - Appendix 1

(signed on 14th September 2007 between the two enterprises is titled "Addendum 1") - In the heading, the Addendum refers to the MoU dated 19th July 2007 between the signing parties (Nyiombo & Omnia Small Scale Limited) and signed as witness by V. Mkuyamba as General Manager for the latter company. In the Addendum, the latter appointed Nyiombo to supply and deliver some fertilisers under FISP for Western Province as per tender allocation for 2007/8 done by the Ministry of Agric & Cooperatives, with exception of Sesheke only. Omnia undertook to pay for the service.

Similarly, Nyiombo appointed Omnia Small Scale Ltd to supply and deliver some fertilisers for Eastern Province as per tender allocation by the Ministry and undertook to pay Omnia for the service.

Annex 15 - email

(Dated 26th June 2007 from Idris Mullar of Nyiombo to Vincent Mkuyamba of Omnia providing the latter Nyiombo prices in Western Province). Nyiombo provided its pricing to the Appellant.

(See Annex 15 at page 54-55 of the RoP, also the analysis and findings in the Staff Paper at page 13-14 paragraph 1.6 of the Amended RoP, also in the Decision at page 75 paragraph (vii) of the RoP).

Annex 5 - email

(Dated 24th February 2010 (from Kwazi Dlamini of Nyiombo to Vincent Mkuyamba, General Manager of Omnia Small Scale Limited, reading as "Forwarded by Vincent Mkuyamba Zambia Omnia group on 25.02.2010..."), as Annex 5 (see the RoP). Quoting the email stating, *"Kindly forward me your latest receipts in your areas. Also be advised that the Lundazi cargo will be received by you by Friday .... More details to follow after I confirm with the guys at the loading point. Thus far the first lot of cargo that will be coming in will be 240mt of Urea. I will keep you updated over the same."* The Respondent found that this kind

of correspondence confirmed market allocation and virtually eliminated any contrary position.

Annex 8 - Email

(Dated 2nd May 2010 from Kwazi Dlamini of Nyombo sent to Vincent Mkuyamba among others on the subject "Nyiombo ... offloading in Chipata", asking Vincent to assist with the needful....");

Annex 9 - email

(Dated 1st March 2010 from Kwazi Dlamini on Nyiombo receipts update, attaching an email from Mulonda Mubita at Omnia to Kwazi at Nyiombo with copy to V. Mkuyamba at Omnia, requesting for reports and providing that "attached is a file of summaries of the stock received in Chipata, Petauke a and Katete as at 26th February 2010. ..."; and an email dated 24th February 2010 from Kwazi Dlamini at Nyiombo to V Mkuyamba at Omnia asking Vincent to forward "your latest receipts in your areas" (same email in Annex 5);

Annex 10 - email

(Dated 10th March 2010 from Kwazi Dlamini at Nyiombo to Mulonda Mubita at Omnia, and others, with copy to V Mkuyamba at Omnia and others asking Mubita if he had an update to the last report and advising that D compound would "start to be received within your areas within the first to second week of April".

(See Annex 8 at page 46, Annex 9 at page 47, Annex 10 at page 49, Annex 11 at page 50, Annex 12 at page 51, and Annex 13 at page 38 of the RoP; together with analysis and findings in the Staff Paper at page 13 paragraph 1.5 of the Amended RoP, also in the Decision at page 75 paragraph (vi) of the RoP)

162. Given the nature of the offence in issue as cartel conduct, for which it is usually difficult to find direct evidence, and the consistency we have observed in the pattern of conduct between the Appellant and Nyiombo since 2006/2007 right into the 2012/2013 farming seasons, we accept the said historical documents as being relevant and adding even more weight to the already credible evidence provided by the emails generated during the currency of the Act. Added to this evidence are the National Assembly proceedings and the World Bank report whose contents confirm that the two enterprises were awarded tenders for the supply of fertilizers under the FISP for the farming seasons 2010/11 up to 2012/13. These are the seasons to which Annexes 11, 12, 6 and 13 relate.

