

THE COMPETITION AND CONSUMER PROTECTION

BILL, 2010

MEMORANDUM

The Object of this Bill are to —

- (a) continue the existence of the Zambia Competition Commission and re-name it as the Competition and Consumer Protection Commission;
- (b) safeguard and promote competition;
- (c) protect consumers against unfair trade practices;
- (d) provide for the establishment of the Competition and Consumer Protection Tribunal;
- (e) repeal and replace the Competition and Fair Trading Act, 1994; and
- (f) provide for matters connected with, or incidental to, the foregoing.

A. J. SHONGA,
Attorney-General

THE COMPETITION AND CONSUMER PROTECTION

BILL, 2010

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A BILL

ENTITLED

An Act to continue the existence of the Zambia Competition Commission and re-name it as the Competition and Consumer Protection Commission; safeguard and promote competition; protect consumers against unfair trade practices; provide for the establishment of the Competition and Consumer Protection Tribunal; repeal and replace the Competition and Fair Trading Act, 1994; and provide for matters connected with, or incidental to, the foregoing.

ENACTED by the Parliament of Zambia.

Enactment

PART I

PRELIMINARY

1. This Act may be cited as the Competition and Consumer Protection Act, 2010, and shall come into operation on such date as the Minister may, by statutory instrument, appoint.

Short title
and
commencement

2. (1) In this Act, unless the context otherwise requires—

Interpretation

“acquired” means acquired by take over, purchase of shares or assets, or any other means through which an enterprise obtains, secures or gains a legal interest in another independent enterprise;

“agreement” means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises;

“assets” in relation to an enterprise, includes physical assets, businesses, shares and other financial securities, brands and intangible assets including goodwill, intellectual property rights and know how;

“bid rigging” means a horizontal agreement between enterprises where—

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- (a) one or more parties to the agreement agrees not to submit a bid in response to a call for bids; or
- (b) the parties to the agreement agree upon the price, terms or conditions of a bid to be submitted in response to a call for bids; 5
- “ Board ” means the Board of the Commission constituted under paragraph 1 of the First Schedule;
- “ Chairperson ” means the person appointed as Chairperson of the Board under paragraph 1 of the First Schedule;
- “ Commission ” means the Competition and Consumer Protection Commission referred to under section *four*; 10
- “ company ” has the meaning assigned to it in the Companies Act;
- “ concerted practice ” means 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; 15
- “ confidential information ” means trade, business, commercial or industrial information that belongs to an enterprise, has a particular economic value and is not generally available to, or known by, others; 20
- “ consumer ” means
- (a) for the purposes of Part III, any person who purchases or offers to purchase goods or services supplied by an enterprise in the course of business, and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer; and 25 30
- (b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration; 35

“distribution ” means any act by which goods are sold or services supplied for consideration;

5 “dominant position ” means 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;

10 “enterprise ” means a firm, partnership, joint- venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them;

15 “essential facility ” means an infrastructure or resource that cannot reasonably be duplicated, without access to which competitors cannot reasonably provide goods or services to their customers;

“ Executive Director ” means the person appointed as Executive Director under section six;

20 “ former Commission ” means the Zambia Competition Commission established under the repealed Act;

“goods or products ” includes services, buildings and other structures;

25 “group ” in relation to an enterprise that is a company, means that company, any other company that is its holding company or subsidiary and any other company that is a subsidiary of the holding company or a single economic entity;

30 “ horizontal agreement ” ~~means an agreement between~~ enterprises each of which operates, for the purpose of the agreement, at the same level of the market and would normally be actual or potential competitors in that market;

“ inter connected ” in relation to bodies corporate, has the meaning assigned to it under subsection (2);

35 “ inspector ” means a person appointed as inspector under section seven;

“ irreparable injury ” means injury which is substantial and can never be adequately remedied or atoned for by damages;

