BLCS PMB 22/9/21

IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL HOLDEN AT LUSAKA

APPEAL NO. 2017/CCPT/005/COM

BETWEEN:

CM 10:00hrs

PANGAEA SECURITIES LIMITED **APPELLANT**

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION **RESPONDENT**

CORAM: Mr. Willie A. Mubanga, SC (Former Chairperson), Mrs. Eness C. Chiyenge (Chairperson), Mrs. Miyoba B. Muzunbwe-Katongo (Vice Chairperson) and Mr. Buchisa K. Mwalongo (Member)

For the Appellant: Mr. S.M. Lungu, SC, Mr. M. Musukwa and Mrs. T. Benn – Messrs. Shamwana and Company

For the Respondent: Mrs. M. B. Mwanza (Director, Legal & Corporate Affairs); Mrs. M. M. Mulenga (Manager, Legal & Corporate Affairs); and Ms. M. Mtonga (Senior Legal Officer) – Competition and Consumer Protection Commission

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NOTICE OF CORRECTION OF ACCIDENTAL ERROR IN TRIBUNAL JUDGMENT PURSUANT TO PRACTICE DIRECTION NO. 2 (2021)

TAKE NOTICE that an accidental error occurred when processing the judgment of the Tribunal in this appeal, whereby the word "buy" appearing twice in paragraph 110 (a) was erroneously inserted instead of the word "sell", the latter word being in line with the facts of the case as appear in the rest of the judgment on the subject of waiver of the LuSE and brokerage fees; that is, that the waiver occurred on the sell side.

TAKE FURTHER NOTICE that paragraph 110 (a) of the judgment IS HEREBY amended to correct the said accidental error, by replacing the word "buy" appearing twice with the word "sell".

Dated this 27th day of August 2021

Mrs. Eness C. Chiyenge – Chairperson

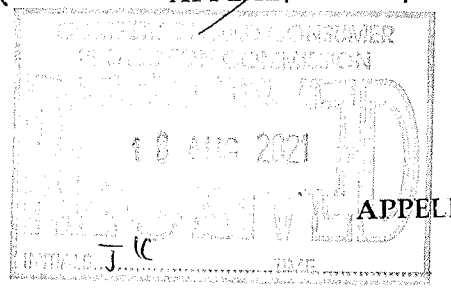
Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson

Mr. Buchisa Mwalongo - Member

DLCA 18/8/24

IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

APPEAL NO. 2017/CCPT/005/COM



BETWEEN:

PANGAEA SECURITIES LIMITED — APPELLANT

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

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

For the Appellant: Mr. S.M. Lungu, SC, Mr. M. Musukwa and Mrs. T. Benn – Messrs. Shamwana and Company

For the Respondent: Mrs. M. B. Mwanza (Director, Legal & Corporate Affairs); Mrs. M. M. Mulenga (Manager, Legal & Corporate Affairs); and Ms. M. Mtonga (Senior Legal Officer) – Competition and Consumer Protection Commission

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JUDGMENT

Legislation referred to:

1. The Competition and Consumer Protection Act No. 24 of 2010, sections 5 (l), 8, 9, and 16.
2. The Securities Act Chapter 364 of the Laws of Zambia, Second Schedule B and C (a)
3. The Securities (Conduct of Business) Rules, S.I. No. 168 of 1993, Rule 19.
4. The Securities (Licensing Fees and Levies) Rules, S.I. 165 of 1993 (as amended by S.I. 153 of 1995), Rule 12 (1).
5. National Pension Scheme Act Chapter 256 of the Laws of Zambia, sections 3, 4 and 5.

Cases referred to:

1. Insurers Association of Zambia and 15 Others v. The Competition and Consumer Protection Commission, 2018/CCPT/022/COM.
2. Societe Technique Miniere v. Maschinenbau Ulm Case 56/65 [1966] ECR 235, 249.
3. Haecht v. Wilkin Case 23/67 [1967] ECR 407.
4. Volk Vervaecke 5/69 [1969] ECR 295.
5. BAYER AG v. Commission (2000) ECR II-3382 paragraph 173.
6. Competition Authority v Beef Industry Development Society Ltd (C-209/07) Unreported November 20, 2008 (ECJ).
7. MTN Zambia Limited v. Competition and Consumer Protection Commission (Appeal No. 85 of 2019) 2021 ZMCA 41 (31 March 2021).

8. Atochem v. Commission Case T-3/89 [1991] ECR II -867, paragraphs 53-54.
9. Reinforcing Mesh Solutions (Pty) Limited and Vulcania v. Competition Commission and Others, (84/CR/DEC09) [2013] ZACAC 4 (15 November 2013
10. European Night Service *(Joined cases T-374/94, T-375/94, T-384/94 and T-388/94).*
11. T-Mobile (2009) ECR 1-4529.
12. Expedia Inc. v Autorité de la concurrence and Others (C-226/11) [2012] ECR.
13. Top Gear and Nine Others v. Competition and Consumer Protection Commission 2012/CCPT/003.

Other works referred to:

1. Richard Whish, Competition Law, 2nd Edition at page 250.
2. OECD paper on Prosecuting Cartels, 2006 without Direct Evidence DAF/COMP/GF 2006.
3. Black's Law Dictionary (9th edition) at page 1177.
4. AG Opinion in case C-209/07, paragraph 47, footnote 26.
5. EU Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101 of the Treaty (TFEU (2014)).

CHIYENGE, Chairperson, delivered the Judgment of the Tribunal

INTRODUCTION

1. This is our judgment on the appeal by Pangaea Securities Limited (hereinafter referred to as "the Appellant") against the decision of the Competition and Consumer Protection Commission (hereinafter referred to as "the Respondent") made on 20th December, 2016 wherein it determined that the Appellant and other stock brokers on the Lusaka Securities Exchange (hereinafter referred to as "the LuSE") violated sections 8 and 9 (1) (a) and (e) of the Competition and Consumer Protection Act No. 24 of 2010 (hereinafter referred to as "the Competition Act").
2. The delay in delivering judgment is regretted. We decided to rehear the appeal, acting in abundance of caution, to avoid Rule 31 (2) of the Competition and Consumer Protection (Tribunal) Rules, S.I. 37 of 2012 (the Tribunal Rules), which requires a decision of the Tribunal to be made within sixty days of hearing the appeal, being used as a ground of appeal. The delay has further been compounded by the Covid-19 pandemic which has had a negative impact on our efforts to efficiently conduct hearings and deliver our decisions. In addition, following the filing of the parties' submissions, in the process of preparing the judgment, we discovered that the Respondent's Record of Proceedings, including the Decision subject of appeal, had some missing texts. An Amended Record of Proceedings was filed on 9th August 2021.

BACKGROUND

Complaint, inquiries and investigations

3. Facts not in dispute are that by letter dated 22nd May 2015, the Chief Executive Officer of the National Pension Scheme Authority (hereinafter referred to as "the NAPSA"), which was buying 27% of government shareholding in ZCCM-IH on the LuSE, complained to the

Respondent against conduct of all the stock brokers operating on the LuSE, who included the Appellant. In NAPSA's view the conduct complained of warranted investigation and possible sanction for cartel behavior. The letter read (relevant parts):

"22nd May 2015

The Executive Director
Competition and Consumer Protection Commission
Fourth Floor, Main Post Office
Cairo Road
P.O. Box 34919
LUSAKA

COMPLAINT AGAINST STOCK BROKERS'S APPARENT CARTEL BEHAVIOUR

The above subject matter refers.

We write to register our complaint with you on the conduct of the stock brokers that are operating in Zambia on a transaction involving the sale down of the ZCCM-IH shares by the Government.

....

Normally, the capital markets transactions involve different players including brokers to put together a transaction that is transacted through the Lusaka Stock Exchange (LuSE). The Stock Exchange, Securities and Exchange Commission charge a fee in respect of brokerage and market commissions and there is a prescribed fee structure that guides the transaction fees. However, there is scope for negotiation of the fees.

In this regard the initial transaction involves the sale of 15,850,631 shares which NAPSA had negotiated a price with government and the transaction was scheduled to be concluded through the Stock Exchange. In view of the fact that the Authority had to manage its transaction fees and mindful of the size of the transaction; NAPSA engaged the Lusaka Stock Exchange and the Securities and Exchange Commission and to negotiate the fees and both institutions refused to grant any form of reduction in their fees.

The Authority also invited stock brokers to submit the respective fees that would apply should they participate in facilitating the transaction that had already been agreed between the seller and the buyer. NAPSA had capped its brokerage fee for this transaction at 0.125% but asked the respective bidders to indicate their proposed fee.

A number of brokers submitted their proposed fees for the transaction which ranged between 0.100% and 0.125% and based on this range, it was noted that the Authority could actually transact at the lowest fee.

The essence of transacting at the lowest fee level provides an opportunity to the Authority to manage the transaction costs which help in improving the investment returns for the members of the Pension Scheme.

NAPSA having noticed that since the bids were at different prices and would have liked to deal with all the brokers invited the brokers to a meeting to inform them about the results of the bids. The brokers were asked to indicate whether or not they would like to participate in this transaction at the lowest rate of 0.100% obtained from the market.

Regrettably, the stock brokers met in a closed door meeting and resolved to withdraw the quotes that they had submitted and have now threatened the conclusion of the transaction. Apart from meeting in a closed door meeting, the Competition Act of withdrawing a quote that was freely provided on account of a mass action is against market practice and warrants investigation and possible sanction for exhibiting cartel behavior which threatens the growth of the Zambian Capital Markets.

Attached are copies of related documents to assist with the investigation.

We thank you for your usual cooperation and support.

Yours faithfully,
NATIONAL PENSION SCHEME AUTHORITY

Charles Mpundu
DIRECTOR GENERAL

Cc. Secretary and Chief Executive, SEC
Chief Executive, LuSE"

(See letter at pages 3-4 of the Respondent's Record of Proceedings (RoP)) (italics ours)

4. In the course of the Respondent's inquiries and investigations that ensued, pursuant to section 55 of the Competition Act the Respondent obtained information in various forms, (including responses to specific questions, from the NAPSA, the LuSE, the Securities and Exchange Commission (hereinafter referred to as "the SEC"), and the stock brokers). The Respondent issued a Notice of Investigation together with an accompanying letter (dated 24th June 2015) to all the seven (7) stock brokers, including the Appellant. The other stock brokers were: Stockbrokers Zambia Limited; Madison Asset Management Limited; African Alliance Securities Limited; Equity Capital Resources Plc; Intermarket Securities Limited; and Finance Securities Limited.

5. In the Notice of Investigation to the stock brokers, the Respondent outlined salient parts of the NAPSA's complaint, namely; that the NAPSA had alleged that there was a transaction by Government to sell down 27% of its shareholding in Zambia Consolidated Copper Mines Investment Holdings Plc (hereinafter referred to as "the ZCCM-IH"). That the complaint alleged that the NAPSA negotiated with Government to buy shares and in order to manage transaction fees, the LuSE, the SEC and all stock brokers were engaged to negotiate commissions and brokerage fees for the transaction. That all stock brokers were invited to submit quotations on the possible fees they would charge for the transaction. That after noticing the differences in price of bids received, the NAPSA invited all the stock brokers to a meeting to announce bid results and inform them that they were going to offer business to all stock brokers who were willing to transact at a fee of 0.100% of transaction value which was the lowest of the bids received. Further, that after the meeting with the NAPSA, each stock broker met with other stock brokers where they agreed to withdraw bids and fix higher brokerage fees for the transaction.

6. The Respondent further alleged that it appeared (each of the said stock brokers and the LuSE, respectively) engaged in restrictive business practices in contravention of sections 8

and 9 (1) (a), (c) and (e) of the Competition Act. All the stock brokers responded to the allegations, denying the charge.

7. Later, on 17th June 2016, the Respondent issued a Notice of Investigation to the LuSE. The Respondent repeated much the same facts as those alleged in the Notice of Investigation issued to the stock brokers. The Respondent stated that it was alleged that the LuSE facilitated a waiver of LuSE, SEC and brokerage commissions on the sell side while refusing to grant a waiver on the buy side of the transaction. That it was also alleged that when some stock brokers withdrew their bids which they submitted when the NAPSA called for bids, they cited that they were going to have an emergency meeting with the LuSE. That in this regard, the LuSE coordinated and facilitated a platform for stock brokers to meet and discuss the brokerage commission that they were supposed to charge the NAPSA. The Respondent alleged that the LuSE had engaged in restrictive business practices, which conduct appeared to be in contravention of sections 8 and 9 (1) (a), (c) and (e) of the Competition Act. The LuSE responded denying the charge.

8. The Respondent also interviewed, prior to and after issuance of the said Notices of Investigation, representatives of the LuSE and the SEC, as well as representatives of the Appellant and other stock brokers that participated in the said meeting of 21st May 2015 held at the offices of the NAPSA.

(See the Notice of Investigation at pages 75 - 77 and at pages 409 - 410, and various other documents pages 39 - 215 of the RoP. See also minutes of various interviews conducted by the Respondent in the Supplementary Record of Proceedings filed on 4th August 2017)

9. Various correspondences between the NAPSA and the LuSE, and the SEC; between the Respondent and the LuSE, the SEC, and the stock brokers (including their Advocates) also constitute part of the RoP, and specifically part of the annexes to the four reports produced by the Respondent (the (preliminary) report of February 2016 (pages 217 - 306); Staff Paper of May 2016 (pages 307 - 408); and report of September 2016 (pages 418 - 515); and Staff Paper of November 2016 (pages 518 - 625)), which culminated in the Respondent's Decision subject of the appeal (pages 626 - 666, as amended by the Amended Record of Proceedings filed on 9th August 2021).

Relevant Market definition

10. The Respondent defined the relevant market relating to the subject matter in the following terms: (i) the product market is provision of brokerage services to institutional and individual investors at the LuSE; and (ii) the geographical market is the whole Zambia since provision of brokerage services is done throughout Zambia.

Respondent's findings and directives

11. The Respondent's (preliminary) report, and the September 2016 referred to above were availed to the stock brokers and the LuSE, respectively, and commented on before the matter was tabled before the Respondent's Board of Commissioners for determination. The comments were part of and annexed to the subsequent reports that culminated in the Decision subject of appeal. The findings in the various reports were consistent, save that, following conclusion of the investigations, in the report of September 2016 and Staff Paper of November 2016, the LuSE was exonerated. In conclusion, the findings of the

Respondent's Board of Commissioners, per its decision of 20th December 2016, were as follows:

(a) The Board established that the conduct by stock brokers to meet and discuss pricing of brokerage commission was consistent with the definition of an agreement under the Competition Act. The Board also found that the findings of the investigation of the meeting held at NAPSA on 21st May 2015 provided sufficient evidence that there was an agreement among stock brokers to withdraw bids after the price NAPSA offered was seen to be low. This conduct was found to have violated section 8 of the Competition Act.

(b) The Board established that the agreement by stock brokers to withdraw bids and attempt to reopen new negotiations with NAPSA via LuSE was a horizontal agreement as parties to the agreement were actual competitors in the relevant market. It was also established the horizontal agreement by stock brokers affected competition to an appreciable extent. It was further established that the agreement was a price fixing agreement to refuse a lower offer of brokerage commission offered by NAPSA and attempt to set higher brokerage commission via LuSE.

(c) The Board established that there was collective refusal to deal in, or supply, goods or services in the conduct by stock brokers to collectively withdraw bids with the intent to reopen new negotiations via LuSE. Further, the decision by stock brokers to collectively agree to withdraw bids had the object of preventing competition to an appreciable extent.

(d) The Board established that conduct by NAPSA to cap brokerage commission on the quotations from stock brokerage companies to 0.125% of transaction value did not violate any provisions of the Competition Act. This is because brokerage fees were negotiable and NAPSA was only negotiating to brokers depending on their budget. However, NAPSA's conduct of not awarding business to the winning bidder but instead attempted to split business equally to all stock brokers including those who did not submit bids was against industry best practice of tendering process.

(e) The Board established that although there was an agreement among stock brokers, LuSE was not party to the agreement which stock brokers made. It was further established that LuSE was not a party to the buyer's invitation for tender nor the discussions during and after stock brokers withdrew their bids.

12. The Board directed as follow:

(a) All stock brokers be directed to refrain from engaging in any anti-competitive agreements in future transactions.

(b) Stock brokers that submitted bids (African Alliance Securities, the Appellant, Equity Capital Resources and Intermarket Securities) be fined 3%of their respective annual turnovers for engaging in an anti-competitive agreement to withdraw bids and fixing prices for brokerage services which violated sections 8 and 9 (1) (a) and (e) of the (Competition) Act.

(c) Stock brokers that did not submit bids (Finance Securities, Stock Brokers Zambia and Madison Asset Management Company) be fined 2% of their respective annual

turnovers for participating in a meeting which resolved an anti-competitive agreement to withdraw bids for those that submitted and open new negotiations via LuSE a conduct which violated section 8 and 9 (a) and (e) of the (Competition) Act.

(d) LuSE be engaged in a compliance programme to raise awareness on anti-competitive agreements which may affect stock brokers in future transactions.

(See pages 111-113 of the Amended Record of Proceedings filed on 9th August 2021)

APPEAL AND HEARING OF THE APPEAL

13. The Board's decision was served on the Appellant on 25th January 2017 (see page 678 of the RoP). The Notice of Appeal filed on 20th February 2017, outline the grounds of appeal and the reliefs sought, all of which we deal with in the part of this judgment dealing with our consideration and determination of the appeal, under section (C). The Respondent also filed grounds in opposition of the appeal, which we also deal with later, likewise.

14. Following our initial hearing of the appeal, we conducted rehearing of the same, *de novo,* the circumstances of which we have explained at the outset in our introduction. The Appellant called two witnesses, that is, Ms. Tidale Mwale Chisunka **(AW1)** and Wendy Musamwa Gilazi Tembo **(AW2)**. The Respondent called one witness Shadreck Milezhi **(RW)**. We heard the witnesses on 28th September 2020, 29th September 2020 and 16th April 2021. We directed the parties to file their respective submissions, the last of which was filed on 4th June 2021.

15. However, in the course of preparation of the judgment, we discovered that the Record of Proceedings was incomplete. We issued an order pursuant to section 71 (1) (a) of the Competition Act, on 3rd August 2021, requiring the Respondent to file amendments in consultation with, and with the consent of, the Appellant. The Respondent filed the documents amending the Record of Proceedings on Monday 9th August 2021. Friday, the day after the general elections, being a holiday, resulting in a long weekend, we proceeded to deliver the judgment today.

CONSIDERATION AND DETERMINATION OF APPEAL

16. We are grateful to counsel on the both sides for their resourceful submissions, to which we refer as necessary in our determination of the appeal. We also refer to the oral evidence and documentary evidence before us, as appropriate. We have carefully considered the appeal. However, before we address our minds specifically to the grounds of appeal, we find it necessary to address issues raised generally and indirectly in this appeal, including in the parties' respective submissions.

17. In our consideration of appeals before us, we often find ourselves faced with issues that were not clearly dealt with or identified and determined in the processes before the (Respondent), or not properly or sufficiently addressed in counsel's arguments before the (Respondent) as well as ourselves. In our recent judgment in the case of the **Insurers Association of Zambia and 15 Others v. The Competition and Consumer Protection Commission, 2018/CCPT/022/COM (the Insurers case)**, we addressed three such (cross-cutting) subject matters before delving into the specific grounds of appeal.

18. *In casu*, we have identified two of the three issues we identified and dealt with in **the Insurers case**: (A) relevance of legislation and case law of foreign jurisdictions; and (B) legal and economic contexts of competition law within the Zambian jurisdiction. We accordingly deal with these issues before we deal with the grounds of appeal, which we do under section (C) of this part of the judgment.

(A) RELEVANCE OF LEGISLATION AND CASE LAW OF FOREIGN JURISDICTIONS

19. In **the Insurers case** in which, as *in casu*, the subject matter of the appeal rested primarily on the interpretation of sections 8 and 9 of the Competition Act, we had the following to say (which we quote extensively for full appreciation of the approach we have taken):

> *"27. The doctrine of in pari materia can, where applicable, be a useful aid to statutory interpretation. However, in interpreting legislation, other statutes or case law can only be considered to be in pari materia if they deal with the same subject matter on the same lines. Variations in the adaptation processes of enactments, for instance, take the earlier (adapted) enactments outside of the realm of pari materia. ....*
>
> *28. It is possible, nonetheless, that though the law to which foreign case law relates and the facts of the case itself may not be in pari materia with provisions of the Competition Act and facts of the case under consideration, there may be similarities between them that are so compelling as to make the case law a persuasive aid in our efforts to determine issues before us. Unfortunately, we often find that counsel make no or little effort to demonstrate that the relevant provisions of the Competition Act and the facts of the case under consideration are on all fours with, or the same in any material particular as, the foreign law and case law they seek to rely on. Unfortunately, this is the situation we find ourselves in presently with the result that, by and large, there is a lack of focus on what may arguably be relevant and persuasive in the Tribunal's efforts to resolve the issues before it. Of particular concern to us is Article 101 TFEU (including its subsidiary instruments) and the case law that has developed around the Article.*
>
> *29. We have observed that parts of the language of the prohibitions of restrictive agreements in sections 8 and 9 of the Competition Act are derived from Article 101(1) TFEU[1] and some related subsidiary instruments (regulations, rules and guidelines) made under provisions of the Treaty. However, the prohibitions in paragraph (1) are couched in general terms. The paragraph prohibits as incompatible with the internal market anti-competitive agreements between undertakings (i.e. enterprises), decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Furthermore, various details and notions such as those relating to categorizations like vertical agreements and concerted practices, and horizontal cooperation agreements, the "effect on trade" criterion, and concepts such as hardcore restraints and appreciability of restraints (i.e. restraints which may have a significant effect on trade between Member States) are to be found in subsidiary instruments, such as Commission Guidelines, which have evolved over time in the implementation and interpretation of the Article[2].The Article in paragraph (3) provides*

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[1] Article 81 of EC Treaty became Article 101 of the Treaty on the Functioning of the European Union with the entry into force of the Lisbon Treaty on 1 December 2009. Previously, Article 81 was Article 85.