163. In light of the weight of the evidence, we have reached the inescapable conclusion that this arrangement between the Appellant constituted an agreement in the terms defined by section 2 (1) of the Act. By agreement is meant in this case the whole arrangement under which the two enterprises acted in cooperation in their conduct as suppliers of fertilizers under the FISP as reflected in the various documents, including emails, we have reviewed. Lest we be misunderstood as conveying the idea that any specific document was the agreement, since that is not the only form an agreement may take per the definition. The whole arrangement constituted the *agreement (at the very least, an oral agreement), whether or not legally enforceable, between the two enterprises which was implemented in Zambia.*

164. Nonetheless, we must point out that if a written form of agreement is unsigned, that simply means it is an oral agreement evidenced in writing; an oral agreement is included in the definition. What matters is the meeting of the minds between the parties to an agreement that is implemented or intended to be implemented in Zambia. We need not go into a legal discourse on the concept of "the meeting of the minds", which is a very basic ingredient in the formation of an agreement. Looking at the facts of the case, it does not even arise as an issue. The Appellant has not raised it as an issue, though the Respondent argued the point. In any case, we would require no case law to reach a conclusion on this point, as opposed to some cases we have decided in the past, notable among them the **Insurers case**, where the point was hotly contested. The meeting of the minds between the two enterprises is self-evident in the various documents including the emails exchanged between them, both those generated during the subsistence of the Act and those predating it. Therefore, the two enterprises were in agreement.

165. To recap, earlier we have determined that the two enterprises engaged in dividing the market (i.e., provinces or zones) for the supply of fertilizers under the FISP. We also earlier determined that the Appellant and Nyiombo *would normally be actual competitors in the relevant market,* per what is stated in the definition of "horizontal agreement". When we put all these findings together, we arrive at the conclusion that the Appellant and Nyiombo entered into a horizontal agreement by which they divided markets, i.e., territories for the supply of fertilizers under the FISP. They did this by an arrangement whereby the two enterprises collusively (acting together) supplied zones which they divided between them for their mutual benefit. Hence Nyiombo supplying fertilizers in zones allocated to the Appellant under the FISP tenders, as seen in the emails running from 2010 up to 2011 and 2012. This is a horizontal agreement that is prohibited *per se* in terms of section 9 (1) (b) of the Act.

166. Next is the question whether the Appellant violated section 9 (1) (a), i.e., whether the horizontal agreement *fixes, directly or indirectly, a purchase or selling price or any other trading condition.* Annex 19, which the Respondent referred to at page 56 of the RoP, albeit as evidence supporting a finding of bid rigging (and not price fixing), not only predates the coming into force of the Act, but also falls short of the comparison in the bid prices between the two enterprises. This is because the bid relating to the Appellant is missing.

167. We recall that the Appellant made an interlocutory application for an order for the Respondent to file a supplementary RoP so as to produce inter alia tender documents referred to in the RoP and for the Appellant to produce additional documents. The Respondent opposed the application stating that it had produced all the documents it had made use of in arriving at its decision, and that in any case, it had returned to the Appellant all the documents it had seized during the search, both originals and copies. That, therefore, it did not have any such documents in its possession apart from those it had produced in the Record of Proceedings. That, if it had been the case that the Respondent had in its possession the alleged documents, then the Appellant should have filed a Notice to Produce under Rule 16 of the Tribunal Rules. Alternatively, that the Appellant should have filed an appropriate application to file any documents it had in its possession that were seized by the Respondent during the investigations, but which were returned and that the Respondent was not averse to such an application.

168. As for the application for the Applicant to produce further documents, the Responded opposed it contending, referring to the Notice of Investigation, that contrary to the Appellant's claim, the Applicant had been given an opportunity to be heard which it opted not to utilise.

169. In view of the Respondent's assertion that it had returned all the documents that were seized from the Appellant, both originals and copies, and did not have any, other than those produced in the RoP, we declined the application for the Respondent to produce documents that were allegedly missing from the RoP. Instead, we directed that we would issue a consent order for the filing of a Supplementary RoP. That is, if the Appellant would produce those documents and the two parties agreed to file them as a Supplementary No consent order was filed. To complete the story, we also declined the Appellant's application to produce additional documents that it did not produce to the Respondent during the proceedings subject of this appeal. This was *inter alia* because the Appellant had had the opportunity to produce any documents during the investigative stage. We do not make it a habit to allow parties to introduce documents or other evidential material that could have been but were not produced during the proceedings subject of appeal.