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2006

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- “ market ” in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the goods or services;
- “ merger ” has the meaning assigned to it in section *twenty-four*; 5
- “ micro business enterprise ” has the meaning assigned to in the Zambia Development Agency Act, 2006;
- “ negative clearance ” means the certification by the Commission that an otherwise anti-competitive conduct can be allowed under conditions specified by the Commission; 10
- “ *per se* ” in relation to a prohibited practice, means a practice which is prohibited in all circumstances so that it is not necessary for the Commission to demonstrate that it has anti competitive effects;
- “ price ” means a charge of any description; 15
- “ professional association ” means the controlling body established by, or registered under, any law, or recognised by the Commission as fulfilling similar functions on behalf of its members, in respect of a profession;
- “ re-sale price maintenance ” means an agreement between a supplier and a dealer whose object or effect is, directly or indirectly, to fix a minimum selling price to be used by the dealer when re-selling goods to customers; 20
- “ regulator ” means a regulatory body or agency, or a Government department that exercises functions of prudential, technical or economic regulation on the basis of statutory powers; 25
- “ repealed Act ” means the Competition and Fair Trading Act, 1994;
- “ sale ” includes an agreement to sell or offer for sale, the furnishing of a quotation, whether verbally or in writing, and any other act or notification by which willingness to enter into any transaction for sale is expressed; 30
- “ service ” includes the sale of goods, where the goods are sold in conjunction with the rendering of a service; 35
- “ services ” includes the carrying out and performance on a commercial basis of any engagement, whether professional

or not, other than the supply of goods, but does not include the rendering of any services under a contract of employment;

5 “small claims court ” has the meaning assigned to it in the Small Claims Courts Act;

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“small business enterprise ” has the meaning assigned to it in the Zambia Development Agency Act, 2006;

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2006

10 “statutory monopoly ” means a commercial undertaking or an activity conducted by an entity, whether or not owned wholly or partly by the State, on the basis of statutory provisions that preclude other entities from conducting the same activity;

“subsidiary ” has the meaning assigned to it in the Companies Act;

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15 “supply ” includes, in relation to—

(a) goods, the supply, including re-supply, by way of sale, exchange, lease, hire or hire purchase of the goods; and

(b) services, the provision by way of sale, grant or conferment of the services;

20 “Tribunal ” means the Competition and Consumer Protection Tribunal established under section *sixty-seven*;

“turnover ” means the latest audited gross sales of an enterprise;

25 “undertaking ” means a commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission;

30 “vertical agreement ” means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services;

35 “Vice-Chairperson” means the person appointed as Vice-Chairperson of the Board under paragraph 1 of the First Schedule; and

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“Zambia Bureau of Standards” means the Zambia Bureau of Standards established under the Standards Act.

(2) Any two or more bodies corporate are to be treated as inter connected if one or more of them is a subsidiary or are subsidiaries of the other, or if all of them are subsidiaries of the same body corporate. 5

Application

3. (1) Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within, Zambia.

(2) 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 that is open to participation by other enterprises. 10

(3) This Act shall not apply to— 15

- (a) an agreement or conduct insofar as it relates to intellectual property rights including the protection, licensing or assignment of rights under, or existing by virtue of, a law relating to copyright, design rights, patents or trade marks; 20
- (b) activities of employers or an agreement to which employers are party, insofar as it relates to remuneration, terms or conditions of employment of the employees;
- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members; 25
- (d) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose; and
- (e) the business of any enterprise exercising a statutory monopoly which precludes the entry of another enterprise into the relevant market in Zambia: 30

Provided that—

- (i) the enterprise does not enter into an agreement that has the purpose of restricting competition;
- (ii) the conduct of the enterprise does not, in itself or in conjunction with another enterprise, amount to an abuse of a dominant position; or 35

(iii) the enterprise, if it wishes to enter into a merger transaction, is in compliance with the provisions of this Act relating to mergers.

5 (4) Notwithstanding paragraph (a) of subsection (3), the Commission may apply the provisions of this Act to an agreement or conduct, where it has reasonable grounds to believe that the agreement or conduct involves a practice that—

(a) is prohibited under subsection (1) of section *nine* or subsection (1) of section *ten* or

10 (b) disproportionately restricts or prevents competition.

PART II

THE COMPETITION AND CONSUMER PROTECTION COMMISSION

15 4. (1) The Zambia Competition Commission established under the repealed Act shall continue to exist as if established under this Act and is for purposes of this Act hereby re-named the Competition and Consumer Protection Commission.

Continuation
and re-
naming of
Zambia
Competition
Commission
Cap.417

20 (2) The Commission shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may, by law, do or perform.

(3) The provisions of the First Schedule apply to the Commission.