[2] See, for example, Commission Notice on Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), Commission Notice on Guidelines on the application of Article 81 of the Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2). Paragraph 3 of the Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) states

exemptions to the prohibitions in paragraph (1) in specified terms, while details of how these are to be determined and applied are dealt with in subsidiary instruments made under the Treaty.[3] *The whole Article 101 reads:*

"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- *directly or indirectly fix purchase or selling prices or any other trading conditions;*
- *limit or control production, markets, technical development, or investment;*
- *share markets or sources of supply;*
- *apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- *make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promotingtechnical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."(Underline ours)

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that the existing guidelines on vertical restraints, horizontal cooperation agreements and technology transfer agreements(5) deal with the application of Article 81 to various types of agreements and concerted practices. And that the purpose of those guidelines is to set out the Commission's view of the substantive assessment criteria applied to the various types of agreements and practices. See also Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) as well as Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (2014/C 291/01).

[3] See, for example, Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08), various Commission Regulations such as Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices Official Journal L 102, 23.4.2010, p.1-7; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 11, 14.1.2011, pp. 1-72).

30. It is probably apparent by now, from what we have outlined above, that the interpretation of Article 101 TFEU is heavily governed by subsidiary instruments. Article 103 provides for regulations and directives giving effect to principles set out in Articles 101 (and 102) to be laid down by Council on a proposal by the Commission after consulting with the EU Parliament. Article 104 provides that prior to the coming into force of these instruments, the authorities in Member States are to rule on the admissibility of agreements, decisions and concerted practices in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph (3). Thus the approaches taken by the EU Commission and authorities in Member States in the interpretation of Article 101 TFEU have evolved with the development of these subsidiary instruments. In turn, the development of these instruments themselves has been influenced by the case law that has developed around the subject matters they deal with.

31. We take the view that in seeking to establish what elements, if any, of the Article and its subsidiary instruments and the related case law may be useful aids in the interpretation of sections 8 and 9 of the Competition Act, it is important to understand the similarities and differences between the wording of Article 101 TFEU and that of sections 8 and 9 of the Competition Act. We also need to remember that though some language of the Article's subsidiary instruments and EU case law has been incorporated into section 8 of the Competition Act in particular[4], the subsidiary instruments and the related case law are specifically tailored to the objective of provisions of the Article. Further, that these instruments and case law have been developed and applied to the Article at different times since the coming into force of the Article. The objective of the Article is to protect competition in the EU Community market. Therefore, an assessment of a restrictive object or effect of an agreement, decision or concerted practice in an internal market has to establish that it affects the Community market, apart from meeting other criteria, in order for it to be held as prohibited by the Article. We also note, for instance, that ***"Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82[5] of the Treaty"*** *provides for burden of proof in its article 2 that:* ***"In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or Association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."[6]*** *We also note that "**Guidelines on the application of Article***

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[4]Section 8 of the Competition Act has also borrowed language from subsidiary instruments relating to Article 101 TFEU, such as **"Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07)"** which contains the concept of appreciability in section 2.4.

[5] As earlier outlined, these Articles became Articles 101 and 102 in 2009.

[6] The burden of proof on the party invoking an exemption per paragraph (3) is repeated in paragraph 41 of the **"Guidelines on the application of Article 81(3) of theTreaty** *C 101, 27/04/2004 P. 0097 - 0118"*.Paragraph 43 of the Guidelines goes on to state that the assessment under Article 81(3) of benefits flowing from restrictive agreements is in principle made within the confines of each relevant market to which the agreement relates. Furthermore, paragraph103 states, ".... However, the fundamental objective of the assessment remains the same, namely to ascertain the overall impact of the agreement on the consumers within the relevant market. Undertakings claiming the benefit of Article 81(3) must substantiate that consumers obtain countervailing benefits (see in this respect paragraphs 57 and 86 above)." It is therefore apparent that evidence that is by adduced by claimants pursuant thereto is assessed to ascertain whether or not the conditions set by Article 101 (3) TFEU, which are cumulative, are met.

81(3) of the Treaty C 101, 27/04/2004 P. 0097 - 0118" make distinctions in the application of analytical assessments in relation to agreements (and decisions and concerted practices) that are restrictive by object compared to those that are restrictive by effect in the following terms:

> *"2.2.2. **The basic principles for assessing agreements under Article 81(1)***
>
> *17. The assessment of whether an agreement is restrictive of competition must be made within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions(20). In making this assessment it is necessary to take account of the likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand). Article 81(1) prohibits restrictions of both inter-brand competition and intra-brand competition(21).*
>
> *18. For the purpose of assessing whether an agreement or its individual parts may restrict inter-brand competition and/or intra-brand competition it needs to be considered how and to what extent the agreement affects or is likely to affect competition on the market. The following two questions provide a useful framework for making this assessment. The first question relates to the impact of the agreement on inter-brand competition while the second question relates to the impact of the agreement on intra-brand competition. As restraints may be capable of affecting both inter-brand competition and intra-brand competition at the same time, it may be necessary to analyse a restraint in light of both questions before it can be concluded whether or not competition is restricted within the meaning of Article 81(1):*
>
> > *(1) Does the agreement restrict actual or potential competition that would have existed without the agreement? ....*
> >
> > *(2) Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? If so, the agreement may be caught by Article 81(1). ....*
>
> *19. In the application of the analytical framework set out in the previous paragraph it must be taken into account that Article 81(1) distinguishes between those agreements that have a restriction of competition as their object and those agreements that have a restriction of competition as their effect. An agreement or contractual restraint is only prohibited by Article 81(1) if its object or effect is to restrict inter-brand competition and/or intra-brand competition.*
>
> *20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects (25). In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein(26).*

21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

22. The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. These factors include, in particular, the content of the agreement and the objective aims pursued by it. It may also be necessary to consider the context in which it is (to be) applied and the actual conduct and behaviour of the parties on the market(27). In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect. Evidence of subjective intent on the part of the parties to restrict competition is a relevant factor but not a necessary condition.

23. Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or identified as hardcore restrictions in guidelines and notices are generally considered by the Commission to constitute restrictions by object. In the case of horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers(28). As regards vertical agreements the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales(29).

24. If an agreement is not restrictive of competition by object it must be examined whether it has restrictive effects on competition. Account must be taken of both actual and potential effects(30). In other words the agreement must have likely anti-competitive effects. In the case of restrictions of competition by effect there is no presumption of anti-competitive effects. For an agreement to be restrictive by effect it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expested with a reasonable degree of probability(31). Such negative effects must be appreciable. The prohibition rule of Article 81(1) does not apply when the identified anti-competitive effects are insignificant(32). This test reflects the economic approach which the Commission is applying. The prohibition of Article 81(1) only applies where on the basis of proper market analysis it can be concluded that the agreement has likely anti-competitive effects on the market(33). It is insufficient for such a finding that the market shares of the parties exceed the thresholds set out in the Commission's de minimis

notice(34). Agreements falling within safe harbours of block exemption regulations may be caught by Article 81(1) but this is not necessarily so. Moreover, the fact that due to the market shares of the parties, an agreement falls outside the safe harbour of a block exemption is in itself an insufficient basis for finding that the agreement is caught by Article 81(1) or that it does not fulfil the conditions of Article 81(3). Individual assessment of the likely effects produced by the agreement is required.

32. Thus, the historical evolution of the subsidiary instruments on application of Article 101 TFEU has had a huge bearing on the development of the case law, in particular the burden and standard of proof expected of the competition authority concerned. One author on the implications of the evolution of the TFEU subsidiary instruments for interpretation of Article 101 TFEU gives an exposition on the treatment of the distinction between object and effect, some aspects of which we find factual, relevant and helpful ....[7]"

33. On the other hand, though the Competition Act provides for the development of regulations and guidelines to aid the implementation of provisions of the Competition Act[8], the regulations and guidelines developed so far do not relate to the two sections in any specific and comprehensive manner (though some aspects may in general terms be applicable to these sections; e.g. Regulation 3 of the Competition and Consumer Protection (General) Regulations, S.I. 97 of 2011 which provides for the determination of a product market (which incidentally also permits the adoption by the Commission of international best practices in so far as they are not inconsistent with the Competition Act and the Regulations and are practical to the Zambian situation)). Given this scenario of scarcity of local subsidiary instruments, recourse to foreign law, including case law, especially the EU competition law, to the extent relevant and necessary, may be helpful. Our view takes account of the fact that the conciseness of the two sections of the Competition Act lends itself to summary determinations in cases the facts and circumstances of which can be evaluated and conclusions can be drawn without the application of rigorous technical assessments. Sections 8 and 9 of the Competition Act state as follows:

> *"8. Any category of agreement, decision or concerted practice which has its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited.*
>
> *9. (1) 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 conditions;*

---

[7]Bruno Lebrun Thibault Balthazar, "**Definition of restrictions of competition by object: Anything new since 1966?**" on 06/07/2011 and seen on 31/03/2021 at 16:16 hours at https://iclg.com/cdr/expert-views/definition-of-restrictions-of-competition-by-object-anything-new-since-1966.

[8]See section 66, empowering the Minister, on recommendations of the Commission, to make regulations to provide for the manner in which investigations under Part VIII are to be carried out; section 84 empowering the Commission to make such guidelines are necessary for the better carrying out of provisions of the Competition Act and providing that such guidelines are binding on all persons regulated under the Competition Act; and section 87, empowering the Minister, on the recommendation of the Commission, to make regulations for the better carrying out of provisions of the Competition Act.

(b) divides markets by allocating customers, suppliers or territories specific types of goods or services;

(c) involves bid rigging, unless the person requesting the bid is informed of the term of the agreement prior to the making of the bid;

(d) sets production quotas; or

(e) provides for collective refusal to deal in, or supply, goods or services.

(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.

(3) An enterprise that contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.

34. Plainly, the ingredients of the prohibition in section 8 that need to be established are three, namely that: (i) there is an agreement, or decision or concerted practice (the definitions of "agreement" and "concerted practice" are in the Competition Act), (ii) that its object or effect, as the case may be, is the prevention, restriction or distortion of competition (iii) to an appreciable extent in Zambia. In the case of Article 101 TFEU, on the other hand, the ingredients are that (i) there is an agreement between undertakings, decisions by associations of undertakings or concerted practice, and (ii) it may affect trade between Member States, and (iii) its object or effect, as the case may be, is the prevention, restriction or distortion of competition within the internal market. But further than that, where there is a claim of an exemption per paragraph (3) and evidence that the cumulative conditions are met is presented by the claimant, an assessment is made accordingly[9].

35. Comparing the two scenarios, it is apparent that in the case of Article 101 TFEU, not only does it require assessments to establish that the agreement, decision or concerted practice has as its object or effect, as the case may be, prevention, restriction or distortion of competition within the internal market, but also that it may affect trade between Member States appreciably. And further, an accused party may seek to prove that it is exempted by paragraph (3), in which case a further assessment of the party's evidence has to be made accordingly. In the case of section 8, however, primarily, the assessment required is to establish whether there is an agreement, decision or concerted practice by object or effect, and once the restriction is established to be by object, the only evaluation required is whether the object is the prevention, restriction or distortion of competition to an appreciable extent in Zambia. Ultimately, therefore, the question we deal with in such a case is how (i) the existence of a restrictive agreement or decision or concerted practice, and (ii) the appreciability of its prevention, restriction or distortion of competition in Zambia are to be established. If on the other hand, the restriction is established not to be by object, a lot more is required in terms of economic evaluations, i.e. to establish whether it is so by effect, and if so whether the prevention, restriction or distortion of competition is to an appreciable extent in Zambia. And the ultimate question we have to deal with, likewise,

[9] With the introduction of "Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82[9] of the Treaty", once the prosecuting authority establishes the existence of the prohibited agreement prima facie per Article 101 (1), for it to be accorded an exemption per paragraph (3), the burden of proof is on the party invoking the exemption. Paragraph 43 of the "**Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 - 0118*" provides that an assessment to ascertain whether or not the conditions of paragraph (3) are met are carried out within the confines of the relevant market.

once it is established that the restriction is not by object, is how it may further be established whether it is so by effect and if so how it may be established whether the prevention, restriction or distortion of competition is to an appreciable extent in Zambia.

36. In the case of section 9 of the Competition Act, any horizontal agreement[10] 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. We note that the classifications are adaptations of the unexhaustive particularisation of agreements, decisions and concerted practices that are prohibited by Article 101 (1) TFEU, which have also been categorized under EU law (subsidiary instruments) as hardcore and, therefore, their treatment as restrictive by object and the presumption of their serious impact on competition.[11]

37. When Article 101 TFEU is compared with sections 8 and 9 of the Competition Act, the position of these two sections stands apart on a number of fronts, not only in what we have already outlined but in addition the following features of the Competition Act:

38. The prohibitions in both sections 8 and 9 do not in themselves provide exemptions that limit the scope of prohibited restrictive agreements. But a restrictive agreement to which all the parties are interconnected bodies corporate falling under a single economic unit is exempted per section 13. This exemption from the application of these sections, which is granted by the Competition Act itself, means that if during the Commission's investigations the corporate status of the parties to a restrictive agreement is found to be covered by section 13, automatically the agreement must be taken to be exempted from the application of sections 8 and 9 (and 10 and 12). Further, the Competition Act also in section 3 (3) makes certain exceptions from the application of the Competition Act, including "concerted conduct designed to achieve a non-commercial objective or similar purpose". We are of the view that the Commission in its investigations may by itself establish circumstances pointing to the existence of such an exception. Where an investigated party invokes such an exception, the Commission has to make an assessment to establish whether or not the exception applies. Sections 3 and 13, are of course, not in issue in the case under consideration; we merely wish to illustrate the point concerning exceptions and exemptions made by the Competition Act itself.

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[10] "Horizontal agreement" is defined by section 2 of the Competition Act as "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 the market".

[11] The categorisation of these restrictions (in both horizontal and vertical agreements) as hardcore means that they receive more severe treatment under the EU law, such as being blacklisted from block exemptions granted by the Commission and being treated as restrictive by object, with the result that they require no further assessment to establish that they affect trade between Member States per Article 101 (1), subject to the test of appreciability of affectation. See, for example, paragraphs 21, 22 and 23 of the "**Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 - 0118*". In the case of horizontal agreements, restrictions of competition by object include price fixing, output limitation and sharing of markets and customers, while for vertical agreements, these include includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales (See paragraph 23 and Notes 28 and 29).

39. We further note that the Competition Act separately provides for authorisation of a restrictive agreement by the Commission, on application by the parties to a restrictive horizontal or vertical agreement, under section 14, in circumstances where the specified threshold is met, together of supply or acquisition of thirty percent or more of goods or services of any description in a relevant market in Zambia, in the case of the former category of agreements or, in the case of the latter category, where individually a party supplies or acquires at either one of the two markets that are linked by the agreement, fifteen percent or more of the goods services of any description in a relevant market in Zambia. Such an authorisation may be granted for a restrictive agreement that could otherwise be caught by section 8 or 9 of the Competition Act. An application under section 14 is to be made in the prescribed form and manner.

40. Furthermore, an enterprise may apply to the Commission to be exempted from the prohibition determined as such by the Commission under section 12 of the Competition Act. (Section 12 gives power to the Commission to prohibit restrictive horizontal or vertical agreements other than that falling under section 8 (anti-competitive practice, agreement or decision), section 9 (horizontal agreements prohibited per se), or section 10 (vertical agreements prohibited per se), or any other agreement prohibited per se under the Competition Act -by a determination that (i) the agreement has the effect of preventing, distorting or restricting competition or substantially lessening competition in a market for any goods or services in Zambia; and (ii) the agreement is not otherwise exempted under the Part (Part III – Restrictive Business and Anti-Competitive trade Practices)). The application for exemption from the application of section 12 is required to be made in the prescribed manner and form upon payment of a prescribed fee under sections 18, and according to section 19 where such an application is made, the Commission shall grant an exemption to an agreement that contributes to, or is likely to contribute to, or result in-

(a) maintaining or promoting exports from Zambia;
(b) promoting or maintaining the efficient production, distribution or provision of goods and services;
(c) promoting technical or economic progress in the production, distribution or provision of goods and services;
(d) maintaining lower prices, higher quality, or greater choice of goods and services for consumers;
(d) promoting the competitiveness of micro and small business enterprises in Zambia ; or
(e) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, or is likely to result, from the agreement.

And the Commission may grant the exemption subject to such conditions and for such period as it considers appropriate. Where the Commission declines to grant the exemption, it is required to inform the applicant and give reasons therefor. The Commission may amend or revoke such an exemption.

41. The Commission may also grant an exemption from prohibition, under section 12, of rules of a professional Association which contain a restriction that has the effect of lessening competition in a market. This is according to section 22. The application is required to be made in the prescribed manner and form upon payment of a prescribed fee.

42. The distinctions we have outlined in the foregoing paragraph further contribute to the position that the level or depth of assessments required in the case of sections 8 and 9 of the

Competition Act cannot be expected to be the same as assessments under Article 101 TFEU. In fact, all the distinctions we have identified in our discussion of the subject under consideration could well apply to other competition laws, including case law, of other jurisdictions depending on relevant factors as may apply to the circumstances of each case.

43. In light of above considerations, we conclude on this aspect of our judgment that recourse to foreign case law, especially EU competition law, to the extent relevant, may be a helpful aid in the Tribunal's interpretation of sections 8 and 9 (as indeed other provisions of the Competition Act) and the application of these provisions to cases before the Tribunal. In particular, reliance thereon ought to take into account, as may be appropriate, (i) similarities and/or differences in the provisions of the Competition Act on the one hand and those of the foreign law on the other;(ii) the particular facts and circumstances of the case before the Tribunal, including the national economic and legal context; and (iii) the evolution of the foreign case law and, in the case of the EU case law in particular, the subsidiary instruments that have shaped it and vice versa. We shall accordingly be guided in our consideration of the specific grounds of appeal and counsel's arguments."

20. *In the present case, we also find that the underlying question of the relevance of, and rationale for relying on, legislation and case law of foreign jurisdictions were not properly or adequately articulated by the parties in the processes before the Respondent and in counsel's arguments before us. We accordingly derive guidance from the approach we took in the Insurers case, which we have outlined above, in determining matters with such implications. In short, we are guided that recourse to foreign case law, especially EU competition law, to the extent relevant, may be a helpful aid in the Tribunal's interpretation of sections 8 and 9 (as indeed other provisions of the Competition Act) and the application of these provisions to cases before the Tribunal. In particular, reliance thereon ought to take into account, as may be appropriate, (i) similarities and/or differences in the provisions of the Competition Act on the one hand and those of the foreign law on the other;(ii) the particular facts and circumstances of the case before the Tribunal, including the national economic and legal context; and (iii) the evolution of the foreign case law and, in the case of the EU case law in particular, the subsidiary instruments that have shaped it and vice versa."*

21. In light of the position we have taken, as demonstrated in our foregoing discussion of the subject of relevance of foreign legislation and case law, we are of the firm view that counsel for the Appellant have incorrectly asserted and implied in their submissions that the wording of Article 85 (1), (which is now Article 101 (1), TFEU) is couched exactly as section 8 of the Competition Act, and thus suggesting that that paragraph of the Article and the case law developed around its interpretation are in *pari materia* with section 8 of the Competition Act.

22. We also find inaccurate counsel for the Appellant's argument that *"the principle of appreciability of restrictive practices applies equally to horizontal agreements whose objects or effect is to prevent competition, thus, even horizontal restraints of a clearly competitive nature could fall outside because of their diminutive nature."* In our analysis above of the differences between Article 101 (1) TFEU and the subsidiary instruments that have shaped its interpretation, on the one hand, and sections 8 and 9 of the Competition Act, on the other hand, we have repeated what we stated in the **Insurance case** that:

"In the case of section 9 of the Competition Act, any horizontal agreement[12] *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. We note that the classifications are adaptations of the unexhaustive particularisation of agreements, decisions and concerted practices that are prohibited by Article 101 (1) TFEU, which have also been categorized under EU law (subsidiary instruments) as hardcore and, therefore, their treatment as restrictive by object and the presumption of their serious impact on competition.*[13]*"*

(B) LEGAL AND ECONOMIC CONTEXTS OF COMPETITION LAW WITHIN THE ZAMBIAN JURISDICTION

22. Legal and economic contextual issues often arise, directly or indirectly, in relation to allegations of contravention of sections 8 and or 9 of the Competition Act and indeed other provisions of the Competition Act. For example, various correspondences on the subject of the ZCCM-IH share purchase transaction, some of which were intended to justify or defend the conduct complained of raise some legal and economic contextual issues. The facts of the case and the evidential material presented to the Respondent and laid before us also raise economic contextual issues with respect to the roles played by, or conduct of, institutions such as the LuSE, the SEC, the Industrial Development Corporation (the IDC) and the ZCCM-IH in the collective negotiation of the fees chargeable by the LuSE and the stock brokers, and their implications for proper functioning of normal competition, if any, per the Competition Act.

23. We, for example, quote some correspondences by the SEC, in which the capital markets regulator stated as follows (quoting only aspects related to the legal and economic context):

"SEC/FD/REG/8

27th May, 2015
Mr. Brian Temb,o
CEO - LuSE

Mr. Caesar Siwale,
CEO - Pangea

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[12] "Horizontal agreement" is defined by section 2 of the Competition Act as "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 the market".