170. We, however, left open the possibility of our issuing an order for any document to be produced in the event we found it necessary. In the process of reviewing the appeal proceedings, we issued an order that the Respondent amends its Staff Paper in the RoP as originally filed as some pages were missing. We could have issued an order for the production of the missing Annex 14; the tender documents referred to in Annex 3 (which is allegedly an extract from tender documents); and the tender documents referred to by the Respondent in their analysis on the issue of bid rigging, referencing Annex 19 which, as we found, does not have the tender documents for the Appellant. We did not issue such an order as the position remained unchanged, that is, production of these documents was only feasible if the two parties by agreement identified and filed documents that had been seized from the Appellant and were referred to in the proceedings of the Respondent. We have earlier found Annex 3 to be unreliable and therefore of no evidential value to issues before us.

171. We have failed to understand how the Respondent would not have retained the documents they seized from the Appellant and Nyiombo referred to in their analysis and findings (some of which counsel for the Respondent also blindly referred to). We say blindly because how else did counsel refer to a document which is not in the RoP? The Respondent offered no explanation for not having retained and produced the documents, which is appalling.

172. Going back to the question whether the Appellant violated section 9 (1) (a) of the Act, notwithstanding the Respondent's neglect in their handling of the evidence relating to the said documents, we cannot overlook the obvious fact which is evident on the records we have reviewed. That is, that the kind of cooperation that existed between the two enterprises entailed that when allocated zones by Government for the supply of fertilizers under tender, their secret arrangement was that they divided the zones between themselves. This inevitably meant that the two enterprises would have to coordinate the bid prices for the

various zones. This was so because obviously the bidding enterprise could not be expected to set its own prices independently for zones to be supplied by the other enterprise. Though there are no bid prices on the record for comparison between the two enterprises, it is a fact to be inferred from their kind of collaborative conduct that the two enterprises were fixing bid prices.

173. As we have already pointed out, the result is that the two enterprises, though separate entities that would normally be actual competitors in the relevant market, yet *de facto* conducted bids secretly as one unit, instead of bidding independently. This behaviour is consistent with the contents of the historic documents reflecting this kind of cooperation. For instance, Annex 1 (at pages 25-27 of the RoP) stated inter alia, *"The primary objective for each company to focus on supplying and distributing fertilizer in the allocated zones where it has sustainable competitive advantage in the form of staff, infrastructure and logistics."* Annex 15 (at page 54 of the RoP), is an email from Idris of Nyiombo to Vincent Mkuyamba (at Appellant) providing the latter with prices of fertilizers for Western Province. Sharing or coordination of prices and/or price in this scheme of arrangement was a necessity and a reality.

174. The pro-competitive rationale behind the prohibition against price fixing agreements is that competitors should set their prices independently of one another in order to protect the proper function of normal competition for the benefit of consumers. A publication by the **Federal Trade Commission of the United States of America** states inter alia as follows:

> *"Price fixing is an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms. Generally, the antitrust laws require that each company establish prices and other terms on its own, without agreeing with a competitor. When consumers make choices about what products and services to buy, they expect that the price has been determined freely on the basis of supply and demand, not by an agreement among competitors. When competitors agree to restrict competition, the result is often higher prices. Accordingly, price fixing is a major concern of government antitrust enforcement.*
>
> *A plain agreement among competitors to fix prices is almost always illegal, whether prices are fixed at a minimum, maximum, or within some range. Illegal price fixing occurs whenever two or more competitors agree to take actions that have the effect of raising, lowering or stabilizing the price of any product or service without any legitimate justification. <u>Price-fixing schemes are often worked out in secret and can be hard to uncover, but an agreement can be discovered from "circumstantial" evidence</u>. For example, if direct competitors have a pattern of unexplained identical contract terms or price behavior together with other factors (such as the lack of legitimate business explanation), unlawful price fixing may be the reason."*[22] (Underline ours)

175. Furthermore, we note that paragraph (a) of subsection 9 (1) does not require that the price fixed be the actual. It is sufficient that, for instance, if not directly, a horizontal agreement is indirectly the fixing of the price of goods, as in this case where the two enterprises coordinated in setting the bid prices for fertilizers intended to be supplied by

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[22] Guide to Antitrust Laws https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/bid-riggingeen (seen on 3rd December 2021 at 18:45 hours).

the two enterprises under the FISP. In **the Insurers case**, which we cited in **the Pangaea case**[23], we held as follows:

> *"... for the avoidance of doubt, there is no requirement in the law that the price fixed should be the actual price; it is sufficient that it is a price (minimum, maximum or otherwise) which is intended to be applied by the parties to the agreement...."*

176. In the present case, it is circumstantially evident that the horizontal agreement between the Appellant and Nyiombo entailed that the two coordinated the tender prices for the fertilizers they intended to supply. In this way, the bid prices offered to government for the supply of the fertilisers were directly or indirectly fixed by the two enterprises working together, so the conduct fits well within the terms, *"fixes, directly or indirectly, a ... selling price or any other trading conditions"* per section 9 (1) (a) of the Act.

