

## LEGAL ALERT

### THE ENHANCEMENT OF COMPETITION AND CONSUMER PROTECTION REGULATION IN ZAMBIA BY THE NEW AMENDMENTS TO THE COMPETITION AND CONSUMER PROTECTION ACT NO. 24 OF 2010 BY ACT NO. 21 OF 2023- PART 1



#### Competition provisions

##### Introduction

On 26 December 2023, the Competition and Consumer Protection (Amendment) Act No. 21 of 2023 (“**Amendment Act**”) was passed into law, effectively amending various provisions of the Competition and Consumer Protection Commission Act No. 24 of 2010 (the “**Principal Act**”).

The new changes to the Principal Act are the most substantial from the time the Principal Act came in operation on 4 October 2010.

One of the cardinal amendments to note is that the COMESA Competition Regulations have been finally domesticated into law. This has been a long outstanding issue especially in merger control. Also, the amendments are without controversy as there has been an introduction of regulation regarding the ‘Core Assets’ as defined in the Amendment Act and restriction of movement of Core Assets without the approval of the Commission.

Further, the amendment has given the Commission more regulatory powers in that some provisions have been strengthened to give the Commission the power to impose administrative fines. The new amendments have cut across all the provisions of the Principal Act on both competition and consumer protection provisions.

It is paramount that businesses familiarize themselves with the new amendments to the Principal Act to ensure compliance and avert the imposition of steep administrative fines.

**The following are some salient features of the amendments by Act No.21 of 2023:**

##### New Definitions

“**COMESA**” means the Common Market for Eastern and Southern Africa, formerly the Preferential Trade Area, established by the COMESA Treaty which was signed on 5th November, 1993 and was ratified by Zambia on 8th December, 1994.

“**COMESA Competition Regulations**” means the COMESA Competition Regulations promulgated in 2004 by the COMESA Council of Ministers.

“**Core Assets**” means essential assets and includes important or valuable property without which a company is unable to carry on its normal operations.

“**Trade Association**” includes a business association,

professional association and an interest group with a common business purpose.

“**Unconscionable**” includes a conduct of price gouging, selling of goods and services of unacceptable low quality and other unfair trading practice that defies good conscience and is harsh and oppressive to the consumer.

“**Zambia Compulsory Standards Agency**” means the Zambia Compulsory Standards Agency established under the Compulsory Standards Act, 2017.

##### Application of the Principal Act

Section 3 has been amended by the inclusion of a provision which has domesticated the COMESA Competition Regulations, 2004 which have been introduced in the Third Schedule set out in the Appendix. These regulations will be the administrative oversight of economic activity impacting Zambia and have an effect within the economies of not less than two Member States of COMESA. Put differently, the COMESA Regulations shall now be binding on Zambia as it conducts international trade with other COMESA member states.

This amendment is welcome and puts to rest the long outstanding controversy in which there was no domestication of the COMESA Competition Regulations, but a ‘gentleman’ agreement existed which was not *dejure*.

##### Functions of the Commission

There is an addition to the Commission’s functions by the insertion of the following provisions:

- a. *investigate and assess, restrictive agreements, abuse of dominant positions market power and mergers; and*
- b. *review, in consultation with an appropriate authority, an application for relocation of core assets of an enterprise from the Republic.*

##### Functions of the Board

To enhance administrative oversight over the Commission, there is an insertion of a new Section 5A which outlines the Board’s oversight and management over the Commission’s operations to ensure success in their operations. The Board’s functions are to:

- a. *oversee the implementation and successful operation of the policies, programmes and strategies of the Commission;*

b. monitor and evaluate the performance of the Commission against the plans and budget;

c. approve the annual workplan, action plan and activity reports of the Commission; and

d. approve the budget estimates.

This amendment underscores the role of the Board in corporate governance and increased oversight of the Commission.

### **Inspectors**

There is an amendment to Section 7(4) which provides that Inspectors, with a warrant, may seize and retain as evidence, goods offered, exposed, or sold in violation of the Principal Act.

### **Prohibition of anti-competitive practice, agreement or decision**

Section 8 of the Principal Act has been repealed and replaced to now provide that where an enterprise group of enterprises or trade associations enters into agreements or undertake practices that would prevent or restrict, distort competition to an appreciable extent in the relevant market such an entity they will be liable to a penalty of not more than 10% of that entity's annual turnover.