25 5. The functions of the Commission are to—
(a) review the operation of markets in Zambia and the conditions of competition in those markets;

Functions of
Commission

(b) review the trading practices pursued by enterprises doing business in Zambia;

30 (c) investigate and assess restrictive agreements, abuse of dominant positions and mergers;

(d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;

35 (e) undertake and publish general studies on the effectiveness of competition in individual sectors of the economy in Zambia and on matters of concern to consumers;

(f) act as a primary advocate for competition and effective consumer protection in Zambia;

- (g) advise Government on laws affecting competition and consumer protection;
- (h) provide information for the guidance of consumers regarding their rights under this Act;
- (i) liaise and exchange information, knowledge and expertise with competition and consumer protection authorities in other countries; 5
- (j) advise the Minister on agreements relevant to competition and consumer protection and on any other matter relating to competition and consumer protection; 10
- (k) co operate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act; and
- (l) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act. 15
- Executive Director and other staff 6. (1) The Board shall appoint an Executive Director on such terms and conditions as the Board may determine.
- (2) The Executive Director shall be the chief executive officer of the Commission and shall be responsible, under the direction of the Board, for the day to day administration of the Commission. 20
- (3) The Executive Director shall be an *ex-officio* member of the Board.
- (4) The Board may appoint, on such terms and conditions as it may determine, such other staff as it considers necessary for the performance of the Commission's functions under this Act. 25
- Inspectors 7. (1) The Board may appoint any suitable person to be an inspector for the purposes of ensuring compliance with this Act, on such terms and conditions as the Board may determine. 30
- (2) The Board shall provide an inspector with a certificate of appointment in the prescribed form which shall be *prima facie* evidence of the inspector's appointment as such.
- (3) An inspector shall, in performing any function under this Act
- (a) be in possession of the certificate of appointment referred to under subsection (2); and 35
- (b) show the certificate of appointment to any person who requests to see it or is subject to an investigation under this Act.

(4) An inspector may, with a warrant, at any reasonable time—

(a) enter and search any premises occupied by an enterprise or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;

(b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation:

Provided that a person shall only be searched by a person of the same sex;

(c) examine any document or article found on the premises that has a bearing on the investigation;

(d) require information to be given about any document or article by—

(i) the owner of the premises;

(ii) the person in control of the premises;

(iii) any person who has control of the document or article; or

(iv) any other person who may have the information;

(e) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;

(f) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—

(i) search any data contained in, or available to the computer system;

(ii) reproduce any record from the data; or

(iii) seize any output from the computer for examination and copying; and

(g) attach and, if necessary, remove from the premises for examination and safeguarding any document or article that appears to have a bearing on the investigation.

(5) An inspector who removes any document or article from any premises under paragraph (g) of subsection (4) shall—

(a) issue a receipt for the document or article to the owner of, or person in control of, the premises; and

(b) return the document or article as soon as practicable after achieving the purpose for which it was removed.

(6) A person who —

(a) delays or obstructs an inspector in the performance of the inspector's functions;

(b) refuses to give an inspector such reasonable assistance as the inspector may require for the purpose of exercising the inspector's powers; or

(c) gives an inspector false or misleading information in answer to an inquiry made by the inspector;

commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

(7) An inspector shall furnish the Commission with a written report and any other information relating to an inspection, as the Commission may require.

(8) Nothing in this section requires a person to disclose or produce information or a document, if the person would in an action in a court be entitled to refuse to disclose or produce the information or document.

PART III

RESTRICTIVE BUSINESS AND ANTI-COMPETITIVE TRADE PRACTICES

Prohibition
of anti-
competitive
practice,
agreement or
decision

8. 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.

Horizontal
agreements
prohibited
per se

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;

(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 terms 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.

10. (1) A vertical agreement between enterprises is prohibited *per se*, and void, to the extent that it involves re-sale price maintenance.

Vertical
agreements
prohibited
per se

(2) Notwithstanding subsection (1), a supplier or producer may recommend a minimum re-sale price to the re-seller of a good or a service if—

(a) the supplier or producer makes it clear to the re-seller that the recommendation is not binding; and

(b) the product has a price stated on it and the words “recommended price” appear next to the stated price.

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

11. If an agreement prohibited under section *nine* or *ten* contains any provisions that are not prohibited, the provisions shall continue to have effect to the extent that they can be effected without the prohibited provisions.

Severability

12. Subject to sections *eight*, *nine* and *ten*, an agreement between enterprises is prohibited if the Commission determines that—

Other
horizontal
and vertical
agreements

(a) 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

(b) the agreement is not exempted under this Part.

Inter
connected
bodies
corporate

13. Sections *eight, nine, ten* and *twelve* do not apply to an agreement to which all the parties involved are inter connected bodies corporate falling under a single economic unit.