177. Bid prices are prices that are quoted for the supply of goods or services. When bid prices are tendered, they are intended to be the actual prices for the goods. In **the Top Gear case**, which counsel for the Respondent referred to, the subject prices were quotations agreed among garages that were competitors. The decision of the Tribunal that they violated section 9 (1) (a) of the Act was upheld on appeal by the High Court.

178. We accordingly conclude that the Appellant breached section 9 (1) (a) of the Act. The next issue for consideration is whether the horizontal agreement involved bid rigging per paragraph (c) of section 9 (1) of the Act, per the definition of "bid rigging" in section 2 (1) of the Act, *"means a horizontal agreement between enterprises where-*

> *(a) one or more parties to the agreement agrees not to submit a bid in response to a call for bids; or*
>
> *(b) the parties to the agreement agree upon the price, terms or conditions of a bid to be submitted in response to a call for bids;"*

179. We note that in its analysis in the Staff Paper and Decision on the subject of bid rigging, the Respondent arrived at its finding that paragraph (c) of section 9 (1) was violated, citing Annex 19. We have already determined that Annex 19, though useful for purposes of other issues before us, notably evidencing that the fertilizer supply contracts were awarded by tender, is of no value with respect to the issue of bid rigging. This is because the Annex does not have tender information relating to the Appellant. We have already addressed this anomaly.

180. Nonetheless, having analysed the evidence on record as we have done, we are of the view that the circumstances of this case align with the definition of "bid rigging" in paragraph (b) in section 2 (1) of the Act in that the two enterprises agreed on bid prices to be submitted to government in response to calls for tenders. In the circumstances of the present case, the violation is the same as that which we have found the Appellant to have engaged in in contravention of section 9 (1) (a), which captures a wider scope of price fixing horizontal agreements, not restricted to bid prices. In other words, in paragraph (a) of section 9 (1), the direct or indirect fixing of a purchase or selling price or other trading terms need not be, though it can be, in bidding for tenders. In paragraph (c) of the section, the agreement is restricted to price, terms or conditions of a bid submitted in response to a call.

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[23] Supra.

This is in terms of the definition assigned to "bid rigging" by section 2 (1) of the Act, per paragraph (b) thereof. That Government would call for bids is obvious since the evidence we have reviewed indicates that the contracts were awarded by tender.

181. We therefore do not need to belabour the issue any further. We have already determined in the affirmative that the Appellant and Nyiombo were agreeing on bid prices, since *de facto* they were bidding as one unit in order to supply the zones they divided between them, respectively. The Appellant also violated paragraph (c) of section 9 (1) of the Act.

182. In all, we conclude that the Appellant violated section 9 (1) (a), (b) and (c) of the Act. We move to consider Grounds 3: *The Respondent erred in finding that the Appellant engaged in collusion or cartelistic behaviour in contravention of the Competition and Consumer Protection Act No. 24 of 2010;*

183. We have given a definition of "cartels" in our discussion of grounds 10, 11, 12, 13, 14 and 15, which we sourced from the OECD Policy Paper we earlier cited: ""*Cartels are agreements among competitors fixing prices, allocating markets or rigging tenders (bids). They are the most harmful of all types of competition law violations ....*"

184. The Appellant argued this ground of appeal together with grounds 4, 7, 8 and 13. Our understanding is that the ground of appeal was, as we earlier alluded to, dependent on our findings and conclusions with respect to the question of violation of section 9 (1), which matter we have already determined. Consequently, our findings and conclusions that the Appellant violated section 9 (1) (a), (b) and (c) of the Act have determined this ground of appeal. The Appellant did engage in cartelistic or collusive behaviour.