[13] The categorisation of these restrictions (in both horizontal and vertical agreements) as hardcore means that they receive more severe treatment under the EU law, such as being blacklisted from block exemptions granted by the Commission and being treated as restrictive by object, with the result that they require no further assessment to establish that they affect trade between Member States per Article 101 (1), subject to the test of appreciability of affectation. See, for example, paragraphs 21, 22 and 23 of the "**Guidelines on the application of Article 81(3) of the Treaty** *C 101, 27/04/2004 P. 0097 - 0118*". In the case of horizontal agreements, restrictions of competition by object include price fixing, output limitation and sharing of markets and customers, while for vertical agreements, these include includes, in particular, fixed and minimum resale price maintenance and restrictions providing absolute territorial protection, including restrictions on passive sales (See paragraph 23 and Notes 28 and 29).

Mr. Nathan De Assis,
CEO – ECR

Mr. Chanda Mutoni,
CEO – Stockbrokers Zambia
Ms. Busiwa Kaira,
Intermarket

Mr. Mataka Nkhoma,
CEO – African Alliance

RE: GOVERNMENT DISPOSAL OF SHARES TO ZCCM-IH

We have received a complaint from NAPSA regarding fees payable on the government disposal of shares. It is our understanding from NAPSA's position that the market is colluding in negotiating the fees payable by NAPSA on this transaction.

In order to resolve and ensure that this transaction is concluded without inconveniencing the seller (GRZ) the SEC has convened a meeting to take place today at 14:30 hours at the SEC offices.

Yours faithfully,
(Signed)

Phillip K. Chitalu
SECRETARY AND CHIEF EXECUTIVE"[14]

"SEC/CE/GEN/27

28th May 2015

Mr. Charles Mpundu
Director General
NAPSA
....
LUSAKA

RE: COMMISSION ON THE ZCCM-IH SHARE PURCHASE"

....

Thank you for bringing to our attention the matter relating to commission fees chargeable for the buy side on the ZCCM-IH transaction. Following the subsequent meeting held at our offices yesterday, which meeting was essentially aimed at reaching an amicable way forward between yourselves and the Lusaka Stock Exchange brokers, we can confirm that the stockbrokers' final position was to reiterate their current offer for a reduced fee at 0.3125%, which represents approximately 70% discounts against the maximum rate of 1%. The brokers have further indicated their willingness to apply discounts on commissions relating to NAPSA's future

[14] The letter was copied to Mr. Charles Mpundu – CEO NAPSA.

transactions and effectively NAPSA will be accorded the desired fee of 0.1%, albeit spread over the imminent ZCCM-IH transaction and future transactions. In this regard, the stock brokers are requesting NAPSA management to seek board approval of the foregoing counter offer, which is considered more equitable from an economic perspective.

We understood from the meeting that the earliest the approving committee would meet is 4th June 2015. We therefore wait to hear from NAPSA in this regard.

You will appreciate that as regulator of capital markets, it is in our interest to ensure that the markets are operating in a fair and transparent manner. While the SEC's mandate does not extend to regulation of pricing of licensees in the capital markets, we would like to place on record that we were compelled to convene the meeting with both parties given our concern about the persisting delay in the finalization of the GRZ sale down.

It is our sincere hope that this matter can be resolved in the shortest possible time.

Yours Sincerely,
(Signed)

Phillip K. Chitalu
SECRETARY AND CHIEF EXECUTIVE"[15]

(see pages 26 – 27 of the RoP and the NAPSA's response dated 29th May 2015 at pages 28 – 29, reproduced below)

"(SEC/CE/GEN/2015

1st June, 2015

Mr. Charles Mpundu
Director General
National Pension Scheme Authority
LUSAKA

Dear Mr. Mpundu,

COMMISSION ON ZCCM-IH SHARE PURCHASE

We refer to your letter of 29th May 2015. We wish to respond as follows:

Proposal of 0.3125% as commission

In your letter, you appear to suggest that SEC is proposing that the transaction goes through with the brokers charging 0.3125%. However, in our letter addressed to you and copied to the brokers for transparency purposes (here enclosed for ease of reference), we are merely communicating the broker's (sic) position. We reiterate that this is the same position we were trying to bridge in the meeting attended by Mr. David Chewe where NAPSA appeared not to be willing to negotiate beyond the 0.1% commission rate while the brokers had indicated that they

[15] The letter was copied to the CEO of the LuSE and to the Appellant and the other six stock brokers.

could actually negotiate the terms. We had also deliberately indicated to all parties from the outset that our role was not to negotiate fees on behalf of either NAPSA or the brokers but that our role was to ensure that the seller was not inconvenienced through the actions of NAPSA and/or the brokers.

Waiver of fees

Our Act, the Securities Act and in particular Section 12 of the Securities (Fees and Levies) Schedule gives the Commission powers to waive part or all of the fees as they deem fit. In exercise of these powers, the Commissioners did not however direct the market to waive fees due on the seller's side as Commissioner's (sic) mandate on fees is limited to Commission business, which does not include the waiver of fees by the LuSE or the brokers.

Reference to your 4th June 2015 meeting

We made reference to this meeting as we were made to understand that NAPSA could only possibly consider the payment of fees at a different rate other than 0.1% at the next NAPSA Board meeting. It had been indicated by Mr. Chewe that this would take place on the 4th of June 2015 at the earliest.

Investor Protection Role

For the record, our involvement in this matter was primarily ncessitated by Mr. Chewe's visit to the Commission wherein he alleged the unbecoming situation regarding the ZCCM-IHC transaction. Therefore, as regulator of capital markets, it was in our interest to ensure that markets are operated transparently, fairly and orderly. In our view, therefore, meeting both yourselves and the brokers was the best way forward in the matter and our motive was purely to resolve the impasse on the ZCCM-IHC transaction.

Finally, we regret your comments regarding the need for the SEC to start doing that which it is set up to do. We would like to assure NAPSA that our stepping into this matter, in a bid to ensure that the ZZCCM-IH transaction is not jeopardized, is within our mandate as SEC.

Yours sincerely,
(Signed)

Phillip K. Chitalu
SECRETARY AND CHIEF EXECUTIVE"[16]

(See letter at pages 32 – 33 of the RoP and the letter from the NAPSA dated 29th May 2015, quoted below, to which this is the response)

24. Similarly, the LuSE and the IDC in their correspondences wrote:

"28th April, 2015

Chief Executive Officer
Industrial Development Corporation Limited
....
LUSAKA

[16] This letter was copied to the Secretary to the Treasury – Ministry of Finance; CEO – LuSE; and CEO – CCPC.

Dear Sir,

RE: SELL DOWN OF GOVERNMENT CLASS "B" SHARES IN ZCCM-IH

We refer to the above captioned subject matter and our letter and our letter dated 20th April, 2015. Accordingly, the LuSE Board met today, the 28th April, 2015. The understanding of the Board in this matter is as follows:

That the Minister of Finance/GRZ through the Industrial Development Corporation (IDC), has requested the LuSE to facilitate the placement of all its Class B shares in ZCCM-IH into the CSD and further, has sought that trading in the said B shares commence, through the LuSE, to Zambian citizens and eligible Zambian institutional investors as a preferential offer in the shortest possible way of a sell down by GRZ.

GRZ intend the Class B shares to be sold in two tranches:

The 1st tranche is valued at US$100 million and the residue or 2nd tranche is also valued at US$100 million. The request by the GRZ/IDC is for the LuSE to allow, by waiver, the trade of B shares by GRZ /IDC, under tranche 1, without the application of all SELL SIDE fees (LuSE, SEC and Brokerage fees). The BUY SIDE commissions will not be affected /involved in the request for a waiver of fees as sought for the SELL SIDE;

Tranche 1 will involve the GRZ/IDC as SELLER and NAPSA as BUYER for a volume of approximately US$100 million in value;

Once Tranche 1 is closed, t he balance of the ZCCM-IH "B" shares held by the GRZ/IDC will remain deposited in the LuSE CSD and it was expected that expected that the LuSE and its players/brokers would engage the IDC on how to release these shares to the Zambian public without any waivers on fees. The IDC was also prepared to offer some ideas and suggestions on possible ways to create an active market in the B shares that will remain in the CSD after Tranche 1 trade is closed.

The IDC appreciated the fact that a waiver of fees, as requested, would represent a loss of revenue and lost opportunity for income for the LuSE. The IDC, however, hoped that the LuSE would on the other hand perceive the waiver as an investment to deepen the LuSE with ZCCM-IH shares and provide a foundation for active future trading in ZCCM-IH shares on the LuSE;

The IDC also informed the LuSE that they had already met the SEC, in regard to the waiver of trade fees on tranche 1.

The Board therefore RESOLVED that they had no objection to the request, for the waiver of fees by the LuSE and the Brokers for the tranche 1 sell down of GRZ Class B shares in ZCCM-IH provided that it was acknowledged by both parties that:

(a) the waiver was given on a one-off basis and any subsequent transactions by GRZ/IDC would attract the relevant fees and trade commissions;

(b) in tranche 1 GRZ/IDC will issue instructions to the LuSE CSD to transfer the shares from its custodian account equally to all Brokers who will facilitate the sell side at no charge;

(c) tranche 2 of the GRZ sell down in ZCCM-IH would be effected via the LuSE and that all the Brokers existing at the time, will have equal participation in the SELL side of this transaction without a waiver of fees;

(d) *in consideration of the waiver, GRZ/IDC should further support the deepening of the Capital Markets by ensuring that it offloads part or all of its investments in State Owned Enterprises and other companies or encourages State Owned Enterprises to raise capital on the Exchange.*

Kindly acknowledge the above.

Yours faithfully,
(Signed)

Brian Tembo
CHIEF EXECUTIVE OFFICER"

(See letter at pages 60 - 61 of the RoP)

"REF/IDC/CEO/SDCBS -ZCCM-IH-16215

12th June 2015

Mr. Alfred J Lungu
Board Chairman
Lusaka Stock Exchange
LUSAKA

Dear Mr. Lungu,

RE: SELL DOWN OF GOVERNMENT'S CLASS "B" SHARES IN ZCCM-IH

We wish to confirm receipt of a letter dated 28th April 2015 from Mr. Brian Tembo, Chief Executive of the Lusaka Stock Exchange ("LuSE") in which the decision of the LuSE Board in regard to the above subject matter was conveyed to us.

We note that the LuSE Board positively considered the request by IDC on behalf of the Minister of Finance, for LuSE to facilitate the placement of all GRZ Class B shares in ZCCM-IH into the CSD and that trading of these shares commence through LuSE to Zambian citizens and eligible Zambia institutional investors as a preferential offer in order to actualize the GRZ policy f economic empowerment of the Zambian citizenry through broad and wider ownership of shares. The LuSE Board also accepted the request by IDC on behalf of GRZ for a full waiver of all transaction fees on the SELL side in regard to the first Tranche of shares to be sold to NAPSA on pre-matched basis.

We have also taken note of the conditions given by the LuSE Board, among which is the request that GRZ/IDC should in turn further support the deepening of the Zambian capital market by divesting some of its investments in SOEs via the LuSE market and also encouraging SOEs to raise long term capital on the Exchange.

On behalf of the Honourable Minister of Finance, we wish, through you Sir, to extend Government's gratitude to the Board of LuSE for taking a broad and long term view and recognizing the positive benefits that the sell down by GRZ of its B shares in ZCCM-IH will have in stimulating the growth and development of the Zambian Capital Market and accordingly granting a waiver of the SELL side fees on the first Tranche of Shares to be traded on the Exchange.

Yours sincerely,
INDUSTRIAL DEVELOPMENT CORPORATION ZAMBIA LIMITED
(Signed)
ANDREW CHIPWENDE
CHIEF EXECUTIVE OFFICER"[17]

25. The LuSE in their letter responding to the Notice of Investigation confirmed the aforesaid circumstances surrounding the offer and acceptance to waive the LuSE and the brokerage fees on the seller-side of the transaction. The LuSE inter alia said, referring to the prior arrangement that NAPSA reneged on, *"This is why when some of the brokers could not agree with the Buyer on the level of commission to charge they withdrew and the Seller subsequently instructed the LuSE to move shares initially allocated to all the brokers to the broker who the Buyer had instructed to represent them – Pangea Securities."* This is in the letter at pages 623-625 of the RoP, Annex 11 to Staff Paper, November 2016. We note that in the letter from the six brokers to the CEO of ZCCM-IH, dated 4th June, 2015, the said brokers released the shares that had been split among them all, stating in part:

> *"We wish to advise that considering the circumstances that we find ourselves in we are unable to sell our allocation of the shares to the pre-matched buyer who is NAPSA. This is because NAPSA has declared that they will only use one broker on the buy side. We believe that this is against the good spirit in which you equally apportioned the ... shares and our understanding that all the member brokers would be able to participate on the buy side the transaction which is currently not the case and as such we can't proceed with the transaction at no economic benefit.*
>
> *We therefore wish to request that the shares are transferred from our respective brokerage accounts and deposited back into your Custodial account held at the LuSE CSD for your further instructions.*
>
> *We wish to thank you for considering our firms in this transaction and we look forward to working together on the Tranche 2 sell down of ZCCM-IH."*

26. Further, the LuSE and the NAPSA in their various correspondences on the subject matter of this appeal wrote:

> "7th May, 2015
>
> *The Chief Executive Officer*
> *Lusaka Stock Exchange*
> ....
> ....
> ....
> ....
> *LUSAKA*
>
> *Dear Sir,*
>
> *RE: COMMISSION ON THE ZCCM-IH SHARES*

[17] The letter was copied to the Minister of Finance; and CEO – ZCCM-IH.

Further to our discussions yesterday and in view of the large size of the imminent ZCCM-IH share sell-down and as one of the major intended buyers of the shares, we write to request that you consider a reduction in the commission to be applied on the buy side from 0.25% to below 0.125%.

As you would appreciate, the sell down will be the largest single transaction that the LuSE will be experiencing and you stand to benefit not just doing the initial transaction but through future secondary trades that will be taking place.

We remain committed to supporting the growth of the capital markets and await your confirmation of the reduction at the earliest to enable us make further decisions on the transaction.

Yours faithfully
NATIONAL PENSION SCHEME AUTHORITY
(Signed)

Charles Mpundu
DIRECTOR GENERAL"

(See letter at page 65 of the RoP)

"11th May 2015
Mr Charles Mpundu
Director General
National Pension Scheme Authority
....
....
....
LUSAKA

Dear Sir,

RE: COMMISSION ON ZCCM-IH SHARES

Reference is made to the above captioned subject and to our email of 8th May, 2015 on the same matter.

We wish to reiterate our position we had given in the meeting of the 6th May, 2015 in your board room that the LuSE Boaed would not give any waivers on commission charges on the buy-side in the negotiated transaction which was envisaged to involve the minister of Finance as seller and NAPSA as buyer.

It was our understanding in that meeting that NAPSA was comfortable with a fifty percent (50%) discount on overall commission on this transaction. For the avoidance of doubt this worked out to 0.6875% which is half of the guide total commission of 1.375%. We did state that the LuSE and SEC component of this commission which totaled 0.375% would be unchanged resulting in the broker component being 0.3125. Further, we did inform the meeting that we assumed a facilitator role given the urgency and importance of the intended Tranche 1 sell-

down-down by the Minister of Finance of part of the Government's Class B shares in ZCCM-IH. As such, the brokers would have no issue with their portion of the commission charge.

NAPSA was therefore granted the total buy-side commission rate of 0.6875% representing the desired 50% discount and should therefore proceed to trade.

Yours faithfully
(Signed)

Brian Tembo
CHIEF EXECUTIVE OFFICER"

(See letter at page 66 of the RoP)

"26th May, 2015

Mr. Charles Mpundu
Director – General
National Pension Scheme Authority
....
....
....
LUSAKA

RE: COMMISSION ON THE ZCCM –IH SHARE PURCHASE

We refer to the above captioned subject matter, our letter to yourselves dated 11th May 2015 and your letter to the LuSE brokers dated 19th May 2015.

We have noted with concern the unsettledness that seems to have recently surrounded the buy-side of the sale of the Government of the Republic of Zambia's Class "B" shares in ZCCM – IH Plc. As facilitator of this transaction, we had, in our earlier letter, given the position concerning the total commission payable, which we had stated would not exceed 0.6875% of the value of transaction. We had further broken down this block commission as 0.375% being due to the SEC and the LuSE, while 0.3125 would be the commission due to the brokers.

In appreciation of the special nature of this transaction, it was agreed that NAPSA would spread the buy instruction equally among the seven (7) existing LuSE brokers. Therefore the attempt by NAPSA to obtain quotations from the individual brokers and cap the commission chargeable to a maximum of 0.125% went against what had been agreed to with the LuSE as facilitator.

We have been advised by the brokers that had responded to your request for quotations, that they have since withdrawn those quotations. We therefore wish to reiterate our position and that of the LuSE brokers as reflected in our aforementioned letter, that commissions due to the brokers shall be 0.3125% of the transaction value. This represents a discount of almost 70% on the guide commission payable in an ordinary transaction in addition to the 10% discount on the price of the ZCCM-IH shares which has already been extended to NAPSA. It is thus our hope that you will observe the terms upon which this transaction was facilitated as aforesaid so as not to delay the process any further.

Yours faithfully,
(Signed)

Brian Tembo
CHIEF EXECUTIVE OFFICER"[18]

(See letter at pages 19 - 20 of the RoP)

"29th May 2015

Mr. Charles Mpundu
Director - General
National Pension Scheme Authority

....
....
....
....
LUSAKA

RE: COMMISSION ON THE ZCCM-IH SHARE PURCHASE

We refer to the above captioned matter and have taken note of the contents of your letter dated 29th of May 2015. We were of the view that the current status of this matter is as communicated to you by the Commission in their letter dated 27th May, 2015. The said letter offered guidance regarding this matter.

However, we would like to clarify a few issues raised in your letter as follows:

The communication to you in respect of the brokerage was given on the basis of the mandate that we were given by the brokers in this matter. The LuSE, just like the SEC, merely acted as intermediaries for good order. We do not regulate commission rates for brokers. We are also desirous of seeing this transaction executed as quickly as possible. This is why we met with NAPSA and ZCCM-IH on 6th May 2015.

Notwithstanding the letter from the commission, if NAPSA, at this stage, has given Pangea Securities the entire BUY order, we would have no mandate to direct how Pangea would proceed in this transaction. Further, it should be understood that the role of the LuSE is to merely offer the trading platform for the trading of the securities and therefore we cannot be directed by yourselves as proposed, to move the shares already sitting in the individual broker accounts to Pangea, as that instruction can only come from ZCCM-IH who directed that they be deposited equally among the brokers. If Pangea is the buying broker as you indicate in your letter they have to match the BUY order with the selling brokers.

In addition, kindly be advised that only ZCCM-IH, as vendor on behalf of GRZ, can direct us to move the shares back to the GRZ custodial account and then to Pangea Securities if it now the intention to have Pangea handle both BUY and SELL sides.

Yours faithfully,

(Signed)

Brian Tembo

CHIEF EXECUTIVE OFFICER"[19]

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[18] This letter was copied to the CEO - SEC; the CEO - ZCCM-IH; the Appellant and all the other six stock brokers.
[19] This letter was copied to the Secretary to the Treasury - Ministry of Finance; CEO - SEC; the Executive Director - CCPC; CEO - ZCCM-IH Plc; the Appellant and the other six stock brokers.

(See letter at pages 30 - 31 of the RoP)

27. The NAPSA in its various correspondences wrote:

"29th May 2015

Mr. Brian Tembo
Chief Executive Officer
Lusaka Stock Exchange
...
...
LUSAKA

Dear Sir,

RE: COMMISSION ON ZCCM -IH SHARE PURCHASE

We acknowledge... receipt of your letter dated 26th May 2015 ....
....

It is regrettable that the transaction was delayed and cannot be concluded due to misunderstanding on the commission payable. When you attended the meeting at our offices, we made it very clear that waiving of fees on the seller's side was an unfair act by the Securities and Exchange Commission (SEC), Lusaka Stock Exchange (LuSE) and the brokers. We further made it very clear that we will also be seeking either a waiver or a reduction in the commissions payable which in total should not exceed 0.5% in total given the size of the transaction. You kept insisting that SEC and LuSE fees should be paid in full and we could pay 0.3125% to the brokers which we categorically declined and indicated that LuSE would actually be benefitting twice given that LuSE is controlled by the same brokers and it was up to ourselves to negotiate the best possible rate for NAPSA.

As you may be aware NAPSA has a custodial responsibility over members' funds and should at all times act in the best interest of the beneficiaries. One of the objectives of the Authority is to manage the transaction costs associated with its investments and in this light, when we wrote to you to ask for a reduction; we had that objective in mind in view of the size of the transaction and also in ensuring that there was fairness and equity in the treatment of buyers and sellers by the exchange."

You wrote in your letter that you guided what the Commission rate should be but if your (sic) recall, the position the Authority had taken was that is that th commission fees should still be negotiated and not dictated by yourselves as LuSE. We would like to reiterate that in the meeting we challenged you to consider a reduction in the commission rate payable to both SEC and LuSE and we indicated to you that we would negotiate the commission rate with the brokers and the alternative was for you to re-apportion the fees amongst yourselves provided the total cost did not exceed the maximum of 0.5% that we are willing to pay.

You therefore could not expect the Authority to be bound by your unilateral position of 50% of the standard fees which was not supported. We are of the opinion that the practice of not allowing negotiated fees on this special transaction sets a very bad precedent would be counterproductive and would not support the growth of the Capital Market.

