CCPC

COMPETITION & CONSUMER
PROTECTION COMMISSION

Protecting and Enhancing Competition and Consumer Welfare in the Economy for the Benefit of Zambia

Merger Control Regulation:

What you need to know when buying or selling a business entity

1. Introduction

When companies decide to merge, they are in fact altering the market structure of the sector (s) in which they operate. The merger may enhance or reduce competition. It is also possible that a merger may not change the levels of competition in the sector. As a Competition Authority, the Competition and Consumer Protection Commission (CCPC) is more concerned with mergers that would significantly reduce competition in the relevant market as opposed to those mergers that enhance competition or maintain the levels of competition.

It can be challenging for any authority to predict the effects of a merger without analyzing the proposed merger and the market (s) in which it will occur. Therefore, the Competition and Consumer Protection Act number 24 of 2010 under sections 25, 26, 27 and 28 clearly stipulates the types of mergers that are reviewable by the Commission and the necessary threshold for a merger to warrant notification. This allows the Commission to undertake a review of the merger and analyze the possible market effects it will have after the merger has been consummated or effected.

This brochure is not a substitute for the Act and the regulations and orders made under it, nor a definitive interpretation of the law. If you are not sure about how the law applies in the context of your particular situation, you may wish to seek legal advice.

2. The Competition and Consumer protection Act Number 24 of 2010 (the Act) on Mergers

The following are the types of mergers that are renewable by CCPC

Section 25 of the Act states that:

(1) A merger is subject to the provisions of this Part if it is reviewable by the Commission.
(2) The Commission shall review a merger if -
  (a) the merger is subject to prior authorisation in accordance with section twenty-six; or
  (b) the Commission elects to review the merger in accordance with section twenty-seven.

Section 26 of the Act states states that:

(1) Parties to a merger transaction that meets the prescribed threshold under subsection (5) shall apply to the Commission for authorisation of the proposed merger in the prescribed manner and form.
(2) The Commission may, upon receipt of an application under subsection (1), approve or reject the application.
(3) The Commission shall, where it rejects an application under subsection (2), inform the applicant accordingly and give the reasons thereof.
(4) A merger that meets the prescribed threshold under subsection (5) and is implemented without the Commission's authorisation is void.
(5) The Minister may, by statutory instrument, on the recommendation of the Commission, prescribe the threshold to be applied for the purposes of subsection (1).

Section 27 of the Act states that:

(1) Notwithstanding section twenty-six, the Commission may, where it has reasonable grounds to believe that a merger falls below the prescribed threshold, review the merger if

  (a) the merger is likely to create a position of dominance in a localised product or geographical market;

(b) the merger is likely to contribute to the creation of a dominant position through a series of acquisitions which are not individually subject to prior notification;
(c) the merger may substantially prevent or lessen competition;
(d) the merger is concluded outside Zambia and has consequences in Zambia that require further consideration; or
(e) as a result of the merger, there is, or is likely to be, competition and public interest factors which require to be considered.

(2) The Commission may, where it determines that a merger is reviewable by the Commission under subsection (1), request any party to the merger to submit to it any information on the transaction for its verification.

(3) The Commission may, within seven days of receiving and verifying the information under subsection (2), request the parties to the merger to apply to the Commission for authorisation of the merger in accordance with section twenty-six.

Section 28 of the Act states that:

(1) Any party to a merger transaction seeking clarification as to whether the proposed merger requires the authorisation of the Commission under section twenty-six or is subject to review by the Commission under section twenty-seven, may apply to the Commission for negative clearance in the prescribed manner and form upon payment of the prescribed fee.

(2) Negative clearance, if given, does not commit the Commission if new information becomes available showing that such clearance is not appropriate.

3. What is a Merger or Takeover?

Given that the central concern of merger control is with the effects of the merger on competition, Section 24 (1) of the Act defines a merger as having occured where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

(2) A merger contemplated in subsection (1) may be achieved in the following circumstances:

(a) where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;
(b) where an enterprise amalgamates or combines with another enterprise; or
(c) where a joint venture occurs between two or more independent enterprises.

(3) For purposes of subsection (1), a person controls an enterprise if that person -

(a) beneficially owns more than one half of the issued share capital of the enterprise;
(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
(c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;
(d) is a holding company and the enterprise is a subsidiary of that company;
(e in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
(f) has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the element of control referred to in paragraphs (a) to (e); or

(g) has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise.

Many vertical and conglomerate mergers or acquisitions would generally receive favorable consideration in Zambia, unless it can be shown that they are intended or are likely to prevent, restrict or distort competition.