185. We move to consider grounds 4 and 7 together as they are related.

Ground 4: The Respondent erred in failing to properly investigate the matter;

Ground 7: The Respondent erred in grossly misapprehending the facts relevant to this matter, in relying on inaccurate and extraneous evidence and in ignoring crucial facts in the matter;

186. The issues raised in the two grounds of appeal can only be reasonably evaluated in context of grounds of appeal they relate to. We have already addressed these grounds of appeal in our earlier consideration of other grounds of appeal, notably, grounds 6, 8, 10, 11, 12, 13, 14 and 15. We have deplored the conduct of the Respondent with respect to the some documents, notably tender documents, referred to in the Staff Paper and the Decision. This kind of conduct has potential to undermine not only the Respondent's performance of its functions but also the Tribunal's ability to render fair and just decisions.

187. We are satisfied, nonetheless, that the evidence available on the record, the National Assembly proceedings and the World Bank report we took notice of have sufficiently enabled us to reach what we consider to be a fair and just determination.

188. We now move to address the rest of the grounds of appeal, starting with **Ground 9:** *The Respondent erred in finding that the Appellant was a middle player who added a mark up to make profit and that the resultant effect was that the price of fertilizer went up.; (NUMBRR 7)*

189. It makes commercial sense that the two enterprises paid each other for bidding and securing allocations of zones for the other. This is common sense requiring no evidence. In fact, Annex 2, one of the historical documents predating the coming into force of the Act, indicated that the two enterprises would pay each other for the service. That this would result in the price of the fertilizers going up would be a very likely consequence. This kind of price distortion is one of the mischiefs that the law seeks to address. However, we note that the information which the Respondent relied on was sourced from newspapers, which we have already determined cannot be relied upon as proof of the facts alleged. Of course, as a matter of policy consideration, price fixing and bid rigging attract serious attention, including public interest, on account of price distortions that are presumed to occur and do in fact occur. In this case, it is public knowledge that the FISP tender contracts for fertilizers are in multi-million dollars.

190. However, we make these comments only in passing because proof of price increase or other economic impact is not an ingredient in the *per se* prohibitions of the horizontal agreements in section 9 (1), as we have already determined. The Respondent's findings in respect of the subject matter were, therefore, though a matter of public interest, not a legal requirement. We, accordingly, find no basis for being called upon to determine the issue.

191. Finally, we deal with grounds 16 and 17.

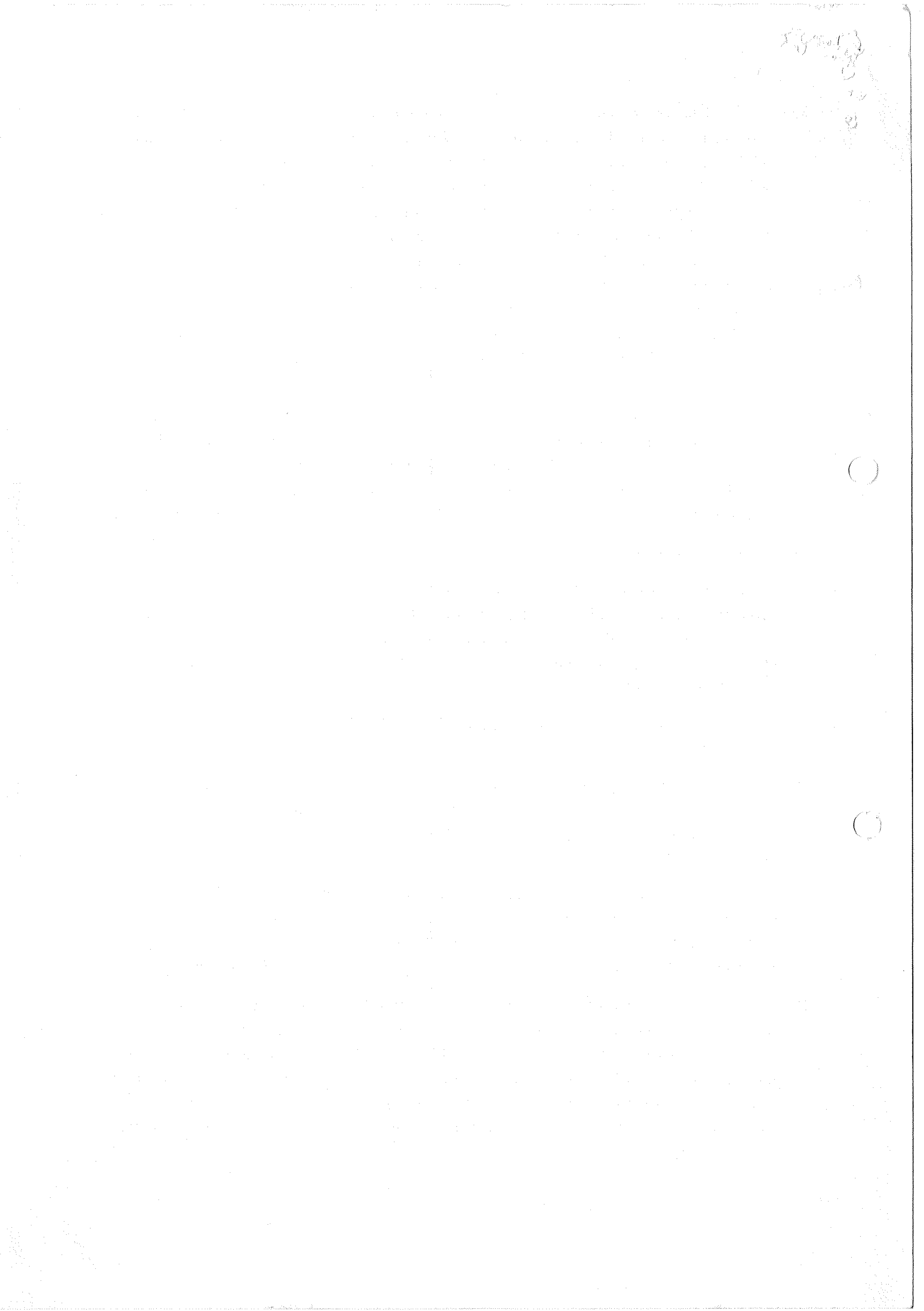
Ground 16: The Respondent erred in directing the Appellant to pay a fine of 5% of its annual turnover without, inter-alia, evaluating the relevant turnover which should form the basis for the fine and by failing to take into account various mitigating factors, including the nature, duration and extent of the alleged contravention of the Act and the market circumstances in which the alleged contravention took place;