With regard to the action by the brokers to withdraw their bids in the range of 0.1% to 0.125% which were freely provided, please note that apart from showing an unprofessional conduct; this act also borders on cartel behavior which warrants investigation by the Competition and Consumer Protection (CCPC) Commission. Further, your support of such a negative act by the stock brokers and owners of the Stock Exchange does not inspire confidence and discipline in the Capital Market and this will have a long term negative ramifications which are not good for the market.

We note that you are urging us not to delay the transaction. Please note that the buy order has been given to Pangea Securities and it is up to the brokers and yourselves to execute the transaction today without further delay. Our understanding was that the shares were apportioned among various brokers, it is thus imperative that you move all the shares into Pangea account to enable the full transaction for the 15.8 million to take place today.

....

Yours faithfully
NATIONAL PENSION SCHEME AUTHORITY
(Signed)
Charles Mpundu
DIRECTOR GENERAL"[20]

(see pages 24 – 25 of the RoP).

"29th May 2015

MrPhillip K. Chitalu
The Secretary and Chief Executive Officer
Securities and Exchange Commission of Zambia
....
....
LUSAKA

Dear Sir,

RE: COMMISSION ON ZCCM-IH SHARE PURCHASE

Reference is made to your letter of 29th May 2016 (sic) under reference number SEC/CE/GEN/27 on the above.

We write to indicate that we are not in agreement with your proposal that we proceed with your fee of 0.3125%. We note with regret that you seem to be siding with the brokers and LuSE in this matter Your role we believe is to provide for a fair and equitable platform for disciplined and competitive market operations.

Your waiver of the SEC, LuSE and broker fees on the seller side amounts to unfair market practices. Even in property conveyance matter it is normal for the seller to be responsible for property transfer tax and not the buyer who is also free to negotiate the purchase price but

[20] The letter was copied to the Secretary to the Treasury – Ministry of Finance; CEO – SEC; Executive Director – CCPC (Respondent herein); CEO – ZCCM-IH; and the Appellant and all the other six stock brokers.

clearly in this transaction you want the buyer to effectively cover up for the seller's position by waiving fees. The precedent set here unfortunately will have negative repercussion for the future and is likely to impact on the confidence and growth of the capital market.

Furthermore, as institutional investors we feel that this action leaves us exposed as we cannot be guaranteed investor protection and fair play in the market.

You may wish to note that NAPSA has a custodial responsibility over member's (sic) funds and must at all times act in the best interest of its members. In so doing, it is our responsibility to ensure that we get the best terms possible for our members and not allow for corporate cartel behavior to unnecessarily eat into the menbers' funds.

We had earlier today copied you into a letter that we wrote to the LuSE Chief Executive Officer in response to his letter on the same subject.

In your letter you have made reference to our Board Meeting scheduled for the 4th of June 2015and we would like to advise that this is not on the agenda and should LuSE and the brokers not carry out the transaction immediately, we will deploy the funds into money market or other instruments.

It is our sincere hope that your institution will do that which it is set up to do including providing a platform for fair and equitable trading, discipline in the market, investor protection and promotion of the growth of the capital markets.

....

Yours faithfully
NATIONAL PENSION SCHEME AUTHORITY
(Signed)
Charles Mpundu
DIRECTOR GENERAL"[21]

(See pages 28 - 29 of the RoP and letter from the LuSE in response dated 29th May 2015 and quoted above)

28. In its letter of 8th June 2015, the ZCCM-IH wrote to all the stock brokers, including the Appellant:

"Dear Sirs

SELLDOWN BY GRZ OF ALL ITS CLASS B SHARES IN ZCCM-IH PLC: INSTRUCTIONS TO RELEASE TRANCHE 1 SHARES IN THE CSD TO BROKERAGE ACCOUNTS FOR SALE PURPOSES AND SELL INSTRUCTION

We refer to your letter dated 04 June 2015 in which you advised that you were unable to sell your allocation of the GRZ shares in ZCCM-IH to the pre-matched buyer NAPSA.

[21] This letter was copied to the Secretary to the Treasury - Ministry of Finance; CEO - LuSE; CEO (CCPC).

We wish to reiterate that ZCCM-IH still stands by its earlier position as advised in its instructions dated 07 May 2015 that the shares would be allocated equally among the 7 brokers to facilitate this trade. However, since this is on the Buy Side, ZCCM-IH is not party to the decision by NAPSA to engage one broker. Thus ZCCM-IH will abide by NAPSA's decision.

Yours sincerely
ZCCM Investments Holdings Plc
(Signed)

Dr. Pius Kasolo
Chief Executive Officer"[22]

29. In their collective correspondence, the Appellant and other stock brokers (signed by four of them, including the Appellant) stated as follows:

"26th May 2015

The Chairman
Lusaka Stock Exchange
....
....
Lusaka, Zambia

BROKERAGE COMMISSIONS SALE OF 15,850,631 ZCCM SHARES BY GRZ TO NAPSA VIA THE LuSE (THE "TRANSACTRION")

Background

On 07 May, 2015, ZCCM Investment Holdings Plc wrote to each of the Lusaka Stock Exchange ('LuSE") member brokers, on behalf of the Minister of Finance, informing them that the Government of the Republic of Zambia ("GRZ" or the "Seller") would be selling 15,850,631 Class "B" shares held in ZCCM-IH to the National Pension Scheme Authority ("NAPSA" or the "Buyer") (collectively the "Transacting Parties"). GRZ would accordingly equally allocate the shares to be traded across the 7 LuSE member brokers, and each broker was accordingly instructed to execute cross trades on behalf of GRZ at no brokerage, LuSE and Securities and Exchange Commission ("SEC") commissions on the buy-side.

Sell-Side Commissions

The LuSE, SEC and brokerage commissions payable on the sell-side of the trade were waived following a request from the seller. The agreement with the waiver on brokerage commission was under the implicit understanding that reasonable market related commissions would be applicable on the buy-side.

On 19th May 2015, NAPSA separately and individually wrote to the LuSE brokers herein undersigned requesting for quotations for brokerage commissions on the buy-side of the trade, and further requested that these that these quotations be submitted by close of business on the

[22] This letter was copied to the Secretary to the Treasury – Ministry of Finance; CEO – LuSE; CEO – NAPSA; CEO – IDC; and CEO – SEC.

same day (within 2 hours of receipt of the request from NAPSA), and that the maximum fee payable by NAPSA would be 0.125%. This initial proposed brokerage represented an 87.5% discount to the standard brokerage fee of 1% stipulated in the LuSE Fee Schedule. As a circumstance of the proposed cap on fees, NAPSA received from some but not all of the undersigned, which were as low as 0.1%. Despite the submission of these quotations, subsequent discussions between the undersigned revealed that the fee cap proposed by NAPSA would be detrimental to the market as a whole, and that the member brokers should present a united-front to preserve the collective integrity of the of the profession, and prevent an operating environment in which brokers are forcibly required to submit unrealistically low commissions.

On 21st May 2015, NAPSA requested a meeting with LuSE brokers (giving only 50 minutes notice), and presented that NAPSA was prepared to pay a brokerage of no more than 0.1% on the buy side representing a 90% discount to the standard brokerage commission of 1%, and a further 20% reduction in the initial proposed fee of 0.125%. At the meeting, the brokers collectively proposed a fee of at least 0.5% representing a 50% discount on the standard brokerage commission of 1%. As at close of business on 21st May 2015, each of the undersigned in their individual and respective capacities either outright rejected to execute the buy-side of the trade at NAPSA's proposed brokerage commission of 0.1%, or withdrew earlier quotations that were submitted from a position of considerable weakness.

Implications of Proposed Brokerage Fees for the Transaction

We the undersigned would like to express our sincere concern with the reaction from the Transacting Parties regarding their proposed commissions, or lack thereof. As is the case in any market, arms-length transaction commissions are normal and particularly on the LuSE (which is still a nascent and highly illiquid market), go a great length in supporting the growth and development of the capital market. In the context of the overall value of the transaction, or transactions of this size executed both in Zambia and internationally, we the undersigned strongly opine that the standard brokerage fees are reasonable, and are by no means onerous.

Nonetheless, in our meeting with NAPSA held on 21st May 2015, we collectively proposed a fee of 0.5% on the buy side for brokerage commissions, which with no brokerage commission payable on the sell-side, imply an average commission of 0.25% for executing both the buy and the sell side of the trade. Unfortunately, the fee proposed by NAPSA, including the waiver of the sell-side commissions, implies an average brokerage fee of 0.05% for both the buy and sell-sides. We are of the view that the fee proposed is unreasonably low in the context of the transaction value, and would set an unfortunate precedent for other market participants, and indeed future transactions on the LuSE.

Role of the Member Brokers

It will be noted that the proposed sell-down by GRZ to NAPSA as the initial step for ZCCM-IH to achieve minimum spread compliance, and thereafter to manage the Government's further sell-down to the public, is a result of the perennial hard work of the LuSE member brokers over years of promoting and assisting ZCCM-IH with its positioning. As a result, ZCCM-IH is now able to achieve the GRZ sell-down aspirations at a price never before seen by ZCCM-IH shareholders, including the GRZ.

The commission proposed by NAPSA and GRZ's to not pay any commission thus leaves us exposed after having contributed intellectual capital and sound advise into the process, only to be side-lined now that the commercialization of years of sound advise bears fruit.

It is also worth noting that the settlement procedures for this trade, as currently proposed by the trading parties in the letter of 07 May 2015 from ZCCM-IH, does not comply with the current LuSE CSD Trading and Settlement Procedures as it proposes to by-pass the role of member brokers in the trading cycle.

We the undersigned are of the unilateral position that the commission structure proposed for the transaction would be detrimental to the growth and development of the capital markets, and set an unfortunate precedent regarding future transactions. In practice, transaction fees add credibility to transactions and indeed, similar or higher fees would be payable on any stock exchange. The proposed commission structure leaves the undersigned at a significant disadvantage, seemingly by virtue of our domicile and market of operation. Unfortunately, the terms proposed are uncharacteristic and nullify the role played by brokers in the development of the Zambia capital market, or indeed the integrity of the capital market as a whole.

We therefore seek your guidance and assistance in representing the concerns of the undersigned to the respective Transacting Parties regarding the commissions proposed in the Transaction, and to seek clarity around the aversion of the payment normal or reasonably discounted transaction fees when such fees have been paid locally and internationally for other transactions.

Finally, we further seek your assistance in conveying the central role the Transacting Parties play in the development of the Zambian Capital Market, and the immense opportunity that the Transaction would play in supporting brokers, the LuSE, and the SEC.

We are available to meet at your earliest convenience to discuss the contents of this letter.

....

Sincerely,

For and on behalf of African Alliance Securities Limited *(Signed)*

_____

For and on behalf of Equity Capital Resources Limited _____

For and on behalf of Finance Securities Limited _____

For and on behalf of Intermarket Securities Limited *(Signed)*

_____

For and on behalf of Madison Asset Management Limited _____

For and on behalf of Pangea Securities Limited *(Signed)*

_____

For and on behalf of Stockbrokers Zambia Limited *(Signed)*

_____

Lusaka Stock Exchange Member Brokers

CC: Brian Tembo, CEO – Lusaka Stock Exchange

Phillip Chitalu, Secretary and CEO – Securities and Exchange Commission"

(See letter at pages 379 – 381 of the RoP)

30. First of all, noting that the subject appeal arose from a transaction in a statutory regulated sector, we briefly examine our competition law in that context. We repeat what we said in **the Insurers case**:

"19. Section 42 of the Competition Act in Part VI dealing with "SECTOR REGULATED ACTIVITIES explicitly provides that "Subject to section 3[23], the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III". It is important here to note that Part III deals with "RESTRICTIVE BUSINESS AND ANTI-COMPETITIVE TRADE PRACTICES" and includes sections 8 and 9. It is also important that this provision, though limited to economic activities falling under statutory regulators, is nonetheless subject to the general provisions of section 3 of the Competition Act which provides for the application of the Competition Act to all economic activity within, or having an effect within, Zambia and in subsection (3) makes exceptions to the application of the Competition Act itself to certain economic activities. ... The ... economic activities of enterprises in the sector are subject to the requirements of Part III, which includes sections 8 and 9 by virtue of section 42 of the Competition Act, and above all by virtue of section 3 (1) of the Competition Act, the whole Act applies to all economic activities in the insurance sector.

20. It is clear from provisions of the Competition Act, as we have endeavoured to demonstrate, and from the object of the Competition Act as seen in the long title, which states in part, **"An Act to ... safeguard and promote competition; protect consumers against unfair trade practices ...."** that it was the intention of the legislature that the Competition Act should have overriding application above all other legislation having a bearing on competition (including consumer protection) in the country. ... . In particular, we emphasise that economic activities of enterprises in sectors falling under statutory regulators are subject to the reign of Part III of the Competition Act, to which sections 8 and 9 belong.

21. From the foregoing, it follows that as the law stands, the legal context of sections 8 and 9 of the Competition Act is first and foremost the Competition Act itself, subject only to the Constitution. Any provision of any other law, such as the Insurance Act, the Pensions Scheme Regulation Act or other related law in the case under consideration, is secondary and may be taken into account only to the extent not inconsistent with the Competition Act. For instance, we have found a provision in the Pensions Scheme Regulation Act that is relevant to the present case and which we take into account as we see appropriate. Section 5 (1) (j) of the Act states one of the functions of the PIA as **"to**

[23] Section 3 provides, inter alia, exceptions to the application of the Competition Act.

formulate and implement measures calculated to encourage healthy competition and eliminate unfair practices in the insurance and pensions industries".

31. What we said in **the Insurers case** is pertinent in the present case, in which the economic activities of the Appellant and the other brokers that were alleged to have contravened the Competition Act were regulated under the Securities Act, Chapter 364 of the Laws of Zambia (which has since been repealed and replaced). We further find that in fact the Securities Act had provisions that were consistent with promoting competition in the securities markets, namely:

    (a) The Second Schedule which provided for an applications by a company for a securities exchange licence under section 8 of the Act included requirements (in paragraphs B. and C.) that

        "B. At least five of the applicant's members shall be persons engaged in carrying on the business of dealing in securities independently of and in competition with each other.

        C. The rules and practices proposed to be followed by the applicant must be such as will ensure that business conducted by means of its facilities will be conducted in an orderly manner and so as to afford proper protection to investors. In particular, the rules of the proposed exchange shall make such provisions as the Commission considers satisfactory with regard to-

            (a) efficient, honest, fair, competitive and informed trading in securities;" **(underline ours for emphasis)**

    (b) The Securities (Conduct of Business) Rules, S.I. No. 168 of 1993, provided in Rule 19 (1) that *"A licensee's charges shall not be unfair in their incidence or unreasonable in their amount having regard to all relevant circumstances."*[24]

32. In tandem with the objectives of the Competition Act, the sector law relating to the securities markets places a statutory obligation on the securities exchanges, in this case the LuSE and its member brokers dealing on the exchange, to conduct their business affairs in a fair and competitive manner. This is cardinal for the proper operation and development of the securities markets. The Respondent did endeavour to provide an analysis of the legal status of the Appellant and the other entities, and did provide substantial information on the operations of the relevant securities market, and the role played by the LuSE. However, inadequate effort was devoted to examining the various information availed the Respondent, including the letters we have quoted above, *vis-a-vis* implications of the Competition Act, if any.

33. For example, the Respondent, while implicitly indicating, in its analysis for purposes of market definition, that the LuSE held a dominant position for provision of securities exchange markets in the country did not interrogate the issue of possible abuse of dominance. The Respondent investigated the LuSE late in its investigative proceedings in relation only to sections 8 and 9 of the Competition Act, and concluded that although there was an agreement among stock brokers, the Exchange was not a party to the agreement, and that it was not a party to the buyer's invitation for tender nor the discussions during

[24] The Rules relate to dealers and others licensed to operate on securities exchanges under Part IV of the Act.

and after the stock brokers withdrew the bids. We have not seen the basis for these findings in light of the documentary evidence some of which we have quoted above. We see no analysis of the role played by the LuSE in the subject transaction before and after the bids subject of this appeal, and how that role did not amount to contravention of any provision of the Competition Act, particularly section 8 (since LuSE was not in a horizontal commercial relationship with its members, but provided a platform on which the members operated).

34. In fact, while the SEC, being the regulator of the securities markets (as opposed to providing a service in competition with others) is by law authorised to waive all or part of its fees,[25] the Respondent did not interrogate competition implications, if any, of:

    (a) The LuSE and its member brokers waiving their respective fees on the sell-side, and this being given on the understanding that in return the GRZ would in future conduct transactions via the LuSE and its member brokers (without waivers);

    (b) the LuSE negotiating fees, including what was termed as "discounts", (on its own behalf, and also on behalf of its members, the Appellant and the other brokers, collectively, on the buy-side of the transaction in issue, before and after the bids subject of this appeal; and

    (c) explicit or implicit power to waive fees, if any, of the LuSE and/or its member brokers, under the LuSE Rules, in light of the provisions of the Competition Act.

35. The Respondent did not question the LuSE's and brokers' conduct of collectively negotiating the brokerage commissions through the LuSE prior to NAPSA calling for individual bids. We see that it was suggested in some of the documentary information that it was arranged to split the transaction shares on the Seller side equally among all the brokers because of the size (value) of the transaction which could not be otherwise handled. We have not seen any proof to that effect.

36. All that the LuSE letter in response to the Notice of Investigation, referred to earlier, said was that *"the Seller requested the LuSE to manage the transaction given its special national interest nature"*. In fact, as it turned out, the whole transaction was handled by the Appellant, both on the Seller and on the Buyer sides, after the other brokers refused to transact on the sell-side for no economic benefit. The Respondent in its findings stated, *"The Commission's findings revealed that ZCCM-IH instructed LuSE CSD to split 15,850,631 shares equally to the seven LuSE stock brokers. This instruction was mainly to give an opportunity for all stock brokers to benefit from the transaction. The Commission's findings revealed that after the ZCCM-IH shares were split, LuSE facilitated the waiver of all fees on the sell side. On the buy side, the fees payable to SEC and LuSE were not negotiable while brokerage commission was negotiable. Brokerage commission negotiations were done through LuSE on behalf of all the stock brokers."*

37. Even assuming the transaction could only be managed if shared among all the brokers, the question of legality of collective negations would be liable to interrogation under the Competition Act. As we have stated in our discussion under the subject of relevance of

[25] Rule 12 (1) of the Securities (Licensing Fees and Levies) Rules, S.I. 165 of 1993 (as amended by S.I. 153 of 1995), reads, "Where the Commission considers it appropriate in the exceptional circumstances of a particular case, the Commission may in its discretion waive payment of all or part of the fee which would otherwise be payable under these Rules".

legislation and case law of foreign jurisdictions, and in the case referred to, **the Insurers case**, offences falling under sections 8 and 9 of the Competition Act provide no escape, unlike Article 101 (1) TFEU, apart from the "appreciability"condition in section 8. The only way a restrictive agreement will not be caught up is if it is excepted or exempted by or under the Competition Act.

38. The Respondent did not look at possible abuse of dominance by the LuSE. The anti-competition concept of abuse of dominance, per section 16 of the Competition Act, read together with the definition of "dominant position" in section 2 and the non-rebuttable presumption of the existence of dominant position provided by section 15, could well have come into play with respect to the conduct of the LuSE, but the subject was not identified, investigated and evaluated in relation to the LuSE.[26] The Respondent only addressed the issue of dominance in relation to the complaint by the Appellant and the others that NAPSA had in its conduct abused its dominance, which we deal with later as a ground of appeal.

39. In **the Insurers case**, we did reiterate the position that the definition of the relevant market is the foundational economic context in determining allegations of anti-competitive conduct. In this case, the relevant market has been defined as the provision of brokerage services to institutional and individual investors at Lusaka Stock Exchange throughout the whole country Zambia. In our view, this definition, which has not been appealed, suffices to the extent that the case was limited to sections 8 and 9 of the Competition Act. However, inquiry into possible abuse of dominant position by the LuSE would have most probably required a separate market definition to interrogate competition issues relating to the position of LuSE *vis-vis* the relevant securities markets throughout the country.

40. It may well be that the narrower focus on sections 8 and 9 in defining the relevant market may have led to the Respondent's narrow scope of investigation. We have time and again pointed out the need for a sufficient enough identification of the relevant market(s) if competition issues presented in a particular case are to be adequately dealt with.

41. As far as the role played by the GRZ through the IDC and ZCCM-IH Plc in seeking a waiver of the LuSE fees and the brokerage fees on the sell-side of the transaction was concerned and dealing with all the brokers collectively through the LuSE, we note that section 3 (2) of the Competition Act states, *"This Act binds the State insofar as the State or an enterprise owned, wholly or in part by the State, engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market."* Section 2 defines ""distribution" as *"any act by which goods or services are sold ... for consideration;"* Therefore, the State and its agencies engaged in commercial enterprises, such as the IDC and the ZCCM-IH, have a statutory obligation to comply, and not undermine compliance, with the requirements of the Competition Act.

42. A question arises, for instance, whether the IDC and the ZCCM-IH may well have been privy to a restrictive agreement in contravention of section 8 of the Competition Act, particularly considering the definition of "agreement", which states, *"agreement" means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or*

[26] EU competition law and decisions around Article 102 TFEU, dealing with abuse of dominance, indicate that waivers and discounts of charges, rebates can amount to abuse of dominance.

intended to be implemented in Zambia and includes an oral agreement ..." The understanding on which the waiver of the LuSE fees and brokerage commissions on the sell-side were granted, providing for conduct of future business transactions via the LuSE, is still in place. We raise this issue to demonstrate that the Respondent did not fully address itself to the roles and conduct of the respective entities involved in the transaction in issue.