4. Why do Companies Merge?

There are many reasons why companies merge. They include the following:

- Using a merger as a basis to entering a market – i.e. domestic market or even an export market
- To expand the business portfolio - i.e. product range
- To enjoy efficiencies
- To eliminate competition
- To become dominant
- To obtain research and development process, facilities and future products (Intellectual property rights)

5. What should companies intending to merge do?

The Law principally requires that before any merger/takeovers can take legal effect, authorisation must be sought from the Commission. The Act, and in particular Section 26, requires notification of all mergers/takeovers, that meet the prescribed threshold under section (5) of K9 billion, shall apply to the Commission for authorization of the proposed merger in the prescribed manner or form.

6. How does one Notify with the CCPC?

Merger notification is the formal process of lodging in relevant documents and or information to the Commission accompanied by the relevant statutory fee. All parties to a merger or takeover are required to provide mandatory pre-notification information to the Commission. Therefore, a full notification reveals ownership of business, business engagement, the motive of the transaction and gives the understanding of the market structure in the relevant market. It also shows the type of sector of the industry that would be affected by this transaction.

This assists the Commission to assess competition concerns if any that may arise from the transaction. The Commission will be able to look out for any conduct that may lead to the prevention, restriction and distortion of competition or the creation of a dominant position of market power and the likely abuse of such power, which is in violation of section 8 of the Act. The Commission assesses each merger transaction on a case-by-case basis and only when the matter is found to be or is likely to have the effect of lessening competition substantially in Zambia can it be prohibited.

7. Do transnational Mergers need CCPC's authorization?

The rule of thumb is that if a transnational merger has an effect on the Zambian market and meets the prescribed threshold, then it needs the approval of the Commission and therefore needs to be notified. Mergers completed abroad have domestic effect if that merger affects the structural conditions for the domestic market. Domestic effects are identified when:

(1) both enterprises are already operating in Zambia before the merger either directly or through subsidiaries or branches
(2) only one of the enterprises is operating in Zambia before the merger

8. Why regulate mergers?

The notification for authorization ensures that mergers/takeovers that take place in the economy do not lead to reduced innovation and competition in Zambia. The Act does not prohibit mergers/takeovers (or monopolies and dominant firms) per se. Only when such mergers/takeovers have the likelihood of abuse of market power or substantially reduced competition can they be prohibited.

9. What is the Merger Procedure?

Firstly, the Commission carries out a market inquiry with all relevant stakeholders, indicating the nature of the transaction, who the parties to the transaction are, and other relevant information as submitted in the notification form. The stakeholders are requested to provide their responses to the merger after which the Commission continues to assess the merger to the tests provided for under sections 26, 27 and 28 of the Act.

When conducting market inquiries, CCPC requests/solicit information on the proposed merger from the following:

- Stakeholders
- Parties to the transaction
- Competitors
- Relevant organizations represented by the Board of Commissioners
- Government Ministers
- Other Competitor Bodies (regional and international)

Secondly, the Commission also depends on other information obtained from the notifying parties. Such information includes copies of the financial reports, annual reports, sales and purchase agreement, etc.

The commission further uses information it has in possession regarding the sector under investigation

10. What Information is Required to Evaluate a Merger?

To carry out an assessment of a merger, the Commission requires reliable and current information on market, products, competitors, market structure as well as customers' preference and tastes. The list is as follows:

- Market structure i.e the market shares and geographical coverage
- Major customers
- Competitors and their shares
- Product substitutes or goods that have the same attributes
- Ownership structure
- Directors of the merging parties
- Financial and economic benefits of the transaction
- Motives of the parties to the transaction
- Sales and Purchase Agreement
- Any information that the CCPC would request for

11. How does the CCPC assess a merger?

In assessing mergers, the Commission uses an objective test and has adopted assessment criteria based on international best practice. The starting point of an assessment in a competition case is defining the relevant market. This provides a framework of analysis for the Commission.

Defining the relevant market

The relevant market may be defined in terms of product, function, time and geography in accordance with Section 2 of the Act and Part III of the Proposed Regulations. This helps in identifying the relevant market that would be affected by the transaction.