Share of
supply
threshold for
authorisation
of restrictive
agreements

14. (1) Where the parties to—

(a) a horizontal agreement, together supply or acquire thirty percent or more of goods or services of any description in a relevant market in Zambia; or 5

(b) a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, fifteen percent or more of goods or services of any description in a relevant market in Zambia; 10

the parties shall apply to the Commission for authorisation of the agreement in the prescribed manner and form.

(2) The Commission shall, upon receipt of an application under subsection (1), carry out an investigation to determine whether the agreement is prohibited under this Act. 15

(3) The Commission may, upon the conclusion of an investigation under subsection (2), approve or reject the application.

(4) The Commission shall where it rejects an application under subsection (3), inform the applicant accordingly and give the reasons therefor. 20

Share of
supply
threshold for
establishing
existence of
dominant
position

15. A dominant position exists in relation to the supply of goods or services in Zambia, if—

(a) ~~thirty~~ thirty percent or more of those goods or services are supplied or acquired by one enterprise; or 25

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

Prohibition
of abuse of
dominant
position

16. (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. 30

(2) For purposes of this Part, “abuse of a dominant position” includes— 35

(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;

5 (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;

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(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.

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

20 17. The Minister may, on the advice of the Commission, prescribe the procedure for determining the relevant product market within which the share of supply or acquisition thresholds are to be met under subsection (1) of sections *fourteen* and *fifteen*.

Determination
of relevant
product
market

25 18. (1) Subject to subsection (2), an enterprise that wishes to be exempted from a prohibition under section *twelve* may apply to the Commission for exemption in the prescribed manner and form upon payment of the prescribed fee.

Application
for
exemption

(2) Subsection (1) does not apply to an agreement that is prohibited *per se* under this Act.

19. (1) The Commission may, after receipt of an application under section *eighteen*—

Application
for
exemption

30 (a) grant the exemption; or

(b) refuse to grant the exemption.

(2) 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;

35 (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;
- (e) promoting the competitiveness of micro and small business enterprises in Zambia; or
- (f) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or is likely to result, from the agreement.

(3) The Commission may grant an exemption under subsection (2), subject to such conditions and for such period as it considers appropriate.

(4) The Commission shall, where it refuses to grant an exemption under subsection (1), inform the applicant accordingly and give the reasons therefor.

Amendment
of exemption

20. The Commission may amend an exemption granted under section *nineteen*, if—

- (a) some other enterprise has succeeded to the interest in the enterprise exempted, by substituting the name of the enterprise with the name of the successor;
- (b) the name of the enterprise has changed, by substituting the name so changed; or
- (c) there has been a change in market circumstances since the exemption was granted.

Revocation of
exemption

21. (1) The Commission may revoke an exemption, if—

- (a) the exemption was granted on materially incorrect or misleading information;
- (b) there has been a material change of circumstances since the exemption was granted; or
- (c) the enterprise exempted fails to comply with any condition upon which the exemption was granted.

(2) The Commission shall, where it proposes to revoke an exemption under subsection (1), give notice, in writing, of the proposed action to the enterprise to which the exemption was granted and request the enterprise to submit to the Commission, within seven days of the receipt of the notice, any representation which the enterprise may wish to make on the proposed action.

(3) Notwithstanding subsection (2), an enterprise that does not comply with a condition of an exemption is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.

22. (1) A professional association whose rules contain a restriction that has the effect of lessening competition in a market may apply to the Commission for an exemption of a prohibition under section *twelve* in the prescribed manner and form upon payment of the prescribed fee.

Exemption
in respect of
professional
rules

(2) Upon receipt of an application under subsection (1), the Commission shall—

(a) publish in a daily newspaper of general circulation in Zambia, a notice of the application; and

(b) give interested parties, fourteen days from the date of that notice, to make representations concerning the application.

(3) After considering an application and any representations received in relation to the application, the Commission may—

(a) grant an exemption; or

(b) refuse to grant an exemption.

(4) The Commission shall publish a notice of its decision under subsection (3), in such manner and form as it considers appropriate.

(5) The Commission may exempt all, or part, of the rules of a professional association from the provisions of section *twelve* if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain—

(a) professional standards; or

(b) the ordinary function of the professional association.

(6) The Commission shall, where it refuses to grant an exemption under subsection (3), inform the applicant accordingly and give the reasons therefor.

(7) The Commission may, where it considers that any rules of a professional association, either wholly or in part, should no longer be exempt under this section, revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has—

(a) given the professional association notice of the proposed revocation; and

(b) given interested parties fourteen days, from the date of that notice, to make representations concerning the revocation.

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(8) The exemption of a rule of a professional association or the revocation of an exemption therefor, shall take effect from such date as may be specified by the Commission.