43. In consequence of the foregoing inadequacies, the investigations, findings and conclusions reached by the Respondent do not represent a complete picture of the legal and economic issues raised and their competition implications in terms of the Competition Act. Nonetheless, we are enjoined by our procedural rules to take into consideration all evidential material before us [27], and we shall do so but only to the extent that the material is relevant to the determination of the appeal.

(C). GROUNDS OF APPEAL

44. We will deal with grounds one and two together and grounds three, four and five together. This is in view of the fact that the grounds relate to section 8 and section 9, respectively. We deal with the remaining grounds six and seven separately. We note that the Appellant's counsel have in their submissions dealt with all the grounds of appeal together, while the Respondent's counsel have combined grounds one and two. We deal with the grounds in opposition of grounds of appeal indirectly in our determination, to avoid being repetitive.

Grounds one and two

(i) ***That the Respondent erred in m aking the finding that the Appellant had participated in an agreement or concerted practice which had, as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent.***

(ii) ***That the Respondent erred in fact and law when it held that the agreement among stock brokers had, as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent.***

45. Section 8 states, *"Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited."*

46. In their submissions, counsel for the Appellant has taken issue with the Respondent finding that "the conduct by the stock brokers to meet and discuss pricing of brokerage commission was consistent with the definition of an agreement under the Act". Also that "the Board also found that findings of the investigation of the meeting held at NAPSA on 21st May, 2015 provided sufficient evidence that there was an agreement among stock brokers to withdraw bids after the price NAPSA offered was seen to be low". And that "this conduct was found to have violated section 8 of the Act" (paragraph 216, page 664 of the RoP)

47. Counsel have argued that the Appellant's action in withdrawing the bid was not in contravention of section 8 (and 9) of the Competition Act, stating that facts as to how the meeting came about effectively showed what necessitated the Appellant's action. That the Appellant did not initiate any meeting with any of the stock brokers in order to come up

[27] Tribunal Rules, Rule 29.

with any decision. That it was NAPSA that invited the Appellant to attend a meeting on 21st May 2015 at the NAPSA offices.

48. In reference to the invitation from NAPSA, counsel referenced a document in the Appellant's Bundle of Documents, which Bundle is no longer before the Tribunal, the Appellant having withdrawn it from the record of our proceedings on 18th September 2017. However, as counsel stated when withdrawing the Bundle, most of the documents are in the RoP and this particular document is at page 587 of the RoP (Annex 3 to the Respondent's Staff Paper, November 2016). The invitation was dated 21st May 2015 at 10:10 and was addressed to the stockbrokers, including the Appellant, and read, *"Kindly be informed that there will be a meeting today at 11 hrs at NAPSA (Levy Business Park) concerning the brokerage quotations and the ZCCM-IH investment. We hope to see you at this important meeting."*

49. Counsel have gone on to state that this was preceded by an invitation by NAPSA requesting for a bid from the Appellant for a transaction it was undertaking, again referring to a document in the Bundle, which is attached to the Appellant's letter to NAPSA at page 129 of the RoP. The document is from the NAPSA to the Appellant, dated 19th May 2015 and reads:

> *"REQUEST FOR A QUOTATION FOR STOCKBROKERAGE COMMISSION – ZCCM-IH SHARE TRANSACTION*
>
> *We are in the process of placing buy orders to purchase shares as stated above. The Authority is requesting for a quotation for stock brokerage commission on the transaction. We wish to further advise that the maximum rate that the Authority is willing to take is shall not be more than 0.125%.*
>
> *Your favourable response is highly appreciated and being awaited by close of business today.*
>
> *Yours Faithfully*
> *NATIONAL PENSION SCHEME AUTHORITY*
> *(Signed)*
> *Director Investments*
> *DIRECTOR GENERAL"*

50. Counsel for the Appellant have gone on to state that the Appellant responded, again referencing a document in the Bundle, which is also one of the letters the Appellant attached to the letter referred to in the immediate foregoing paragraph, at page 131 of the RoP. The letter from the Appellant to NAPSA, dated 19th May 2015, read:

> *"REQUEST FOR A QUOTATION FOR STOCKBROKERAGE COMMISSION – ZCCM-IH SHARE TRANACTION*
>
> *Reference is made to your letter dated 19th May 2015 concerning the above subject matter.*
>
> *We hereby write to advise that the Brokerage commission rate Pangea will charge for this transaction is 0.1%.*
>
> *Your favourable consideration in this matter will be highly appreciated.*
>
> *Yours sincerely*

(Signed)
Wendy N. Tembo (Mrs)
Manager – Brokerage Services"

51. Counsel have further submitted that, at that meeting, NAPSA invited all the stockbrokers to announce the results of the invitation for the bids but as opposed to announcing the preferred stock broker who was going to carry out the transaction, it instead informed all the stock brokers who were in that meeting that it was inviting all the stock brokers to participate collectively in the transaction at a shared rate of 0.1%. It further invited the stock brokers to indicate whether or not they were willing to participate. That the stock brokers were allowed to consult and provide their responses in writing on the same day.

52. Counsel further referred to the testimonies of the Appellant's witnesses who testified before us; counsel said the witnesses testified that they felt that the change in the conditions by NAPSA were unfair because they were not prepared to share the commission with any other broker. That the witnesses informed this Tribunal that they (Appellant) responded to the new terms by rejecting it and by retracting the initial bid. Further, that the witnesses said notwithstanding the withdrawal of the Appellant's bid, NAPSA on the same day 21st May 2015 wrote back informing the Appellant that it had accepted the initial bid of 0.1% for the transaction and that the Appellant went ahead and executed the transaction on behalf of NAPSA.

53. Counsel for the Appellant have further submitted that with respect to the Respondent's allegation that the Appellant held a closed door meeting with other brokers to agree on withdrawing the bids, this Tribunal had been supplied with adequate documentation to elaborate what transpired. Counsel referred to the statement given to the Respondent by Mr. Davis Chewe, who chaired the meeting, when he was interviewed by the Respondent's witness (RW) who said (recorded at page 236 of the RoP); that: *"Mr. Chewe submitted that he chaired the meeting up to the end without stepping out of the meeting. He submitted that the only time he left was when the meeting had ended and left the stock brokers representatives in the boardroom because they told him they needed to cover (sic) among themselves...."*

".... He submitted that after he briefed Mr. Charles Mpundu he asked him to ensure that they get their approval that they would take part in the transaction so Mr Chewe rushed to the boardroom and found the stockbrokers representatives out o (sic) the boardroom."

54. Counsel argued further that submissions from the stock brokers, recorded in the RoP, showed that the representatives of the stock brokers that were interviewed all confirmed that they sat to discuss the change in conditions by NAPSA and the demand for them to make a decision. That all but one submission clearly stated that the brokers were unhappy by the position taken by NAPSA to dictate the rate payable and also the demand that an immediate response should be given. That only one broker informed the Respondent that the brokers at that meeting agreed to withdraw their bids. That, however, even that representative confirmed to the Respondent that he did not discuss any fee during that gathering, and that the brokers complained over the conduct of NAPSA (referencing page 240, and 239 paragraph 100 of the RoP).

55. Counsel have argued, referring to the case of **In Societe Technique Miniere v. Maschinenbau Ulm Case 56/65 [1966] ECR 235, 249 (the Societe Technique case)**, that the

words *object* and *effect* are to be read disjunctively, so that it is first necessary to consider what the purpose of the agreement was: that only if it is not clear that the object of an agreement was to harm competition would it be necessary to consider it might have the effect of doing so. That applying this authority, it cannot be said that the meeting where the brokers discussed what NAPSA had done could be said to have had the object or effect of preventing, restricting or distorting competition. That this is because the meeting was called by NAPSA who came and dictated a price for the brokers to consider if they wished to participate in the transaction. Further, quoting the case of **Haecht v. Wilkin Case 23/67 [1967] ECR 407**, *"It would be pointless to consider an agreement, decision or practice by reason of its effect if those effects were to be taken distinct from the market in which they seem to operate, and could only be examined apart from the body of effect, whether convergent or not, surrounding their implementation."* Thus, the argument continues, in order to examine whether it is caught by the Article 85 (1) (which is couched exactly as section 8 of our Act) an agreement cannot be examined in isolation from the above context, that is, from the factual or legal circumstances causing it to prevent restrict or distort competition.

56. That, therefore, the Respondent should have taken into account the conduct of NAPSA, which necessitated the reaction of the Appellant and the other stockbrokers. That although the Respondent found that the capping of the brokerage fees by NAPSA was not a violation of the (Competition) Act, it nonetheless found that *NAPSA's conduct of not awarding business to the winning bidder but attempting to split business equally to all stock brokers including those who did not submit bids was against the industry best practice of tendering process.* That NAPSA's conduct led to the disquiet expressed by the Appellant when it decided to withdraw its bid; that consequently it was wrong for the Respondent to have concluded that the Appellant acted in contravention of section 8 without taking NAPSA's action into account.

57. Further, that contrary to the Respondent's finding that NAPSA's action of capping the brokerage fee did not violate any provision of the (Competition) Act, the action amounted to price fixing as NAPSA dictated to the stock brokers what the upper limit of the money it was willing to pay for the transaction was and the brokers had no chance or capacity to negotiate. Further, that NAPSA demanded an immediate response from the Appellant and other brokers and when they did, NAPSA reported the brokers to the Respondent.

58. Counsel for the Appellant further submitted that at the interview, Mr. Davis Chewe, who chaired the meeting, told the Respondent that the Respondent's officers made the complaint because NAPSA was desperate, that there was communication breakdown which made him think that the transaction was simple without knowing that each broker was parcelled a certain number of shares. That he submitted that having come to know this now, he did not think that the stock brokers agreed to withdraw their bids. (Referencing record of later interview of Mr. Chewe held on 7th October 2015, in which he gave a different view than what he had earlier told the Respondent on 27th May 2015 shortly after NAPSA lodged the complaint (record at pages 15-18 of the RoP) of what transpired among the stock brokers in the meeting (page 439 of the RoP)) That further, NAPSA wrote to the Respondent by letter dated 7th October 2015 advising that the matter had been resolved amicably by the parties involved in the transaction (referencing pages 179-180 of the RoP)

59. That, alternatively, assuming that the Tribunal finds that the Appellant breached provisions of section 8, the Respondent erred by its finding because the Appellant's actions were not appreciable in nature. That the alleged act could not be caught by section 8 of the (Competition) Act if it was not of great significance in the market, citing authors **Richard Whish - Competition Law, 2nd Edition** at page 250, *"Some agreements of which affect competition within the terms of Article 85 (1) may nonetheless not be caught because they do not have an appreciable impact either on competition or on inter-state trade."* Further, that this is what is termed as the *de minimis doctrine, citing the case of Volk Vervaecke 5/69 [1969] ECR 295:*

> *"An agreement falls outside the prohibition in Article 85 (1) where it has only an insignificant effect on the market, taking into account the weak position which the person concerned have on the market of the product in question."*

60. Counsel have argued that the principle applies equally to horizontal agreements whose objects or effect is to prevent competition, thus, even horizontal restraints of a clearly competitive nature could fall outside because of their diminutive nature. That applying the principle to this case, even though the actions of the Appellant may be found to have contravened the provisions of the (Competition) Act, these actions were insignificant in comparison to the whole capital market in Zambia, as it related to a single trade with a party that made it difficult for the Appellant to operate. That an argument that the Appellant was found wanting together with other stockbrokers does not hold because when taken in its totality the single trade was insignificant in the capital market of Zambia.

61. In response, the Respondent's counsel have argued, quoting section 8 of the Competition Act and the definition of "agreement" in section 2, *"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;"* That the decision can take any form (oral, written, and or implied). Further, that the agreement ought to be among enterprises and that it should be implemented or intended to be implemented in Zambia. Further, quoted the holding in the case of **BAYER AG v. Commission (2000) ECR II-3382 paragraph 173 (the BAYER AG case)**:

> *"an agreement ... must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to a concurrence of wills between economic operators on the implementations of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed."*

62. Counsel for the Respondent have argued that the stock brokers met and discussed the brokerage commission, which conduct is consistent with the definition of agreement (in section 2 of the Competition Act and in **the BAYER AG case**). That following NAPSA's invitation to bid, when NAPSA called the meeting on 21st May 2015 and at the meeting asked all the stock brokers, which included those who had submitted bids (including the Appellant, whose bid was the lowest at 0.1%) and the others who had not submitted bids, to indicate whether or not they would participate at the lowest fee of 0.1%, all the stock brokers including the Appellant, withdrew their bids. (Referencing the trail of emails from the stock brokers to the NAPSA at pages 492-498 of the RoP) That the Appellant's two witnesses confirmed the Appellant's withdrawal of its bid.

63. Counsel have further submitted that the Respondent established that at the meeting the stock brokers agreed in the manner alleged, that is (quoting):

> "Interviewed on 16th November 2015, African Alliance Securities is on record as having confirmed that stock brokers agreed to withdraw their bids. That Mr. Joseph Simate the Operations Officer at the time from African Alliance Securities submitted that; *".....the NAPSA person left and while he was gone, the brokers really were in discussion saying that since NAPSA won't budge perhaps we need to negotiate with NAPSA through LuSE board..... .....that's how brokers agreed to say we are not going to amend our orders to a non-commercially viable rate until we have tried to negotiate with NAPSA through LuSE board....."Mr. Simate further submitted that; ".....in terms of withdrawing I think the withdraw aspect comes in, in terms of the broker with the lowest bid because the broker with the lowest bid could go and execute straight away, they could go and execute at 0.1% because literally if NAPSA was going to allocate by that, then really they already had it, but then really they agreed to go and withdraw so that they could go and negotiate for a commercially viable rate....."* **(Referencing interview records at pages 543-556 of the RoP (Staff Paper, November 2016)"**

64. Further, that an extract paragraph from the response letter to the Notice of Investigation, dated 21st July 2015, appearing at pages 151-152 of the RoP, from African Alliance Securities read in part;

> *"... The NAPSA representative asked to be excused momentarily and stepped out of the boardroom. In that time, all the brokers, including the broker offering the lowest brokerage rate for the transaction, resolved to withdraw their quotes and re-open negotiations with NAPSA via LuSE board...."*

65. That a letter dated 21st May, 2015 from Equity Capital Resources addressed to NAPSA revealed that after the meeting, Equity Capital Resources informed NAPSA that it had decided to withdraw its bid to offer brokerage services awaiting the emergency general meeting to be held at LuSE (page 492 of the RoP). That this collective action by the brokerage firms is evidence of a concurrence of wills between the enterprises on the implementation of the conduct of withdrawing bids. This in essence satisfies the definition of an agreement under the Act.

66. Counsel for the Respondent have submitted that an agreement can either be in writing or it can be implied by the conduct of the parties. That in the *case in casu*, it is clear from the conduct of the stock brokers that after the NAPSA officer left the board room, the stock brokers who had submitted their bids resolved to withdraw their bids. That evidence to prove a cartel case can either be direct evidence or circumstantial evidence. That this principle has been well explained in the **OECD paper on Prosecuting Cartels, 2006 without Direct Evidence DAF/COMP/GF 2006**; page 20, paragraph 2 states that; *"Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of "communication" evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices". It was further stated that; " There are different types of circumstantial evidence. One is evidence that cartel operators met or otherwise communicated but does not describe the substance of their communications...* **(underlined for our emphasis) It includes:**

- *records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference.*
- *other evidence that the parties communicated about the subject e.g., minutes or notes of a meeting showing that prices, demand or capacity utilisation were discussed; internal documents evidencing knowledge or understanding of a competitors pricing strategy, such as an awareness of a future price increase by a rival".*

67. Counsel have gone further to submit that cartels are usually formed and conducted in secret; their participants understand that their conduct is unlawful, and that their customers would object to the conduct if they knew about it, and so they take pains to conceal it. That there may not always be direct evidence to prove cartel conduct, but that circumstantial evidence may be relied upon that which shows that cartel operators met or otherwise communicated but does not describe the substance of their communications. That the record show that the Respondent relied on circumstantial evidence to the effect that the stock brokers who had submitted their bids discussed to withdraw their bids, including the Appellant.

68. Further, that the information submitted by African Alliance Securities and Resources corroborated the letters that the stock brokers wrote to NAPSA withdrawing their bids. That no other inference can be drawn from the collective conduct of the stock brokers other than the fact that there was an agreement to withdraw the bids in accordance with the definition of agreement envisaged under Section 8 of the Act.

69. Counsel have gone further to argue that the anti-competitive agreements are categorised as either "by object" or "by effect" under Section 8 of the Act. That **Black's Law Dictionary (9th edition)** at page 1177 defines *'object'* to mean **"something sought to be attained or accomplished, an end, a goal"**. That the investigations conducted by the Respondent revealed that initially, the negotiations for brokerage commission for all stock brokers was done through LuSE. That at that point, negotiations were done collectively by LuSE on behalf of all stock brokers on both the sell and buy side of the transaction. That on the sell side of the transaction, brokers agreed to a waiver of fees while on the buy side they agreed that LuSE would negotiate with NAPSA on their behalf. That after the price negotiations through LuSE failed, NAPSA opted to call for bids from all stock brokers. That when NAPSA obtained the bids, stock brokers stopped negotiating collectively via LuSE and four (4) out of the sev en (7) stock broking companies submitted bids based on their independent pricing. That the brokers were acting independently as competitors in the provision of brokerage services.

70. Further, that it follows that the stock brokers' conduct at the meeting to agree that the brokerage fee offered by NAPSA was too low and the decision to withdraw bids and go through LuSE had the object to prevent competition. That the Appellant's witnesses are on record having testified to the stock brokers' displeasure with NAPSA's request to allow all stock brokers to participate in the transaction at 0.1% brokerage fee. That it follows that the only inference that can be drawn from the conduct of the Appellant is that they discussed the brokerage fee and agreed with other stock brokers to withdraw their bids.

71. Counsel for the Respondent referred us to the case of **Competition Authority v Beef Industry Development Society Ltd (C-209/07) Unreported November 20, 2008 (ECJ)** (the **(the Irish Beef Industry case)** involving an initiative by an Irish beef processing association comprising ten companies to address overcapacity in the industry by reducing the number of processors by 25 per cent. According to the facts of the case, the Beef Industry Development Society (BIDS) asked some members to exit the industry in Ireland for at least two years, disposing of equipment and decommissioning land. Those exiting would be compensated by those staying in the market during the course of the agreement. BIDS argued that the agreement would not adversely affect competition but aimed to improve competitiveness in the beef industry. The ECJ disagreed, holding that through a coordination of market outcome - which prevented the natural selection of market players - the arrangement indeed had as its object the restriction of competition.

72. Counsel have argued that, in assessing the goal of the scheme, the ECJ, in the **Irish Beef Industry case,** the Court deemed the subjective intention of the parties as "irrelevant". That the decision in this case restates the principle that an object to restrict can be found even if the agreement does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. That even though it may be argued that the sole aim of the Appellant's conduct was not to restrict competition, this, borrowing from the ECJ, is irrelevant. Further, that an agreement was established by stock brokers when they met to discuss pricing of the commission brokerage rate which eventually resulted in the resolution to quote high prices and influence those that submitted bids to withdraw. And that AW 2 confirmed in her testimony that the stock brokers discussed the brokerage commission fee at the meeting. Therefore, the conduct by stock brokers is consistent with the definition of 'agreement' under Section 2 of the Act.

73. Furthermore, that in the relevant market for brokerage services, the seven stock brokers formed the entire market of brokerage services at LuSE. That initially, the Government of Zambia and ZCCM-IH wanted all stock brokers to participate in the transaction considering that the market was small, and the transaction was huge. After negotiations between NAPSA and the stock brokers failed, NAPSA reported the stock brokers to the Respondent because the transaction would not have taken place considering that the market was small hence any anti-competitive conduct by stock brokers affected competition to an appreciable extent.

74. In reply, counsel for the Appellant in essence have repeated their earlier submissions. Having considered all the evidence and arguments of the parties, we have noted that there is no dispute that NAPSA misconducted itself, the question whether the conduct amounted to abuse of conduct sanctionable under the Competition Act being a matter we address separately later. There is no dispute also that the Appellant withdrew its bid in reaction to NAPSA's conduct in reneging on the bids it had invited and offering instead to deal with all the brokers at a brokerage rate of 0.1%. There is also no dispute that the other stock brokers who had submitted bids also withdrew, and that those that had not submitted their bids also wrote to the NAPSA indicating that they would not participate on the buy-side of the transaction. There is also no dispute that the stock brokers including the Appellant communicated their positions separately after the meeting of 21st May 2015 at which NAPSA reneged on its invitation for bids and put forth its new offer.

75. There is also no dispute, and evidence some of which we have previously referred to abounds, that at the outset, before the NAPSA invited the stock brokers to bid, all the stock brokers were negotiating collectively with NAPSA on their buy-side brokerage fee through the LuSE. This was after having been all offered and agreed to participate equally on the sell-side at no fee. It is also not in dispute that NAPSA's invitation to bid represented, at least impliedly, an offer to deal individually with a successful bidder. Its new offer meant that the NAPSA would deal with all or any of the stock brokers interested to participate at the brokerage rate of 0.1%. Indeed, at the end of it all, the NAPSA instructed the Appellant to carry out the transaction.