After defining the relevant market the Commission takes a multiple assessment criteria to verify that the merger would not result in the prevention, distortion or restriction of competition, resulting in negative market effects, which may be detrimental to the welfare of consumers, fair trade and or the economy in general. The tests are:

(i) Substantial Lessening of competition Test:

The Competition and Consumer Protection Act, prohibits, under Section 8, any category of agreements, decisions and concerted practices which have as their object the prevention, restriction or distortion of competition to an appreciable extent in Zambia. The principal analysis carried out by the Commission is based on the "competition effect" test. This means the Commission tries to establish the economic benefits of a merger or takeover using competition test. The competition test includes the following:

(a) Calculating the market shares and the market concentration

The calculation of the market share gives the Commission an indication on the level of competition currently existing in the market. Market concentration provides a future picture of how the market will be structured after the merger has been effected.

(b) Extent of import competition

The availability of directly competitive imports gives competition pressure to domestic firms. The Commission will generally recognize such imports if they are sustained and sufficient.

(c) Barriers to entry and market entry

If barriers to entry are low, that is, if it is easy for new entrants to enter the market the Commission will generally authorize the merger/takeover.

(d) Availability of Substitutes

Availability of substitutes constrain the merged-entity from raising prices indiscriminately as customers easily switch to substitutes.

(e) Removal of a vigorous and effective competitor

If the business being taken over was the one offering the effective competitive in the relevant market.

(f) Benefits to consumers

This is whether the likely net effect of the transaction would mean greater choice for consumers in price, quality and service.

(ii) Dominance and Abuse Test:

Where a merger results in the creation of a dominant firm, the Commission is required under the wording of Section 15 to establish whether the merged firm will abuse its dominant position in the market by:

- Limiting access to markets or

- Unduly estraining competition or
- have an adverse effect on trade or the economy in general.

Dominant position of market power refers to a situation where an enterprise either by itself or acting together with a few other enterprises is in a position to control price, quality and quantity of products on the market.

Consideration of Abuse of Dominance

Section 16(1) of the Act states that:

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.

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.

(iii) Efficiency Gains/Test

One of the objectives of the Act is to strengthen the efficiency of production and distribution of services." The efficiency considers:

(i) Production efficiencies – whether the merger will result in lower production costs

(ii) Distribution efficiencies – whether the merger will result in lower distribution costs

Efficiencies may be used by the Commission to justify the authorization of mergers that may have competition concern. The Commission weighs the competition detriment with the benefits arising from the efficiencies before authorizing a merger on grounds of efficiencies.

(iv) Public Interest Test

Under Section 31 of the Act, the Commission may authorise any act which is being consistent with the objectives of the Act. In consideration of such matters, the Commission applies public benefit and public detriment tests. The Commission generally applies three tests, as follows:

- The Commission must be satisfied that in all circumstances that the conduct would, or would be likely to, result in a benefit to the public and that the benefit would outweigh the detriment to the public;
- The Commission must be satisfied that there is a benefit to the public that the conduct should be allowed; and

- The Commission must be satisfied that the conduct is not inimical to the objectives of the Act generally, and in particular the strengthening of the efficiency of production and distribution of goods and services in Zambia.

The Commission determines whether the merger can or cannot be justified on substantial public interest grounds, by considering the effect that the merger will have on the following:

- a particular industrial sector or region;
- employment;
- the ability of small businesses to become competitive;
- and the ability of local industries to compete internationally

Thus, in analyzing a merger and determining whether it should be approved, prohibited, or approved with conditions, the Commission is required to balance the competition factors which are commonly accepted by competition authorities worldwide, with peculiar public interests in the context of Zambia's social economic factors. In this balancing process, it is conceivable that a transaction that has been found to substantially lessen or prevent competition may be approved because the anti-competitive effect is outweighed by the positive impact of the merger in respect of one or more of the overriding public interest factors. Alternatively, an otherwise unobjectionable transaction from a competition perspective could be prohibited because it has a negative public interest impact.

Decision

Following the investigations by the Commission secretariat, the Board of Commissioners then makes a decision on whether to approve a merger without conditions or approve a merger with conditions or reject a merger.

Any party aggrieved with the order or direction of the Commission may within 30 days of receiving this order or direction appeal to the Tribunal. However, any person who is aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination.

Further Information can be obtained from
The Executive Director
Competition & Consumer Protection Commission,
4th Floor Main Post Office,
Cairo Road, P. O Box 34919
Lusaka. Tel: 260-211-222787, 232657
Fax: 260 -211-222789.
Email: zcomp@ccpc.org.zm

or

P.O. Box 20158, Ground Floor Revenue House
(former Nchanga House), Kitwe,
Tel: 260 -212-221115,
Fax: 260 -212- 221067
email ccpckitwe@zamnet.zm

Website: www.ccpc.org.zm