Publication
of grant or
revocation of
exemption

23. The Commission shall, as soon as is practicable, publish in a daily newspaper of general circulation in Zambia, a notice of every exemption granted, and of every exemption revoked.

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PART IV

MERGERS

Definition of
merger

24. (1) For purposes of this Part, a merger occurs 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.

15

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

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(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

25

(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—

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(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;

35

(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.

25. (1) A merger is subject to the provisions of this Part if it is reviewable by the Commission.

Reviewable
mergers

(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*.

26. (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.

Threshold
for
authorisation
of proposed
merger

(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 therefor.

(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).

27. (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—

Other
mergers
subject to
review

- (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; 5
- (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, 10
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 15
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*. 20

Negative
clearance

28. (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 25
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.

Market
assessment

29. The Commission shall, upon receipt of a proposed merger notification, carry out a market assessment of the proposed merger to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general. 30

Competition
assessment

30. (1) The Commission shall, in considering a proposed merger, assess whether the merger is likely to prevent or substantially lessen 35
competition in a market in Zambia.

(2) Notwithstanding the generality of subsection (1), the Commission shall in considering a proposed merger, take into

account the likely and actual factors that affect competition in a defined market, including—

- (a) the levels of concentration of players in the relevant market;
- (b) the creation or strengthening of barriers to market entry;
- 5 (c) the level of imports in the relevant market;
- (d) the extent to which there is countervailing buyer or supplier power in the relevant market;
- (e) the availability of substitute products in the relevant market;
- 10 (f) the likelihood of the merger removing from the market an existing effective and vigorous competitor;
- (g) the dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics; and
- (h) the risk that a position of dominance may be abused.

15 **31.** The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including—

Public
interest
assessment

- 20 (a) the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;
- (b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia;
- 25 (c) the saving of a failing firm;
- (d) the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;
- 30 (e) the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests, of micro and small business enterprises in Zambia;
- 35 (f) the extent to which the proposed merger may affect the ability of national industries to compete in international markets;

(g) socio-economic factors as may be appropriate; and

(h) any other factor that bears upon the public interest.

Period allowed
for assessment

32. (1) The Commission shall complete its assessment of a proposed merger and issue its determination within a period of ninety days from the date of the application for authorisation of the proposed merger, unless a party to the proposed merger fails to provide the Commission, during the period of assessment, information that is required for the completion of the assessment.

(2) Where the Commission does not issue its determination regarding a proposed merger, within the period specified in subsection (1), the proposed merger shall be deemed to be approved.

(3) The Commission may extend the assessment period referred to in subsection (1), by a period not exceeding thirty days.

(4) The Commission shall, where it extends the assessment period under subsection (3), give notice to the parties at least fourteen days before the expiry of the ninety days.

Undertakings
on proposed
merger

33. The Commission may consider any undertakings offered by a party to a proposed merger, in order to address any concern relating to the proposed merger that has arisen, or may be expected to arise, during the assessment of the proposed merger.

Determination
of proposed
merger

34. (1) The Commission may, after the completion of an assessment and consideration of any representations on a proposed merger—

(a) approve the proposed merger without any conditions;

(b) approve the proposed merger with conditions or undertakings given by the parties to address competition and other concerns that may have arisen during the assessment of the proposed merger; or

(c) reject the proposed merger.

(2) The Commission shall, where it rejects a proposed merger, inform the parties accordingly and give the reasons therefor.

Revocation
of merger

35. (1) The Commission may, at any time, revoke an approved merger if—

(a) a party to the merger submitted materially incorrect or misleading information in support of the merger; or

(b) a party to the merger fails to comply with any condition of an approval of the merger.

(2) The Commission shall, where it proposes to revoke an approved merger under subsection (1), give notice, in writing, of the proposed action to every party to the merger, and to any other person who is likely to have an interest in the matter, and call upon
5 such party or person to submit to the Commission, within thirty days of the receipt of the notice, any representations which they may wish to make on the proposed revocation.

36. An approval of a merger by the Commission under this Part shall not relieve an enterprise from complying with any other
10 applicable laws. Compliance with other laws

37. An enterprise which intentionally or negligently—
(a) implements a merger that is reviewable by the Commission without the approval of the Commission;
(b) implements a merger that is rejected by the Commission;
15 or
(c) fails to comply with conditions stated in a determination or with undertakings given as a condition of a merger approval;
Offences relating to mergers

commits an offence and is liable to a fine not exceeding ten percent
20 of its annual turnover.