76. In its new offer, the NAPSA hoped but did not insist that all the stock brokers participate on the buy-side of the transaction, let alone that they negotiate collectively, but asked that they each indicate whether or not they would participate in the transaction at the stated rate of 0.1%. The NAPSA in their email of 21st May 2015 at 1:19 P.M. addressed to each of the brokers said:

> *"Thanks for taking time to come at short notice to our meeting regarding the ZCCM-IH transaction.*
>
> *We are grateful that you gave us your candid feedback and understand that the 0.10% we have offered came from among yourselves.*
>
> *As earlier indicated in the meeting, we are hoping that all of you will consider and participate and we would like to conclude the transaction this afternoon.*
>
> *Should you not wish to participate, let us know as we already have a firm offer from some of your colleagues to conclude the transaction at 0.1% brokerage fee and we shall be proceeding with the transaction this afternoon.*
>
> *We hope to receive your confirmation of your participation or not* ***by 15:00 hrs today Thursday 21 May 2015****. Should you not respond by the stated time, we shall assume that you are not participating and we would proceed to conclude with the parties whose commission rate we have already received.*
>
> *Thank you for your usual support and commitment.*
>
> *Best regards*
>
> *David"*
>
> *(See email at page 203of the RoP)*

77. Even assuming the NAPSA had in its offer insisted to deal with all the brokers and negotiate collectively, the stock brokers would not be bound to comply with such arrangement and they would not be exempted from the prohibitions of the Competition Act. The brokers in reaction to NAPSA's new offer were entitled individually, without being in agreement or concert with others, to withdraw their bids or refuse to participate at the rate offered by the NAPSA. However, one of the questions that the Respondent determined and we need to determine in this appeal is **whether the circumstances surrounding the Appellant's and other stock brokers' reaction of withdrawing their bids and refusing to participate are such that their conduct amounted to contravention of section 8 (and, of course, section 9) of the Competition Act.**

78. First of all, we have reviewed the letter collectively written by all the stock brokers (but signed only by the Appellant and three others) to the LuSE, dated 26th May 2015. We have quoted this letter in full in the section of this judgment in which we have discussed the legal and economic context. The letter said in part:

> *"On 19th May 201, NAPSA separately and individually wrote to the LuSE brokers herein undersigned requesting for quotations for brokerage commissions on the buy-side of the trade, and further requested that these that these quotations be submitted by close of business on the same day (within 2 hours of receipt of the request from NAPSA), and that the maximum fee payable by NAPSA would be 0.125%. This initial proposed brokerage represented an 87.5% discount to the standard brokerage fee of 1% stipulated in the LuSE Fee Schedule. As a circumstance of the proposed cap on fees, NAPSA received from some but not all of the undersigned, which were as low as 0.1%. Despite the submission of these quotations, subsequent discussions between the undersigned revealed that the fee cap proposed by NAPSA would be detrimental to the market as a whole, and that the member brokers should present a united-front to preserve the collective integrity of the of the profession, and prevent an operating environment in which brokers are forcibly required to submit unrealistically low commissions.*
>
> *On 21st May 2015, NAPSA requested a meeting with LuSE brokers (giving only 50 minutes notice), and presented that NAPSA was prepared to pay a brokerage of no more than 0.1% on the buy side representing a 90% discount to the standard brokerage commission of 1%, and a further 20% reduction in the initial proposed fee of 0.125%. At the meeting, the brokers collectively proposed a fee of at least 0.5% representing a 50% discount on the standard brokerage commission of 1%. As at close of business on 21st May 2015, each of the undersigned in their individual and respective capacities either outright rejected to execute the buy-side of the trade at NAPSA's proposed brokerage commission of 0.1%, or withdrew earlier quotations that were submitted from a position of considerable weakness."*
>
> **Implications of Proposed Brokerage Fees for the Transaction**
>
> *".... ....*
>
> *Nonetheless, in our meeting with NAPSA held on 21st May 2015, we collectively proposed a fee of 0.5% on the buy side for brokerage commissions, which with no brokerage commission payable on the sell-side, imply an average commission of 0.25% for executing both the buy and the sell side of the trade. Unfortunately, the fee proposed by NAPSA, including the waiver of the sell-side commissions, implies an average brokerage fee of 0.05% for both the buy and sell-sides. We are of the view that the fee proposed is unreasonably low in the context of the transaction value, and would set an unfortunate precedent for other market participants, and indeed future transactions on the LuSE.*
>
> ***Role of the Member Brokers***
>
> ....
>
> ....
>
> *We the undersigned are of the unilateral position that the commission structure proposed for the transaction would be detrimental to the growth and development of the capital markets, and set an unfortunate precedent regarding future transactions. In practice, transaction fees add*

credibility to transactions and indeed, similar or higher fees would be payable on any stock exchange. The proposed commission structure leaves the undersigned at a significant disadvantage, seemingly by virtue of our domicile and market of operation. Unfortunately, the terms proposed are uncharacteristic and nullify the role played by brokers in the development of the Zambia capital market, or indeed the integrity of the capital market as a whole.

We therefore seek your guidance and assistance in representing the concerns of the undersigned to the respective Transacting Parties regarding the commissions proposed in the Transaction, and to seek clarity around the aversion of the payment normal or reasonably discounted transaction fees when such fees have been paid locally and internationally for other transactions.

...." (underline ours) **(See pages 379-381 of the RoP)**

79. The contents of the said letter, particularly the underlined parts, indicate that the Appellant and the other six brokers asserted that (i) despite the submission of quotations, subsequent discussions between them revealed that the fee cap proposed by NAPSA would be detrimental to the market as a whole, and that the member brokers would present a united-front to preserve the collective integrity of the of the profession, and prevent an operating environment in which brokers are forcibly required to submit unrealistically low commissions; (ii) The Appellant and the other brokers tried to collectively negotiate a higher rate of 0.5% at the meeting with the NAPSA on 21st May 2015 (of course without success); and (iii) that they sought the assistance of the LuSE in representing their concerns to the respective Transacting Parties.

80. We have also looked at the letter that the LuSE wrote to the NAPSA on the same date, 26th May 2015, which letter we referred to in our discussion of the legal and economic context. It read in part:

"We have noted with concern the unsettledness that seems to have recently surrounded the buy-side of the sale of the Government of the Republic of Zambia's Class "B" shares in ZCCM – IH Plc. As facilitator of this transaction, we had, in our earlier letter, given the position concerning the total commission payable, which we had stated would not exceed 0.6875% of the value of transaction. We had further broken down this block commission as 0.375% being due to the SEC and the LuSE, while 0.3125 would be the commission due to the brokers.

In appreciation of the special nature of this transaction, it was agreed that NAPSA would spread the buy instruction equally among the seven (7) existing LuSE brokers. Therefore the attempt by NAPSA to obtain quotations from the individual brokers and cap the commission chargeable to a maximum of 0.125% went against what had been agreed to with the LuSE as facilitator.

We have been advised by the brokers that had responded to your request for quotations, that they have since withdrawn those quotations. We therefore wish to reiterate our position and that of the LuSE brokers as reflected in our aforementioned letter, that commissions due to the brokers shall be 0.3125% of the transaction value. This represents a discount of almost 70% on the guide commission payable in an ordinary transaction in addition to the 10% discount on the price of the ZCCM-IH shares which has already been extended to NAPSA. It is thus our hope that you will observe the terms upon which this transaction was facilitated as aforesaid so as not to delay the process any further." **(See letter at pages 19 – 20 of the RoP)**

81. The above letter (i) refers to the information conveyed to the LuSE by the brokers collectively (implicitly referring to the letter from the brokers to the LuSE cited above); (ii) asserts that the LuSE had been informed by the brokers that had responded to the NAPSA invitation for bids that they had since withdrawn their quotations; (iii) makes reference to their previous negations and allegedly agreed brokerage for the brokers; and (iv) reiterates the LuSE position and that of the brokers in their earlier letter (of 11th May 2015), that commissions due to the brokers would be 0.3125%, representing a discount of almost 70% on the guide commission ordinarily payable.

82. We have also looked at the letters of response of the Appellant and the other stock brokers to the Notice of Investigation. Finance Securities in their letter dated 8th July 2015 stated inter alia that the brokers were negotiating collectively from inception, but ultimately each broker was at liberty to participate or to not participate. **(See letter at pages 89-90 of the RoP).**

83. In summary, a letter dated 8th July 2015 from Madison Asset Management (MAMCo) stated inter alia that LuSE advised MAMCo and other stock brokers that at a meeting held on 6th May 2015 with NAPSA representatives, it was agreed that the commission on the buy side would be 0.5% inclusive fees payable to the SEC and the LuSE. That at this point, MAMCo was ready to participate on confirmation from the NAPSA. That when afterwards they received an invitation to bid, they declined due to its being at odds with the earlier communication, the public tender procedures, as well as due to the capping placed on the rate of commission and the short notice. **(See pages 91-92 of the RoP)**

84. African Alliance in its letter dated 9th July 2015 stated inter alia that the waiver on the sell side of the transaction was agreed on the understanding that the buy side trade would be at market related rates, and that on that basis it agreed to participate on the sell side. That on 19th May 2015, the NAPSA invited bids with a capping, and Africa Alliance submitted its bid. That later all the brokers attended a meeting at which the NAPSA offered the brokers participation at the rate of 0.1% being the lowest quote submitted. That the brokers sought to negotiate a commercial rate. That following the meeting, the brokers approached the LuSe as regulator of the stockbrokers and decided that given the waiver on the sell side trade commissions, a fee cap on the buy side would be detrimental to the market and agreed to withdraw their quotes as the proposed brokerage rate was not financially viable. That on 21st May 2015, African Alliance wrote to withdraw its bid as it did not match up to the maximum rate of 0.1%% and did not resubmit a bid. In summary, according to this letter, (i) the brokers tried to negotiate a "commercial rate"; and when they did not succeed, (ii) they approached the LuSE and decided to withdraw their quotes, citing financially unviable commission rate imposed by the NAPSA. **(See pages 96-100 of the RoP)**

85. Stockbrokers Zambia stated inter alia that in the NAPSA invitation for bids, it capped the fee at 0.125%, requiring quotes by close of business same day. That the fee cap represented a87.5% discount on the standard fee of 1%. That the process and position taken by NAPSA appeared to be at variance with normal best practice as well as with trades executed on behalf of NAPSA previously on the LuSE. That the broker decided not to bid because the terms imposed by the NAPSA appeared to be restrictive and a distortion of of competition. That at the meeting called by the NAPSA on 21st May, 2015, they raised their concern at the

NAPSA's approach, being an imposition of an unfair price due to its dominant position as sole purchaser in the transaction, but that in response they were informed that they were free not to participate. That this position was later communicated the same day via email by which they were requested to indicate their positions by 15:00 hours. That the stock broker wrote declining participation. Further, opined in their letter to the Respondent that judging from the NAPSA's email of 21st May 2015 (following the meeting), it would appear that the NAPSA already had a preferred party as indicated in the email.

86. Our summation of the contents of Stockbroker Zambia's letter is that the broker said (i) at the meeting, the brokers tried to object to the brokerage rate offered by the NAPSA, but were unsuccessful; and (ii) although this stock broker had not submitted a bid, it responded to the NAPSA declining to participate. **(See pages 102-103 of the RoP)**

87. We also examined the response to the Notice of Investigation by Equity Capital, dated 14th July 2015, which requires no further summary. The stock broker confirmed having submitted a bid to NAPSA for 0.125% in response to the latter's invitation. That the stock broker responded to the NAPSA following the meeting of 21st May 2015 stating that they were unable to provide the brokerage service at the rate of 0.1%, and further highlighted that the LuSE had called for a Board meeting to discuss the impasse. That the NAPSA was also trying to negotiate the same service through the LuSE (on behalf of the brokers). This letter confirms that following the meeting, the LuSE was dealing with the issue on behalf of the brokers. **(See pages 134-135 of the RoP)**

88. We also reviewed the response to the Notice of Investigation from Intermarket Securities, by letter dated 15th July 2015. The stock broker confirmed having submitted a bid for the brokerage services at the rate of 0.125%. That the broker submitted the bid in spite of being taken aback by NAPSA's action of calling for bids. That this was because they had been of the understanding that the commission had already been negotiated for on behalf of the stock brokers by the LuSE which had been communicating on their behalf. In terms of what transpired at the meeting, the stock broker stated that, following the information given by the NAPSA that they were offering to transact at the rate of 0.1%, they responded that the proposed commission was too low as the market trade commission was 1.375%, but that they were informed that the decision could not be changed. That after the meeting the broker decided to withdraw its bid and to decline to participate in the transaction at 0.1% commission.

89. It is clear from the letter that the brokers were represented and negotiated collectively through the LuSE. When the NAPSA invited the brokers to bid and called the brokers to the meeting at which it informed the brokers of its decision to offer 0.1% commission, they collectively tried to sway the NAPSA from its new position without success. That the broker afterwards decided to withdraw its bid and to decline to participate. **(See pages 147-148 of the RoP)**

90. The Appellant also responded to the Notice of Investigation by letter dated 2th July 2021. That the broker responded to NAPSA's invitation for bids and indicated that it would carry out the transaction at 0.1%. That the broker found the position taken by the NAPSA and announced at the meeting on 21st May 2015 unacceptable. The reasons the broker gave were that they had the understanding that the transaction would be awarded to one successful

bidder; that it was illogical to split the trade among the seven brokers; and it was unacceptable to extend the transaction to brokers that had not submitted bids. That accordingly, the Appellant responded to the NAPSA withdrawing its bid on 21st May 2015, and that upon receipt of this letter, NAPSA wrote stating that the broker's bid was accepted and that the company was appointed to execute the whole transaction. Our summary of this letter is that the Appellant said it withdrew its bid because it was dissatisfied with NAPSA's offer. **(See pages 127-128 of the RoP)**

91. We have also examined the record of interviews that the Respondent conducted of the various representatives of the seven brokers who attended the meeting of 21st May 2015, particularly as to what transpired among the brokers at the meeting. Mr. Joseph Simate of African Alliance Securities submitted that when NAPSA announced it was willing to spread the business among all the stock brokers at the rate of 0.1%, petitions were made by various stock broker representatives in the meeting for NAPSA to reconsider the fee by increasing it to something higher, to which the NAPSA representative, Mr. Chewe, responded that NAPSA was only willing to trade at the stated rate because that was what they had received from the market.

92. Mr. Simate went on to state that when Mr. Chewe briefly left the meeting, the brokers had discussions and suggested that since NAPSA was not willing to negotiate, they were to open new negotiations through the LuSE Board. That during this discussion, the brokers also agreed not to amend their quotes until they tried to negotiate with NAPSA through the LuSE Board. That the brokers also agreed to withdraw their bids, that they agreed that since the quotes mainly affected the broker with the lowest brokerage commission, stock brokers resolved to withdraw their bids and open new negotiations through the LuSE Board. Further, that African Alliance Securities also withdrew its bid because it wanted to reopen negotiations through the LuSE. Mr. Simate stated at the interview that what was cardinal was that the lowest bidder (the Appellant) needed to withdraw its bid, because if not the then the transaction would go through that bidder, That, but if the lowest bidder withdrew its bid it was possible to have another lowest bidder.

93. As to whether anyone was monitoring or facilitating the withdrawal of the bids, Mr. Simate said there was a mailing list which was circulating and those who withdrew their bids wrote on the mailing list and others were informed. Further, that the stock brokers did not have a meeting with LuSE but that they drafted the letter to LuSE and all the stock brokers had to input and signed (he had a copy of the letter).

94. Mr. Fungai Musana of Equity Capital Resources stated that at the meeting, Mr. Chewe who chaired the meeting informed the stock brokers that the NAPSA was willing to spread the transaction among all the brokers, provided that those that were willing to participate inform the NAPSA by the close of the day. That the stock brokers complained about NAPSA's conduct, but Mr. Chewe informed the brokers that those who were not willing to participate should inform the NAPSA. Further, that the two NAPSA representatives left the meeting in order for the brokers to talk about the pricing. That the two specifically left in order to let the brokers discuss pricing. Further, that the discussion centered around why NAPSA decided to engage the brokers when LuSE was negotiating on behalf of the brokers. **(See pages 21-25 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

95. Mr. Musana stated that at the end of the meeting, the stock brokers agreed that the brokerage fee of 0.1% was too low and that they needed to go back to LuSE for negotiations. **(See pages 25-26 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

96. Mr. Chanda Mutoni of Stockbrokers Zambia said that Mr. Mutoni stepped out of the meeting and told the brokers to discuss among themselves if they were willing to submit bids to the NAPSA; that they were left in the room to discuss. That there was no resolution reached among the brokers to withdraw their bids, and that since Stockbrokers Zambia had nit submitted a bid, he was not bothered with the outcome of the discussions. **(See pages 26-28 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

97. Mr. Muchindu Kasongola of Madison Asset Management Company stated that when the meeting ended, the brokers stayed back in the boardroom. He was not sure if it was the brokers who proposed that they stay behind or it was Mr. Chewe who asked them to remain and discuss. That the discussions were very informal and mainly centered around engaging LuSE in order to resolve the capping of the brokerage fee by the NAPSA. That they resolved to go and make independent decisions on whether or not to deal with NAPSA at the rate of 0.1% of the value of the transaction. He refuted allegations that MAMCo agreed with other brokers to withdraw bids, saying they had not submitted bids. **(See pages 28-29 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

98. Mr. Tushar Thaker of Finance Securities said despite being in the meeting when Mr. Chewe left, he was not aware of what was discussed. That he did not know when the stock brokers who had submitted bids withdrew and why. **(See pages 29-30 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

99. Mr. Joseph Mazila of Intermarket Securities stated that nothing was discussed at the time Mr. Chewe was away. That there was no resolution among the brokers, and that the broker made an independent decision to withdraw. **(See pages 30-31 of the Amended Decision of the Board of Commissioners filed on 9th August 2021).**

100. In addition, we examined statements made by Mr. Davis Chewe, the NAPSA officer who chaired the meeting. Following the filing of the complaint by the NAPSA, Mr. Chewe was interviewed by officers of the Respondent, on 27th May 2015. He said of the stock brokers' conduct, *inter alia*: (i) at the meeting, the brokers were asked if they would participate in the transaction at the lowest fee of 0.1%; (ii) that the alleged closed door meeting among the brokers took place in the boardroom at the NAPSA offices; (iii) at the end of the meeting, he asked the brokers to indicate by 15:00 hours the same day whether or not they would participate; (iv) at that point, the brokers asked him to leave the meeting and they remained in a closed door meeting and decided to withdraw the bids; (v) after the withdrawal, LuSE held a meeting and resolved to fix the fees and wrote to NAPSA suggesting that the transaction fee be increased to 0.3125%.

101. Much later in the investigative process, on 7th October 2015, the Respondent interviewed Mr. Davis Chewe, who said, *inter alia* that: (i) NAPSA had a meeting with the ZCCM-IH, LuSE and SEC to discuss fees they would charge for the transaction; (ii) in that meeting, LuSE offered a 50% discount but that NAPSA did not agree and instead invited all

the stock brokers to submit bids; (iii) on 21st May 2015, the NAPSA convened a meeting to which all the stock brokers were invited; the agenda was not disclosed in advance (and no minutes were taken), but at the meeting, the brokers were informed that the purpose was mainly to inform them of the bids they received and to seek their participation in the transaction at the brokerage rate of 0.1%; (iv) the invitation to participate was extended to all the brokers because the transaction was huge and on the sell side the shares were split among all of them; (v) he did not step out of the meeting, but did so only after it had ended, when he left the brokers' representatives in the boardroom because they wanted to confer amongst themselves; (vi) when he came back, the stock brokers' representatives were leaving and they left; (vii) the representatives did not mention anything concerning withdrawal of the bids; and that (viii) the stock brokers withdrew their bids when they reached their offices.

12. Mr. Chewe further stated that: (i) the ZCCM-IH was structured in such a way that it contributed to their withdrawing the bids; (ii) that the NAPSA did not know that each broker was expecting to benefit from the transaction because each broker was allocated some shares to transact; (iii) with hind sight, he did not think that the brokers agreed to withdraw bids and that earlier he had made that allegation because he did not have enough information concerning how the transaction was packaged; (iv) concerning how NAPSA later gave the Appellant the transaction when it had withdrawn its bid, The NAPSA asked the Appellant and other brokers to conduct themselves professionally, upon which the former reconsidered its position and offered its services; (v) he made the complaint to the Respondent because the NAPSA was desperate and that there was a communication breakdown without knowing that each broker was given a number of shares to transact; and (vi) that the way the transaction was structured on both the sell and buy sides made it complicated, but he now did not think that the brokers agreed to withdraw their.

(See Mr. Chewe's two statements at pages 16 to 18 of the RoP; and pages 18 to 21 of the amended RoP filed on 9th August 2021)

13. We have also looked at the evidence of the two Appellant's witnesses, both of whom attended the meeting of 21st May 2015. AW1 testified that at the meeting, (i) the Appellant was not happy because it had submitted a bid and afterwards they were called to discuss the bids; (ii) at some point NAPSA asked them to discuss amongst themselves what they felt about the proposal; (iii) NAPSA left the brokers and came back and there was no conclusion of what had been discussed; (iv) when they returned to the office, they considered that NAPSA was suggesting that they share the trade volume and that was not what their bid was, it was based on the whole volume; on those grounds they decided to trade only if we had the whole volume and not part of it; they sent them an email communicating that they had withdrawn their position (bid); they never sat down to connive as stock brokers and they did not discuss the pricing; (v) NAPSA sent an email to find out their position because nothing was concluded from there (meeting); and (vii) NAPSA later offered the Appellant the transaction at 0.1% and the Appellant executed it.

14. AW2 testified that, (i) the Appellant did not collude with other brokers, did not give the position of the company but had to go back and consult; (ii) the only time they met was at the meeting and everyone was displeased at the time they met with NAPSA; and (iii) they

met with other brokers at the meeting, they did discuss the brokerage commission - everybody was displeased.