Ground 17: The Respondent erred in directing that the Appellant be prosecuted in accordance with section 9 (2) of the Act;

192. Counsel for the Appellant have argued grounds 16 and 17 of appeal only in relation to ground 1. To recap, counsel's submissions hinge on the Appellant's position that the Respondent erred in finding that the Appellant violated section 9 (1) (a), (b) and (c) of the Act.

193. We note from the submissions that counsel for the Appellant have apparently abandoned the other reasons given for ground 16, i.e., that the Respondent failed *to take into account various mitigating factors, including the nature, duration and extent of the alleged contravention of the Act and the market circumstances in which the alleged contravention took place.*

194. Nonetheless, suffice it to state that we have already upheld the Respondent's findings in relation to violation of section 9 (1) (a), (b) and (c) of the Actand that the Respondent's guidelines relating to fines were first issued in 2014. The Act provides that the maximum fine is ten percent of the annual turnover. In this case, the fine imposed by the Respondent was 5% of the turnover. We see no mitigating factors and we bear in mind that cartel conduct is the worst form of anti-competitive behaviour. Accordingly, we see no reason to upset the fine.

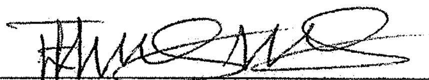


195. As for the direction that the appellant be prosecuted, the ground of appeal falls away in view of our having upheld the Respondent's decision in respect of section 9 (1) of the Act. In any case, we do not interfere with directions for criminal prosecution even where we reverse or vary a finding of violation of a non-criminal regulatory offence. The reason is that we have no criminal jurisdiction, so as to determine that a crime has not been committed. And our own decisions under the Act are subject to appeal and may be reversed. Therefore, where we reverse or vary a finding, and there is a direction by the Respondent that an appellant be criminally prosecuted, the discretion whether or not to proceed with criminal prosecution remains with the Respondent and ultimately the State.

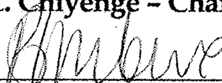
196. In the result, the appeal fails entirely, with costs for the Respondent.

197. Any aggrieved party may appeal this judgment within thirty days.

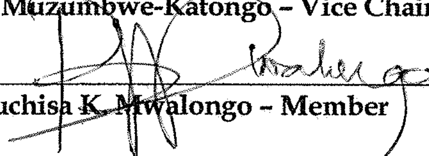
Delivered **at Lusaka** this 8th day of **December 2021**.



Mrs. Eness C. Chiyenge – Chairperson



Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson



Mr. Buchisa K. Mwalongo – Member