This means that the Commission has powers to impose an administrative fine for non per se prohibitions if the rule of reason or business justification defence is not accepted by the Commission.

### **Share of supply threshold for authorization of restrictive agreements**

There is now a significant change in the share of supply threshold requirement for which Parties must apply for the Commission's authorization when deciding to enter restrictive agreements. In this regard, Section 14 of the Principal Act has been amended to change the threshold requirements for authorization of restrictive agreements. For horizontal agreements, the threshold has been reduced from 30% to 15% of the market share whereas in respect of vertical agreements, the threshold has been reduced from 30% to 15%.

It seems not clear why there has been reduction, but our assessment is that the Commission wants to capture and review as many agreements as possible.

### **Determination of relevant market**

Section 17 of the Principal Act has been repealed and replaced to provide that the Minister, may, on the advice of the Commission prescribe the relevant procedure for determining the relevant market within which the share of supply or acquisition thresholds are to be met under the Principal Act.

This amendment has added the involvement of the Commission in the formulation of market definition which is welcome as the Minister is not an expert in competition and consumer protection law.

### **Prohibition of relocation of core assets without authorization and Application for authorization to relocate core assets**

Section 23 of the Principal Act is amended by the inclusion of Section 23A which prohibits the relocation of core assets from the Republic to another State without the approval from the Commission. An enterprise that contravenes this requirement will be liable a penalty of not more than 10% of that entity's annual turnover.

The application for authorization is set out in the new Section 23B.

This new inclusion of core assets is outside the scope of competition law and a potential Constitutional violation of the right to property. It will be interesting to see if this new amendment will be challenged in future. In the old law, there was such a provision which at the time was designed to prevent asset stripping following the privatization of state owned enterprises.

### **Definition of merger**

The control provisions on what constitutes control for merger purposes have been expanded. There has been an amendment to Section 24 (3) of the Principal Act which provides additional areas when determining who has control over an enterprise's assets in a Merger. Accordingly, a person will also be deemed to be in control of an enterprise assets if they:

- buys or leases the core assets of another enterprise;
- has a market presence or a market turnover which is attributed to the assets bought or leased from another enterprise; or
- controls the assets bought or leased.

Additionally, the Commission is authorized to issue guidelines for determining market presence and market turnover for the purposes of this section.

### **Compliance with conditions and undertakings of merger**

There is an amendment to the Principal Act by the insertion of a new Section 34A which provides that an enterprise is mandated to submit correct information to the Commission in relation to an assessment of a proposed merger and adhere to conditions stated in a determination or an undertaking given as a condition of an approved merger under section 34.

An Enterprise's failure to comply with conditions and undertaking of a merger will make them liable to a penalty of not more than 10% of that entity's annual turnover, in addition to such penalty the Commission may revoke an approved merger.

### **Revocation of merger**

Section 35 of the Principal Act has been repealed and replaced to provide that the Commission may revoke an approved merger where the enterprise does not conform with the requirements set out in section 34A.

The Commission is mandated to notify a party to the merger or interested parties of their intention to revoke the approved merger by giving such interested parties 30 days of receipt of the notice, within which to take remedial measures to the satisfaction of the Commission or show cause why the merger should not be revoked.

During this 30-day period, the Commission shall not revoke the approved merger. However, where a party fails to take remedial measures to the satisfaction of the Commission or how cause why the merger should not be revoked, the Commission is mandated to revoke the approved merger.

Further to the above, an enterprise that implements an unapproved or rejected merger by the Commission is liable to a penalty of not more than 10% of that entity's annual turnover.

### **Appeal to the Court of Appeal**

To align the Principal Act in conformity with the Constitution, section 75 is amended to the effect that Appeals from the Competition and Consumer Protection Tribunal now lie to the Court of Appeal and not to the High Court.

We hope you found this alert useful. Please contact our Dispute Resolution and Public Policy Partner and Associate, Sydney Chisenga at [SChisenga@corpus.co.zm](mailto:SChisenga@corpus.co.zm) and Mwinji Nachinga at [MNachinga@corpus.co.zm](mailto:MNachinga@corpus.co.zm) respectively, if you have any questions relating to this legal alert.



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