105. The two witnesses referred us to documentary evidence, some of which has been referred to in counsel's submissions, evidencing among other things the Appellant's bid, withdrawal of its bid, NAPSA's later offer to transact, all of which are not disputed (some of them were referred to as being in the Bundle, which as we earlier stated had been withdrawn by the Appellant, but the documents also being found in the RoP).

106. We have also looked at the testimony of RW, who was Senior Investigator at the Respondent institution and conducted the investigations. He testified *inter alia* that: (i) the Respondent collected various data from the enterprises alleged to have violated the law and others associated with the transaction; (ii) in particular, responses to letters of inquiry, the investigation and interviews, and in particular that responses given by Mr. Simate of African Alliance Securities and Mr. Fungai Musana of Equity Capital Resources; (iii) based on the evidence, the findings of the Respondent were that there was an agreement among stock brokers when they met to discuss the brokerage commission they would charge NAPSA and thereafter they decided to withdraw, and that this was in contravention of sections 8 and 9 (1) (a) and (e) of the Competition Act; (iv) the Appellant despite its denial, was shown by all the other evidence that they were part of the meeting and it was at the meeting that the discussion of prices happened.

107. Under cross-examination, RW testified inter alia that the Respondent overlooked the Appellant's submission as to what transpired in the meeting among brokers because it was not making sense, that when the meeting concluded at NAPSA, the brokers discussed the pricing and what the way forward was going to be, and that was what led to them to withdraw. Further, that although only one stock broker said the brokers discussed withdrawal of the Appellant's bid (lowest bid), while the other six did not, the Respondent still found that the withdrawal was instigated by the meeting; that even though the NAPSA (Mr. Chewe) later informed the Respondent that the matter had been amicably resolved, the Respondent still proceeded to conclude the investigation and render the Decision based on its power to investigate on its own initiative under section 55 of the Competition Act.

108. In his evidence, RW also referred us, inter alia, to communication from various brokers withdrawing their bids, or otherwise declining to participate. The fact that the brokers who had earlier submitted bids withdrew while others declined to participate is not in dispute. Our understanding of the issues before us, as we have earlier stated, is that the brokers in reaction to NAPSA's new offer were entitled independently, without being in agreement or concert with the other brokers (who were competitors in the relevant market) to respond by withdrawing their bids or refusing to participate. However, one of the questions that the Respondent determined and we need to determine in this appeal is **whether the circumstances surrounding the Appellant's and other stock brokers' reaction of withdrawing their bids and refusing to participate were such that their conduct amounted to contravention of sections 8 and 9 (1) (a) and (e) of the Competition Act.** Presently, we are confining ourselves to section 8.

109. First, we must address the issue raised by the Appellant that the Respondent proceeded with the investigation and concluded it despite the NAPSA having indicated that the

matter had been amicably resolved. We note that in terms of the law, there is nothing that obligates the Respondent to discontinue investigations simply because a complainant indicates that it has withdrawn its complaint or that a dispute has been resolved amicably. We have said it in a number of judgments that the mandate of the Respondent under sections 5 and 55 of the Competition Act transcends the individual interests of the parties involved. It would be contrary to public policy for the Respondent to discontinue investigations every time a complaint is withdrawn or a matter is resolved amicably. In fact (Commission) Administrative Guidelines provide procedure on how the Respondent addresses withdrawal of complaints, and provides for continuance of an investigation. This position was confirmed in the Court of Appeal's recent judgment in the case **of MTN Zambia Limited v. Competition and Consumer Protection Commission (Appeal No. 85 of 2019) 2021 ZMCA 41 (31 March 2021).**

110. Coming to our findings of fact concerning what transpired in this case, a clear and consistent pattern emerged from the evidence we have outlined above that the following took place:

(a) The GZR through the IDC and the ZCCM-IH on the buy side spread the share purchase transaction equally among the seven brokers and, through the LuSE, negotiated a waiver of the LuSE and brokerage fees on the buy side.

(b) The LuSE negotiated for all the brokers collectively on their brokerage both on the sell and buy sides of the transaction; this was the position put forth by the LuSE, directly and indirectly, and confirmed also by the brokers. See various communications, including letter to from the LuSE to NAPSA dated 29th May 2015, at pages 30-31 of the RoP, confirming that it had the mandate to negotiate on behalf of all the brokers, *"The communication to you in respect of the brokerage was given on the basis of the mandate that we were given by the brokers in this matter."* The position is also reflected in some brokers' responses to the investigation, which we have outlined above, that the LuSE had charge of the negotiating the brokerage fee with NAPSA and that the invitation for bids was a departure from that arrangement. Similarly, the collective letter from the brokers dated 26th May 2017 to the LuSE, reporting on the meeting of 21st May 2015, what the brokers viewed as an uneconomical rate proposed by the NAPSA and requesting the LuSE's assistance in taking up the matters with the Transacting Parties. We quoted the letter previously (see letter at pages 379 - 381 of the RoP). Further, letter from the LuSE to the NAPSA following the meeting, dated 26th May 2015, at pages 19-20 of the RoP, stating:

> *"We have noted with concern the unsettledness that seems to have recently surrounded the buy- side of the sale of the Government of the Republic of Zambia's Class "B" shares in ZCCM – IH Plc. As facilitator of this transaction, we had, in our earlier letter, given the position concerning the total commission payable, which we had stated would not exceed 0.6875% of the value of transaction. We had further broken down this block commission as 0.375% being due to the SEC and the LuSE, while 0.3125% would be the commission due to the brokers.*
>
> *In appreciation of the special nature of this transaction, it was agreed that NAPSA would spread the buy instruction equally among the seven (7) existing LuSE brokers.*

Therefore the attempt by NAPSA to obtain quotations from the individual brokers and cap the commission chargeable to a maximum of 0.125% went against what had been agreed to with the LuSE as facilitator.

We have been advised by the brokers that had responded to your request for quotations, that they have since withdrawn those quotations. We therefore wish to reiterate our position and that of the LuSE brokers as reflected in our aforementioned letter, that commissions due to the brokers shall be 0.3125% of the transaction value. This represents a discount of almost 70% on the guide commission payable in an ordinary transaction in addition to the 10% discount on the price of the ZCCM-IH shares which has already been extended to NAPSA. It is thus our hope that you will observe the terms upon which this transaction was facilitated as aforesaid so as not to delay the process any further."(Underline ours)

(c) At the meeting, in response to the NAPSA offer of 0.1%, the brokers tried to negotiate a higher brokerage rate, specifically 0.5% (mentioned in the brokers' collective letter), but without success. This was asserted, directly and indirectly, by some of the brokers' representatives who attended the meeting, and confirmed in the brokers 'collective letter to the LuSE subsequently, referred to above, signed, among others, by the Appellant.

(d) At the conclusion of the meeting, Mr. Chewe (who was at that time the only NAPSA representative) left the brokers, at the brokers' request or Mr. Chewe's request, to enable the brokers discuss the transaction pricing. This fact was common cause among the brokers, and confirmed by AW1.

(e) The brokers, left alone, among themselves, discussed the transaction pricing and came to the conclusion that the rate offered by the NAPSA was too low. This was reflected in some of the brokers' individual statements as well as in their collective letter to the LuSE, even though AW1 denied that they discussed the pricing. We find this denial at odds with the rest of the evidence, including the collective letter with which the Appellant associated itself, and the testimony of AW2 who stated that they did discuss the pricing and all the brokers were displeased with the NAPSA.

(f) The brokers agreed, explicitly or tacitly, to withdraw the bids or otherwise decline to participate. Mr. Simate, in particular, asserted that the brokers discussed the pricing and agreed to withdraw the bids, including especially the lowest bid by the Appellant.

(g) The Appellant and others, having failed to prevail on the NAPSA's representative to increase the rate from 0.1%, did agree, when left by themselves, to insist on the higher rate collectively through the LuSE, and to this effect to withdraw their bids or otherwise decline to deal in the transaction. The withdrawals of bids and the insistence on the higher brokerage rate were confirmed in the brokers' collective letter to the LuSE of 26th May 2015, whose context indicates that brokers had agreed to and coordinated their actions.

(h) Whatever other reasons the Appellant and the other brokers may have given for their reactions, it was the intention of the brokers that they withdraw and decline to

transact so as to return to negotiating for a higher brokerage rate collectively through the LuSE. This is explicit or implicit in brokers' statements; they were offended by the NAPSA's withdrawal from negotiating though the LuSE, and some of them stated that they would reengage with the LuSE on the matter. The brokers in their collective letter to the LuSE, signed by the Appellant, among others, sought the LuSE's assistance in engaging with the Transacting Parties on the matter. In particular, Mr. Simate of African Alliance Securities gave a statement that was consistent with the collective position of the brokers, reflected in their letter to the LuSE. He said of what transpired when the brokers were left alone to discuss the pricing, (interview recording quoted at page 108, paragraphs 204 and 205 of the Amended Decision) *"In that time, all the brokers, including the broker offering the lowest brokerage rate for the transaction, resolved to withdraw their quotes and re-open negotiations with NAPSA via LuSE board."* And again, *"... the NAPSA person left and while he was gone, the brokers really were in discussion saying that since NAPSA won't budge perhaps we need to negotiate with NAPSA through LuSE board .... that's how brokers agreed to say we are not going to amend our orders to a non-commercially viable rate until we have tried to negotiate with NAPSA through LuSE board. ....."*

(i) The transaction was only concluded when the Appellant agreed to change its position and agreed to transact, as a result of which the rest of the brokers released the shares apportioned to their accounts so they could be redirected into the Appellant's account to enable the latter execute the transaction.

Whether or not there was an agreement, decision or concerted practice in terms of section 8

111. Having arrived at the aforesaid findings, the question still remains whether the conduct of the Appellant and the other brokers (who were competitors in the relevant market) constituted an agreement, decision or concerted practice in terms of section 8 of the Competition Act. We revisit section 8 of the Competition Act; it states:

"Any category of agreement, decision or concerted practice which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited."

112. Counsel for the two parties have made their respective submissions, which we have outlined earlier. In sum, the Appellant has stated that the Respondent should have taken into account that the conduct of the NAPSA amounted to price fixing as NAPSA dictated to the stock brokers the upper limit of the money it was willing to pay for the transaction and the brokers had no chance or capacity to negotiate. Further, that NAPSA demanded an immediate response from the Appellant and other brokers and when they did, NAPSA reported the brokers to the Respondent. Further, that the Respondent did not take into account the statement Mr. Chewe made later that with hindsight, having gotten more information on the background to the transaction, he did not think that the brokers colluded to withdraw the bids.

113. The Respondent in its analysis of the conduct from the legal perspective *inter alia* stated, (i) that the brokers' conduct was consistent with the definition of an agreement in section 2 of the Competition Act (which states, *"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, that according to the Oxford Dictionary[28], a decision means *"a conclusion or resolution reached after consideration"*. And the definition of "concerted practice" in section 2 of the Competition Act as *"a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independent action and restricts or lessens competition between them;"*

14. The Respondent also in the Staff Paper (at page 359 of the RoP) argued, referring to the case of **Atochem v. Commission Case T-3/89 [1991] ECR II -867, paragraphs 53-54** in which the European Court of First Instance stated, *"Any regular participant at a meeting at which an anti-competitive agreement is concluded will be taken to have participated in the agreement, unless they establish that the undertaking did not have any anti-competitive intention when it attended the meetings, and that the other participants were aware of this. It appears, therefore that the participant tacitly accepts an offer to collude by not publicly distancing itself from the agreement. It is no defence that the participant did not put the initiatives into effect. Further, evidence of prices not reflecting those discussed at the meeting is not sufficient to prove that the entity had participated in the scheme."*

15. The Respondent in its legal analysis further referred to the South African case of **Reinforcing Mesh Solutions (Pty) Limited and Vulcania v. Competition Commission and Others, (84/CR/DEC09) [2013] ZACAC 4 (15 November 2013)** in which a member of the wire mesh cartel placed its role in the cartel in dispute during legal proceedings. While admitting attendance at the meetings, Vulcana refuted that its actions amounted to an agreement to join the cartel and hence denied liability. It contended that its attendance at the meetings took an entirely passive role in the discussions, and because it had no intention of abiding by the decisions reached at these meetings. In passing judgment, the South African Competition Tribunal held that passive participation in unlawful conduct without distancing oneself from its content could be seen as an indication of tacit approval of the conduct. Without Vulcana publicly distancing themselves from the content of an unlawful initiative, or reporting it to competition authorities, Vulcana effectively compromised the discovery of the cartel and encouraged its continuation. Therefore, Vulcana were held fully responsible. The Respondent in the present case have argued that the agreement existed among the stock brokers by virtue of them attending the meeting where resolutions were passed to withdraw bids and charge a higher price.

16. Counsel for the Respondent in their submissions have referred to the definition of "agreement" in section 2 of the Competition Act and the test for the existence of an agreement in **the BAYER AG case**, in which the Court said, *"an agreement ... must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to a concurrence of wills between economic operators on the implementations of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed..."* Counsel have also referred to the evidence on record, namely responses to interviews particularly by Mr. Simate of African Alliance Securities and Mr. Musana of Equity Capital Securities. Further,

[28] page 358 of the RoP, paragraph 229 (Staff Paper, November 2016)

contended that evidence of cartel conduct may be circumstantial rather than direct and referred to contents of a paper, **OECD paper on Prosecuting Cartels, 2006 without Direct Evidence DAF/COMP/GF 2006**; page 20, paragraph 2; *"Evidence used to prove a cartel agreement can be classified into two types: direct and circumstantial. Circumstantial evidence, in turn, consists of "communication" evidence and economic evidence, which include firm conduct, market structure, and evidence of facilitating practices".*

7. We have taken into account the definitions of "agreement" and "concerted practice" in the Competition Act which in very broad terms capture various forms of agreements and of practices. To start with, on the question of existence of agreement, we refer to the text in **the BAYER AG case**, referred to by counsel for the Respondent, which in essence requires that there should be a meeting of the wills of the parties (much like in the formation of a contract at common law), so that they are said to have subjectively intended to enter into agreement. In **the Insurers case**, we said the following (quoting extensively for full understanding):

> *"172. The starting point is the definition given to 'agreement' in section 2 of the Competition 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;" 'Decision' is not defined in the Competition Act, but a standard English dictionary defines the term as (a noun) "a conclusion or resolution reached after consideration." And similar words are listed as "resolution", "conclusion", and "determination", and others.[29] It has been held in the well known EU case of* ***Bayer AG*** *(supra) that proof of an agreement, and by extension in our case, a decision, as we have earlier explained, "must be founded upon the existence of the subjective element of concurrence of the wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market. The form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention." (para. 172) (Underline ours)*
>
> *173. There is no dispute that the test required to establish the faithful expression of the parties' intention by the concurrence of the wills is subjective. But the test for faithful expression of the parties' intention required to establish a concurrence of the wills for purposes of determining the existence of an agreement or decision is not the same as the test of intent required to ascertain (once it is established that there is an agreement or decision or concerted practice) whether it had as its object or effect the prevention, restriction or distortion of competition to an appreciable extent in Zambia. These are separate stages in the assessment process. (Para. 173)*
>
> *174. First of all, counsel for the Appellants have made a statement that sections 8 and 9 have to be read together. Not necessarily, but perhaps for purposes of this case because the conduct in question is the same except that for the IAZ members concerned the conduct has been determined as violating both sections. Moving forward, while counsel for the Appellants have not so much dwelt on the issue of the meeting of the wills in their initial submissions, they have assailed the Respondent's reliance on the* ***Bayer AG*** *case on the question of existence of an agreement or decision, particularly in their submissions in reply, arguing that the meeting of the wills in the present case was not established on the subjective test, citing the* ***T-Mobile case****, our holding in*

)efinitions from Oxford Languages and Google, sighted on internet on 13th April 2021. At 17:10 ps://www.google.com/search?q=What+is+decision&sa=X&ved=2ahUKEwjrvafSvPvvAhURhlwKHVoIB6EQ1QFXoECBEQAQ&biw=1366&bih=657.

*the **MRI case**, holdings in the **GlaxoSmithKline case**, **IAZ International Belgium case**, the **Wouter case**, and others. In our view, the holdings cited by counsel were not dealing with the question of the existence of an agreement or decision but rather an evaluation of its purpose or effect, or its justification in the circumstances as provided by Article 101 TFEU. We have already made ourselves clear that in the context of section 8, justifying conduct in question cannot arise aside the provisions of the Act, that is, for instance, an exception falling under section 3 (3), falling short of the 'appreciability' required within section 8 itself, or an exemption by section 13 or under other provisions of Part III. (Para. 174)*

175. In terms of the standard of subjective intent for the meeting of the wills required to establish the existence of an agreement or, by extension, a decision, the 'subjective standard' has been defined by Black's Law Dictionary as "a legal standard that is peculiar to a particular person and based on the person's individual views and experiences". Subjective intentions can only be externally determined by the conduct of the person concerned, by which it is established that they must have intended to enter into agreement or to make a particular decision. Otherwise contracts would not be ascertained one way or the other if courts could not rely on a party's conduct, whether expressed by oral communication or writing or both. In the Rumpuns case (supra), we said in respect of mens rea, in our interpretation of the offence of implementing a merger without authorization under section 37, "The Tribunal notes that the word "intentionally" as used in the foregoing provision connotes subjective mens rea (guilty mind). In terms of subjective mens rea one must intend to commit a wrongful act, i.e. a wrongful act must be accompanied by an overt mental state such as intent or recklessness."[30] The guilty mind referred to is of course not in terms of knowing or ignorance of the law but in directing one's mind to do the act, as may be seen by the conduct, so as to establish whether the person intended that act. At this stage, we are not dealing with an intended object or effect of the conduct itself but the prior intent of the IAZ and each member subjectively to engage in an agreement or decision." (Para. 175)

18. We further said (quote), *"As for 'concerted practices' occurring in section 8, the term has been defined in the Competition Act as falling short of an agreement, and by its very nature it involves subtle or tacit forms of arrangements between competitors. In view of this, to read mens rea as an ingredient into such practices, which are in any case difficult to crack down, would do serious injury to the legislative intention of prohibiting such practices which are common in anti-competitive cartel conduct. Applying the principle in the **Sherras v. De Rutzen case** (supra) and applied in others cases thereafter and by Charles, J in the **Chitambala Ntumba case** (supra), "One way in which this legislative intention is implied is if the substantial suppression of the mischief at which the offence is directed would not be achieved unless the offence was one of absolute liability....", we conclude that anti-competitive 'concerted practices' are strict liability offences."*

19. In light of the facts surrounding the case, we agree that the Appellants' conduct and that of the other brokers constituted an agreement between them which was intended to be implemented in Zambia, albeit not formal or legally enforceable. We endorse the subjective test applied in **the BAYER case** and we follow the elucidation we provided in **the Insurers case** on the subjective test, i.e., that proof of subjective intent is shown by an overt act (that

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Objective Mens Rea and Attenuated Subjectivism: Guidance from Justice Charron in R. v. Beatty, Palma Paciocco, S.J.D. candidate, Harvard Law School, p.80 available at https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3586&context=scholarly_works visited on 28/06/2019 at 13:38

s observable on the part of the person accused of the offence) in the direction of the ntended course of action.

In this case, neither the Appellant nor any of the other brokers publicly denounced the nti-competitive conduct or dissociated themselves from it, even while withdrawing their ›ids or declining to participate for the reasons they would have us believe. To the contrary, he Appellant and other brokers actively participated in the discussions and otherwise :onducted themselves in a certain way to the ends of the agreed course of action; that is, vithdrawal of the bids and engaging with the LuSE to reinstitute the collective negotiations 'or a higher price. Had the Appellant or any of the other brokers not actively discussed, ıgreed to, and taken, the said course of action, they would in the circumstances still be said, ıt the very least, to have tacitly acquiesced to the agreement or engaged in concerted ›ractice per section 8 of the Competition Act. This position is demonstrated by the case law :ited by the Respondent, which we have endorsed in our previous judgments on the ;ubject.

Furthermore, as we said in **the Insurers case**, and in our discussion of the subject of egal and economic contexts of competition law within the Zambian jurisdiction above, it is ıo defence to section 8 that the Appellant and the other brokers may have been reacting to :he conduct of NAPSA whom they have accused of fixing the price by capping the ›rokerage fee and abusing dominance. If indeed it could be said that they were reacting to NAPSA's misconduct, then the way they went about it was caught up by what is termed as ıgreement or concerted practice per section 8 of the Competition Act.

The Appellant has criticised the Respondent for relying on the testimony of Mr. Simate ›f African Alliance and ignoring the others, including that of Mr. Chewe who later said he did not think that the brokers colluded to withdraw the bids. It is true that the Respondent particularly relied on Mr. Simate's statement in arriving at its findings, and reasonably so, in our view. This is in light of the fact that in cases of anti-competitive agreements, decisions or concerted practices, it is not to be expected that the parties will have a formal agreement or other document endorsing an alleged course of conduct. This is universally recognised by competition authorities, hence the extended definitions of "agreement" and the inclusion of "concerted practice" in the Competition Act to capture the mischief. The article by the OECD on the subject, referred to by counsel for the Respondent, is apt in describing the forms that evidence establishing cartel conduct may take.

Furthermore. we have found Mr. Simate's statements to have been corroborated by a host of evidential material, which we have earlier outlined, demonstrating that the brokers reached agreement as alleged. We have also found that the later statement by Mr. Chewe in which he opined that the stock brokers did not collude, contradicting his earlier statement, is inconsequential in light of the totality of the evidence confirming otherwise. In any case, the statements were merely his opinions as he was not present when the brokers discussed among themselves. We now move to consider the next issue.