PART V

MARKET INQUIRIES

38. The Commission may initiate a market inquiry where it has reasonable grounds to suspect that a restriction or distortion of
25 competition is occurring— Initiation of market inquiry

- (a) within a particular sector of the economy; or
(b) within a particular type of agreement occurring across various sectors.

39. The purpose of a market inquiry is to determine—
30 (a) whether any feature, or combination of features, of each relevant sector and each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Zambia; and Purpose of market inquiry

35 (b) whether any of the circumstances referred to in subsection (2) of section *nineteen*, apply to the sector or type of agreement on the same basis as they would have applied to any matter arising under section *sixteen*

Powers of investigation in connection with market inquiry

40. For the purposes of a market inquiry under this Part, the Commission may invite interested parties to submit information to it and may exercise, in relation to any enterprise that it considers to be involved in the matters covered by the inquiry, its powers of investigation under this Act.

5

Action to be taken following market inquiry

41. (1) The Commission shall, at the conclusion of a market inquiry, publish its findings in a daily newspaper of general circulation in Zambia.

(2) The Commission shall, where it finds as a result of an inquiry that the adverse effects for competition specified in paragraph (a) of section *thirty-nine* exist in relation to a sector or a type of agreement and that paragraph (b) of section *thirty-nine* does not apply, or applies to a limited extent—

10

(a) insofar as particular practices identified by the inquiry are capable of being addressed as matters falling within section *eight* subsection (1) of section *nine*, subsection (1) of section *ten* or subsection (1) of section *sixteen*, deal with them in accordance with the provisions of this Act relating to such matters; or

15

(b) insofar as the adverse effects for competition cannot be remedied under this Act, or are the result of other applicable laws, make recommendations to the Minister for such further action, including amendments to applicable laws as is required to provide an effective remedy.

25

PART VI

SECTOR REGULATED ACTIVITIES

Application of Act to sector regulated activities

42. Subject to section *three*, the economic activities of an enterprise in a sector where a regulator exercises statutory powers is subject to the requirements of Part III.

30

Memorandum of understanding with sector regulators

43. The Commission shall, for the purpose of coordinating and harmonising matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector, in the prescribed manner and form.

Market inquiry into regulated sector

44. The Commission may, where it determines that a regulated sector is unduly restrictive of competition, conduct a market inquiry into the sector, in accordance with Part V.

35

PART VII

CONSUMER PROTECTION

45. A trading practice is unfair if —

Definition
of unfair
trading
practice

(a) it misleads consumers;

5 (b) it compromises the standard of honesty and good faith
which an enterprise can reasonably be expected to meet;
or

(c) it places pressure on consumers by use of harassment or
coercion;

10 and thereby distorts, or is likely to distort, the purchasing decisions
of consumers.

46. (1) A person or an enterprise shall not practice any unfair
trading.

Prohibition
of unfair
trading
practice

(2) A person who, or an enterprise which, contravenes subsection

15 (1) is liable to pay the Commission a fine not exceeding ten percent
of that person's or enterprise's annual turnover or one hundred
and fifty thousand penalty units, whichever is higher.

47. A person who, or an enterprise which—

False or
misleading
representations

(a) falsely represents that—

20 (i) any goods are of a particular standard, quality,
value, grade, composition, style or model or
have a particular history or previous use;

(ii) any services are of a particular standard, quality,
value or grade;

25 (iii) any goods are new;

(iv) a particular person has agreed to acquire goods
or services; or

30 (v) any goods or services have sponsorship, approval,
affiliation, performance characteristics,
accessories, uses or benefits that they do not
have; or

(b) makes a false or misleading representation concerning—

(i) the price of any goods or services;

35 (ii) the availability of facilities for the repair of any
goods or of spare parts for goods;

(iii) the place of origin of any goods;

- (iv) the need for any goods or services; or
- (v) the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy;

is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.

Display of
disclaimer
prohibited

48. (1) An owner or occupier of a shop or other trading premises shall not cause to be displayed any sign or notice that purports to disclaim any liability or deny any right that a consumer has under this Act or any other written law. 10

(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

Prohibition
of supply of
defective and
unsuitable
goods and
services

49. (1) A person or an enterprise shall not supply a consumer with goods that are defective, not fit for the purpose for which they are normally used or for the purpose that the consumer indicated to the person or the enterprise. 15

(2) A person who, or an enterprise which, contravenes subsection (1) commits an offence and is liable, upon conviction—

(a) to a fine not exceeding five hundred thousand penalty units; and 20

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover.

(3) A person who, or an enterprise which, contravenes subsection (1), shall— 25

(a) within seven days of the supply of the goods concerned, refund the consumer the price paid for the goods; or

(b) if practicable and if the consumer so chooses, replace the goods with goods which are free from defect and are fit for the purpose for which they are normally used or the purpose that the consumer indicated to the person or the enterprise. 30

(4) The Commission may, in addition to the penalty stipulated under subsections (2) and (3)— 35

(a) recall the product from the market; or

(b) order the person or enterprise concerned, to pay a fine not exceeding ten percent of that person's or enterprise's annual turnover or three hundred thousand penalty units,

whichever is higher, where the recalled product re-appears on the market.

(5) A person or an enterprise shall supply a service to a consumer with reasonable care and skill or within a reasonable time or, if a specific time was agreed, within a reasonable period around the agreed time.

(6) A person who, or an enterprise which, contravenes subsection (5) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover.

(7) In addition to the penalty stipulated under subsection (6), the person or the enterprise shall—

(a) within seven days of the provision of the service concerned, refund to the consumer the price paid for the service; or

(b) if practicable and if the consumer so chooses, perform the service again to a reasonable standard.

50. (1) A product that is sold in Zambia shall have a label to clearly indicate the product name, the ingredients used in the product, the date of manufacture and expiry of the product, the manufacturer's name, the physical location of the manufacturer, the telephone number and any other contact details of the manufacturer.

Product
labelling

(2) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory consumer product information standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body.

(3) A person who, or an enterprise which, sells, exposes for sale, imports, displays or deals with a product in any manner contrary to subsection (1) or (2), commits an offence and is liable, upon conviction, to a fine not exceeding three hundred thousand penalty units or to imprisonment for a period not exceeding three years, or to both.

(4) The Commission may, in addition to the penalty stipulated under subsection (3)—

(a) recall the product from the market; or

(b) order the person or enterprise to pay a fine not exceeding ten percent of that person's or enterprise's annual turnover or three hundred thousand penalty units, whichever is higher, where the recalled product re-appears on the market.

(5) A person who, or an enterprise which, fails to comply with an order under subsection (4), commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both. 5

Price display

51. (1) A person or an enterprise shall not charge a consumer more than the price indicated or displayed on a product or service.

(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover. 10

Consumer
product
safety

52. (1) A person or an enterprise shall not sell any goods to consumers unless the goods conform to the mandatory safety standard for the class of goods set by the Zambia Bureau of Standards or other relevant competent body.

(2) A person who, or an enterprise which, contravenes subsection (1) commits an offence and is liable, upon conviction — 15

(a) to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both; and

(b) to pay the Commission, in addition to the penalty stipulated under paragraph (a), a fine not exceeding ten percent of that person's or enterprise's annual turnover. 20

(3) A person or an enterprise shall, in addition to the penalty stipulated under subsection (2), be liable for any loss or damage, including any indirect or consequential loss or damage, arising as a result of — 25

(a) the lack of conformity of the goods with the relevant standard; or

(b) the defect or dangerous characteristic on account of which the goods have been declared unsafe. 30

(4) The Commission may, where it has reasonable grounds to believe that a person or an enterprise is selling goods which are unsafe, after consulting the Zambia Bureau of Standards and such other relevant competent body as it considers appropriate, apply to the Tribunal for an order that — 35

(a) goods of a certain description are unsafe and that the sale of such goods to any consumer is prohibited; or

(b) goods of a certain description already sold to consumers

are unsafe and should be recalled from the market by the supplier, who shall meet any expenses of the recall as well as paying compensation to the consumer from whom the goods are recalled.

5 53. (1) In a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Unfair
contract term

10 (2) An unfair contract or an unfair term of a contract between a consumer and an enterprise shall not be binding.

(3) Notwithstanding subsection (2), a contract shall bind the parties if it is capable of being enforced without the unfair term.

54. Any person who alleges that a person or an enterprise—

Complaints on
unfair contract
term or trading
practices,
defective
goods,
misrepresentations,
e.t.c.

- 15 (a) is practising any unfair trading;
- (b) has made a false or misleading representation in respect of any goods, services or facilities;
- (c) has displayed a disclaimer at any trading premises contrary to the provisions of this Act;
- 20 (d) has supplied defective or unsuitable goods or provided unsuitable services to that person;
- (e) is selling goods that do not conform with the mandatory safety standards for the class of goods;
- (f) has concluded or is enforcing an unfair contract or term of contract to the detriment of that person; or
- 25 (g) has contravened any other provision of this Act relating to consumer protection or has failed to comply with a requirement under this Act, to the detriment of that person;

may lodge a complaint with the Commission in the prescribed manner
30 and form.