Whether the conduct had the object or effect to prevent, restrict or distort competition.

We have already established that the question whether an agreement is restrictive by object or effect is determined using the objective test. We have also demonstrated, in our

discussion of the subject of relevance of legislation and case law of foreign jurisdiction, that the determination of whether an agreement is restrictive by object is distinguished from that by effect and that the two are treated disjunctively, as alternatives. The former does not require the competition authority to establish concrete effect of the alleged anti-competitive conduct in the relevant market. We have further determined that concerted practice is established on the basis of strict liability because of the difficulty of establishing *mens rea* in this kind of conduct.

125. In **the Insurers case,** we said (quoting extensively for full appreciation):

> *"179. ... the words 'object or effect' are disjunctive, i.e. alternative and not as cumulative requirements. EU Guidelines make this distinction clear but also bring out the common denominator between the two, that is, circumstances that may have to be evaluated to determine exemptions granted in paragraph (3) of Article 101 TFEU. The Guidelines state as follows:*
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> > *"20. The distinction between restrictions by object and restrictions by effect is important. Once it has been established that an agreement has as its object the restriction of competition, there is no need to take account of its concrete effects(25). In other words, for the purpose of applying Article 81(1) no actual anti-competitive effects need to be demonstrated where the agreement has a restriction of competition as its object. Article 81(3), on the other hand, does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect. Article 81(3) applies to all agreements that fulfil the four conditions contained therein(26).*
> >
> > *21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.*[31] *(Para. 179)*
>
> *180. In our earlier discussion of the subject of relevance of foreign laws, we identified that the sometimes blurred lines in the distinction between restrictive agreements or decisions or concerted practices by object on the one hand and by effect on the other is caused by the fact that in the EU case law, especially that arising and determined before the introduction particularly starting 1999 of a flurry of regulations and in 2003/2004 of guidelines, the adjudication processes were preoccupied with determining issues of circumstances that might take conduct under cover of the exemptions afforded by paragraph (3) of Article 101 TFEU.*

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[31] **Guidelines on the application of Article 81(3) of the Treaty (Text with EEA relevance)** *Official Journal C 101 , 27/04/2004 P. 0097 - 0118,* paragraphs 20 and 21.

Though such evaluations are still undertaken under the current reign of the regulations and guidelines, the burden of proof has shifted to the business entities seeking to invoke and prove the application of the exemption. There is also likelihood in some cases that prevention, restriction or distortion of competition by object may not be clearly established without going into assessment of the concrete impact or effects of the conduct on competition on the relevant market. In the end, it is a matter dictated by the facts and circumstances of each case, including the context of the law. In the context of section 8 of Competition Act, an evaluation going that far may only be necessary if it is needed to establish whether conduct is restrictive of competition by effect. Therefore, we do find the Respondent's proposition that "in terms of the agreement, if its object is found to be restrictive of competition, it is settled; there is no need to establish that it also had restrictive effects" valid.

181. We must now look at the meaning of 'object' in section 8 of the Competition Act. Black's Law Dictionary defines the term as 'something sought to be attained or accomplished; an end, goal, or purpose'.[32] *As we have already stated, the standard of the intent, required to establish the object, is the objective standard. Black's Law Dictionary defines 'objective standard' as 'a legal standard that is based on conduct and perception external to a particular person". An example is given of the law of torts where the standard of a reasonable person is considered an objective standard because it does not require a determination of what the subject person was thinking. Thus, without losing our focus by engaging in unnecessary EU legal jargon, we must look at the evidence before us."*

126. Bearing in mind that by 'object' is meant, as defined in **Black's Law Dictionary**, *'something sought to be attained or accomplished; an end, goal, or purpose'*, we add that, on the other hand, the word "effect" is commonly defined as *"a change which is a result or consequence of an action or other cause"*[33]. Furthermore, before we go to the evidence, we examine briefly EU case law on competition restriction by object versus restriction by effect, more especially cases decided following subsidiary instruments passed post 1999.

127. In the **European Night Service** ***(Joined cases T-374/94, T-375/94, T-384/94 and T-388/94)***, the Court of First Instance stated that the assessment of an agreement requires taking into account the economic context, the nature of products or services as well as the structure of the market *"unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets [in which case] such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article [101 (3) TFEU]."*(italics ours for emphasis) As the Advocate General in **the Irish Beef Industry case** clarified, it cannot be inferred from that statement that the notion of restriction of competition by object is limited to hardcore restrictions but that the consideration of the legal and economic context may be summary for some restrictions (AG Opinion in case C-209/07, paragraph 47, footnote 26).[34]

128. In **the Irish Beef Industry case**, the Court had to decide in a preliminary ruling procedure whether the scheme addressing the structural over-capacity of the beef processing market in Ireland was restrictive by object. Under that scheme, the processing capacity would be reduced by 25 percent through a system limiting the number of suppliers via a financial compensation to those who commit to exit the market. Referring to

[32] Black's Law Dictionary, 9th Edition, page 1177.

[33] See Oxford Dictionary.

[34] Extract from the article by .... cited above.

the test under **the Société Technique case,** the Court decided that restrictions by object are violations that, by their very nature, are injurious to the proper functioning of normal competition.

9. In **T-Mobile (2009) ECR 1-4529,** a Dutch court made a reference for a preliminary ruling asking the Court to detail the criteria to assess whether a concerted practice is restrictive by object. That case concerned the one and only exchange of information between all the Dutch mobile telecommunications operators to decrease the standard dealer remunerations for postpaid subscriptions. The Court decided that such a practice had the potential to harm competition and could therefore be restrictive by object on the basis that : "*in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market.* "The Court added that an agreement restrictive by object is prohibited "*even in the absence of anti-competitive effects on the market*".[35]

). We have already dealt with legal and economic contextual issues, including the implications of the roles played by institutions such as the IDC, the ZCCM-IH and the LuSE; the fact that, unlike Article 101 (1) TFEU, Part III of the Competition Act of which sections 8 and 9 are a part and the rest of the Act do not provide defences or justifications; only exceptions in section 3, the "appreciability" condition in section 8, and exemptions under provisions of Part III, which in any case do not apply to the facts of the present case. We have also established that provisions of the now repealed Securities Act Chapter 364 were pro-competition. We have pointed out and explained why summary findings that may not require in-depth analysis of the economic context or concrete anti-competitive effect are achievable in the case of restriction by object per section 8 and a horizontal agreement per section 9 of the Competition Act. We emphasise that this is the approach we have taken.

. Furthermore, we have in previous judgments, such as **the MRI case** and **the Insurers case,** held that an agreement or decision or concerted practice can have as its object the prevention, restriction or distortion of competition even though that is not the only object, and even though the vother object is legitimate. We endorse, as we have done before, the decision in **the Irish Beef Industry case.** It matters not what other object the Appellant and the other brokers may have sought to achieve; it is sufficient that evaluated objectively, the adopted course of action had as its object prevention, restriction or distortion of competition in the relevant market.

. The Appellant and the other stock brokers directly or indirectly or, at the very least, tacitly agreed to withdraw their bids, and decline to transact on the terms offered by NAPSA to the ends of collectively achieving a higher rate than that offered to them individually to accept or not accept. Therefore, applying the objective test to our findings of facts, we are satisfied that the agreement, decision or concerted practice between the Appellant and the other brokers had as its object the prevention, restriction or distortion of competition among them. Further, that being restrictive by object, there was no need to

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id.

further assess the actual anti-competitive impact of the action. We also, in this regard, note that under the EU law, hardcore restrictive agreements, such as price fixing horizontal agreements, are regarded as restrictive by object due to their serious anti-competitive nature. We stated as much in **the Insurers case**, the extract text of which we have quoted above from our judgment in that case. We, of course, address the question whether the restrictive agreement was horizontal involving price fixing per section 9 later in this judgment. We now move to the next issue.

Whether the conduct prevented, restricted or distorted competition to an appreciable extent in Zambia

133. Counsel for the Appellant have argued that guided by the provisions of the *de minimis notice* (*De Minimis* Notice, EU Commission), the Appellant's "actions were insignificant in comparison to the whole capital market in Zambia, as it related to a single trade". Counsel for the Respondent have argued that the Appellant and the other stock brokers altogether represented one hundred percent of the share of the relevant market, i.e., provision of brokerage services on the LuSE. Further, inter alia, that after negotiations between the NAPSA and the stock brokers failed, the NAPSA reported the stock brokers to the Respondent because the transaction would have failed to take place considering that the market was small hence any anti-competitive conduct by the stock brokers affected competition to an appreciable extent.

134. The question whether the conduct in issue was to an appreciable extent in Zambia has to be determined on the basis of the guidance provided first and foremost by the context of section 8 in the Competition Act itself. The Competition Act in section 14 clearly provides that, depending on share thresholds in a relevant market of parties to a horizontal or vertical restrictive agreement (30 percent or more and 15 percent or more, respectively), the parties may apply to the (Commission) for authorization of the agreement. Accordingly, the determination of "appreciability" in section 8 of the Competition Act is assessed on applicable criteria, such as market share of the parties involved (in the relevant market).

135. It would defeat the objectives of the Competition Act and undermine efforts to sanction cartel conduct if "appreciability" were to be determined on the basis of the value of a single transaction in ratio to the total value of the product service conducted in the relevant market. The notion advanced by counsel for the Appellant that the Appellant's action ought to be considered against the value of the brokerage service in the whole capital markets is farfetched and not supported by law. If this were the case, cartels would resort to engaging in a series of so-called "insignificant restrictive agreements" thereby circumventing the law. Furthermore, contrary to counsel for the Appellant's suggestion, the wording of section 9 of the Competition Act does not state, explicitly or impliedly, that the offence is subject to "appreciability" of the anti-competitive conduct.

136. The Respondent has, for instance, demonstrated that the conduct impaired the proper functioning of normal competition because it involved all the stock brokers (i.e., holding altogether 100 percent share of the relevant market of provision of brokerage service on the LuSE). In other words, by their conduct, the brokers collectively created or had the potential to create an environment where the transaction in question would not be executed unless the NAPSA agreed to the brokers' collectively negotiated or determined fee.

According to the statement that was later made by Mr. Chewe, the situation was only escued because the NAPSA requested the Appellant and the other brokers to conduct hemselves professionally, upon which the Appellant reconsidered its position and agreed o offer its services.

Furthermore, the share threshold approach we have presented above is universal. The De Minimis Notice may be a helpful aid in the interpretation of section 8. However, it has to e properly understood. The *De Minimis* Notice uses relevant market share thresholds of he parties to a restrictive agreement, not the value of the transaction in ratio to the total alue of the product traded in the relevant market. We have noted that greements between actual or potential competitors benefit from the "safe harbour" rovided in the Notice - meaning that they are not caught by the general prohibition of nti-competitive agreements under EU competition law, if the aggregate market share held y the parties to the agreement does not exceed 10 percent on any of the markets affected y the agreement. For agreements between companies that operate at different levels of the upply chain, like with most distribution agreements, the market share for benefitting from he "safe harbor" is 15 percent.

We also note that, in order to benefit from the Notice for both agreements between ompetitors and non-competitors, the agreement must not have an anti-competitive object nd thus, in particular, not contain any so-called "hardcore restrictions" of competition such s price fixing and market allocation.

The *De Minimis* Notice was updated (2014) to reflect recent developments in the urisprudence and in particular the ruling of the EU CJ in the case of **Expedia Inc. v Autorité de la concurrence and Others (C-226/11) [2012] ECR (the Expedia case)**. In this udgment the Court held that "*an agreement that may affect trade between Member States and hat has an anti-competitive object constitutes, by its nature and independently of any concrete effect hat it may have, an appreciable restriction on competition*". The Court thus clarified that nticompetitive agreements by object cannot be considered as minor, because they have by lefinition an appreciable impact on competition. As a result, such agreements cannot enefit from a "safe harbour".

The case of **Volk Vervaecke 5/69 [1969] ECR 295**, which was cited by counsel for the ppellant, was previously the authority in the EU competition law on this subject. This was case about an agreement between a German supplier of washing machines and a listributor for Belgium and Luxembourg (which granted the latter exclusive distribution ights, including absolute territorial protection (an 'object' restriction)). The position eached in that case was that: "*an agreement falls outside the prohibition in Article 101 (1) TFEU hen it has only an insignificant effect on the markets, taking into account the weak position which he persons concerned have on the market of the product in question.*" However, more recently, in **he Expadia case**, the ECJ held that an agreement that may affect trade between Member tates and which has an anti-competitive object constitutes, by its nature and ndependently of any concrete effect that it may have, an appreciable restriction on ompetition. On that basis, the ECJ's holding was that a Commission notice, such as the *De Minimis* Notice, is not binding in relation to the Member States.

More importantly, however, having determined that the conduct of the Appellant and ɜ other stock brokers was anti-competitive by object, we also conclude, in light especially the 100 percent share between them in the provision of brokerage services on the LuSE in ɜ whole country, that the conduct was anti-competitive to an appreciable extent in ımbia. Further, that the appreciability has been demonstrated evidentially that success of ɜ transaction in issue was threatened by the anti-competitive conduct since all the brokers ı the LuSE were involved. The situation was only rescued when the Appellant later anged its position and agreed to execute the transaction. This state of affairs was the ason the SEC intervened to resolve the impasse that was created on the transaction. The ıief Executive Officer wrote to the Director General of the NAPSA on 28th May 2015, *inter ia*:

"You will appreciate that as regulator of capital markets, it is in our interest to ensure that the markets are operating in a fair and transparent manner. While the SEC's mandate does not extend to regulation of pricing of licensees in the capital markets, we would like to place on record that we were compelled to convene the meeting with both parties given our concern about the persisting delay in the finalization of the GRZ sale down.

It is our sincere hope that this matter can be resolved in the shortest possible time." ***(See pages 26-27 of the RoP)***

We move to the next grounds of appeal.

ırounds three, four and five

ii) That the Respondent erred in making the finding that the agreement by the stock brokers was to fix, directly or indirectly, the brokerage commission.

iv) That the Respondent erred when it held that the agreement by the stock brokers was to fix, directly or indirectly, the brokerage commission.

v) That the Respondent erred when it made a finding that the Appellant participated in the collective refusal to supply services.

These grounds of appeal relate to section 9(1) (a) and (e) of the Competition Act, and we lo not see any difference between grounds three and four. Section 9 (1) (a) and (e) states,

"(1) 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) ...;

(c) ...;

(d) ...; or

(e) provides for collective refusal to deal in, or supply, goods or services."

Counsel for the Appellant have argued all the grounds of appeal together, and we have already outlined these. Counsel for the Respondent have argues mainly by reference to the definition of 'horizontal agreement" and the evidence relating to the agreement between the brokers gathered in the investigative process. We therefore do not dwell on the

submissions, particularly that we have already evaluated the evidence in our determination of the grounds of appeal relating to section 8 of the Competition Act.

145. Section 2 defines "horizontal agreement" as *"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."* There is no dispute that the Appellant and all the stock brokers were competitors in the business of provision of brokerage service on the LuSE throughout the country. Therefore the restrictive agreement which we have found to have been concluded between them is a horizontal agreement.

146. Furthermore, in terms of section 9 (1) of the Competition Act, any horizontal agreement of the description mentioned therein is prohibited *per se* and void. "Per se" means that the agreement is in itself, without requiring any examination as to its anti-competitive object or effect, prohibited and void. This is because the anti-competitive object or effect of these agreements is presumed on account of the very nature of the agreements, which are in the EU legislation described as "hardcore" restrictive agreements.

147. The question therefore that we need to address is simply whether the restrictive agreement (a) fixed, directly or indirectly, a purchase or selling price or any other trading condition for the transaction in issue; and (e) provided for collective refusal to deal in, or supply, goods or services. This is mainly a matter of finding of fact from the evidence which we have already outlined and evaluated.

148. As we have already shown, the Appellant and the other brokers discussed and collectively purposed to deal in the transaction only if the NAPSA accepted a higher brokerage fee negotiated through the LuSE, which indirectly amounted to fixing the brokerage commission for the transaction, or to fixing a trading condition, applicable to all of the brokers, in the terms of paragraph (a) of the subsection. Furthermore, as we have already concluded, the Appellant and the other brokers by their agreed course of action, agreed to engage in collective refusal to trade in the transaction, in the terms of paragraph (e) of the subsection. As we have already determined, this anti-competitive conduct threatened the success of the transaction, which was only rescued when the Appellant later changed its position and agreed to execute the transaction.

149. In the case of **Top Gear and Nine Others v. Competition and Consumer Protection Commission 2012/CCPT/003**, this Tribunal held that the agreement reached by nine garages that were participating in the provision of repair services for insured motor vehicles, that they should charge a certain price, engaged in a price-fixing agreement prohibited by section 9 (1) (a) of the Competition Act. As we said in **the Insurers case,** 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 which is intended to be applied or demanded by the parties to the agreement. The Appellant and the other brokers sought, indirectly, to apply or demand a price that was to be determined through collective negotiations via the LuSE. At any rate, the Appellant and the other brokers agreed to collectively fix a trading condition that they would only negotiate the brokerage price through the LuSE.

150. Consequently, grounds three, four and five fail and we proceed to consider ground six.

That the Respondent erred in fact when it did not consider all the evidence and findings before it prior to arriving at its decision.

Briefly, our finding on this ground of appeal is that, as we have shown earlier, although ; Respondent did not address all the issues that we consider to have required :errogation, it did consider all the issues that relate to the Appellant's grounds of appeal, ating to sections 8 and 9 (1) (a) and (e) of the Competition Act. We have further termined that notwithstanding that the NAPSA conducted itself improperly, that cannot onerate the Appellant of liability under the Competition Act, although it may be a tigatory factor in the Respondent's determination of the fine. This ground of appeal erefore fails. We move to the last ground of appeal (ground 7).

i) ***That the Respondent erred in fact and law when it held that NAPSA was not an enterprise and therefore incapable of abusing their dominant position.***

Section 16 of the Competition Act deals with the offence of abuse of dominant ısition in the following terms:

"(1) An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.

(2) For purposes of this Part, "abuse of a dominant position" includes –

(a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

(b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition;

(c) applying dissimilar conditions to equivalent transactions with other trading parties;

(d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;

(e) denying any person access to an essential facility; (f) charging an excessive price to the detriment of consumers; or

(g) selling goods below their marginal or variable cost.

(3) An enterprise that contravenes this section is liable to pay the Commission a fine not exceeding ten percent of its annual turnover."

It is clear from subsection (1) that the provision relates to an enterprise. "Enterprise" is ıfined in section 2 as *"a firm, partnership, joint- venture, corporation, company, association and ıer juridical persons, which engage in commercial activities, and includes their branches, bsidiaries, affiliates or other entities, directly or indirectly, controlled by them;"*. The NAPSA is tablished as a body corporate by section 3 of the National Pension Scheme Act Chapter 6 of the Laws of Zambia. Sections 4 and 5 of this Act sets out the functions and powers of e NAPSA as follows:

"4. The functions of the Authority shall be-

(a) implement the policy relating to the National Pension Scheme in accordance with this Act; and

(b) control and administer the Scheme.

5. (1) The Authority shall have power to-

(a) subcontract any of its functions to a consultant or corporation with proven experience in the particular function being subcontracted;

(b) give such directions as it may consider necessary regarding the operations of the Scheme; and

(c) do all such other acts and things as are necessary to give effect to the provisions of this Act.

(2) In the performance of its functions, the Authority shall, subject to the provisions of this Act, not be subject to the control or direction of any person or authority."

The First Schedule to the Act further provides in paragraph 11 (4) that the NAPSA *"may invest in such manner as it thinks fit such of its funds it does not immediately require for the performance of its functions."*

Our understanding is that the NAPSA is established by statute to administer the National Pension Scheme. While, the NAPSA has power to invest its funds as it sees fit, such as purchasing shares on the stock exchanges as was the case *in casu*, it is by no means engaged in commercial activities in the normal course of doing business envisaged in the definition of "enterprise" in section 2 of the Competition Act. The concept of dominance envisaged in the Competition Act relates to the economic strength of an enterprise in the relevant market in which it operates, or in which its commercial activities have a bearing. This can be seen from section 16 of the Competition Act, outlined above, the definition of 'dominant position" in section 2, and circumstances that establish the existence of a dominant position in relation to the supply of goods or services in Zambia, stipulated in section 15 of the Competition Act.

Section 2 defines "dominant position as *"a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors;"*

Section 15, on the irrebuttable presumption of dominant position states, *"A dominant position exists in relation to the supply of goods or services in Zambia, if-*

(a) thirty percent or more of those goods or services are supplied or acquired by one enterprise; or

(b) sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.

Therefore, abuse of dominance relates to the economic power of an enterprise in the market in which it operates commercially or in which its commercial activities have a bearing. The NAPSA was only purchasing specific shares on the LuSE and not engaged in a competitive business in that market.

59. However, had the NAPSA's conduct been investigated for violation of any other provision of the Competition Act and it had been established, for instance, that the institution was privy to a restrictive agreement per section 8, involving collective negotiation of the brokerage fee, such conduct could arguably attract appropriate remedial measures under section 8 read with section 5 (l) of the Act. We have already bemoaned the failure on the part of the Respondent to comprehensively investigate the conduct of the various institutions that played a role in the subject transaction.

60. In consequence, the appeal fails in its entirety, with costs to be borne by the Appellant.

61. Any aggrieved party may appeal this decision within thirty days.

Delivered at Lusaka this 17th day of August, 2021.

Mrs. Eness C. Chiyenge – Chairperson

Mrs. Miyoba B. Muzumbwe-Katongo – Vice Chairperson

Mr. Buchisa Mwalongo - Member