PART VIII

INVESTIGATIONS AND DETERMINATION BY COMMISSION

55. (1) Subject to subsection (4), the Commission may, at its own initiative or on a complaint made by any person, undertake an
35 investigation if it has reasonable grounds to believe that there is, or is likely to be, a contravention of any provision of this Act.

Investigations
by
Commission

(2) The Commission may, where it undertakes an investigation pursuant to subsection (1), carry out public consultations on the subject of the investigation in such manner as it considers appropriate.

(3) The Commission shall, upon opening an investigation, as soon as practicable, give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated and shall indicate in the notice, the subject matter and the purpose of the investigation. 10

(4) For the purpose of an investigation under this section, the Commission may, by notice in writing served on any person, require that person to—

(a) furnish to the Commission, in a statement signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in the notice which the Commission considers relevant to the investigation; 15 20

(b) produce to the Commission, or to a person specified in the notice, any document or article, as specified in the notice, which relates to any matter which the Commission considers relevant to the investigation; or

(c) appear before the Commission, or before a person specified in the notice, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice. 25

(5) A person who, or an enterprise which, contravenes subsection (4) commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both. 30

(6) The Commission may, where it has reasonable grounds to believe that the giving of a written notice under subsections (3) and (4) may materially prejudice its investigation, defer the giving of such notice until after the investigation is concluded. 35

(7) Notwithstanding subsection (6), the Commission may receive from any person any statement, document, information or article that may assist with its investigation.

(8) The Commission may, upon giving notice under subsections (3) and (4), invite comments from any party with an interest in the matter under investigation.

(9) Nothing in this section compels a person to supply any document or information which the person would be entitled to refuse to produce or give in civil proceedings before any court.

(10) The Commission shall, at the conclusion of an investigation under this section, publish a report of the inquiry and its conclusions in such manner and form as it considers appropriate.

(11) The Commission shall not investigate a matter that is before the Tribunal unless the Tribunal directs otherwise.

56. (1) The Commission shall, where it receives a request from any person to investigate a matter and determines that a request is frivolous or vexatious, dismiss the request and inform, in writing, that person of its decision and the reasons therefor.

Decision not
to
investigate

(2) The Commission may refer a request received from a person or an enterprise to another regulatory authority and shall inform the person or the enterprise of the reasons for its decision.

57. (1) The Commission may, at any time, during or after an investigation under this Part, enter into a consent agreement with an enterprise under investigation or request the enterprise to give an undertaking in the prescribed manner and form.

Consent
agreement
and
undertaking

(2) The Commission shall, upon entering into a consent agreement with an enterprise, or receiving an undertaking from an enterprise under subsection (1), submit the consent agreement or undertaking, as the case may be, to the Tribunal for confirmation.

(3) The Tribunal may, upon receipt of the consent agreement or undertaking under subsection (2)—

(a) give or withhold its confirmation; or

(b) return the matter to the Commission with an indication of any changes that need to be made to the consent agreement or undertaking before the Tribunal confirms it.

(4) An undertaking confirmed by the Tribunal shall—

(a) be published by the Commission in the form of a decision of the Commission; and

(b) have effect as if it were a direction of the Commission under section *fifty-nine*.

(5) A person who, or an enterprise which, fails to comply with any conditions stated in a consent agreement or with any undertaking given by the person or the enterprise is liable to pay the Commission a fine not exceeding ten percent of that person's or an enterprise's annual turnover.

5

Directions
relating to
restrictive
agreements

58. (1) The Commission may, where a restrictive agreement falls within the scope of sections *eight, nine, ten and twelve*, give an enterprise such directions, in writing, as the Commission considers appropriate to ensure that the enterprise ceases to be a party to the restrictive agreement.

10

(2) A direction under subsection (1) may, in particular, require an enterprise to terminate or modify the restrictive agreement concerned within such period as may be specified by the Commission.

(3) The Commission may, in relation to a restrictive agreement referred to under subsection (1), in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise not exceeding ten percent of that enterprise's annual turnover during the period of the breach of the prohibition up to a maximum period of five years.

(4) The Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.

20

(5) An order imposing a penalty under subsection (3) shall be in writing and shall specify the date by which the penalty is required to be paid.

(6) The date specified under subsection (5) shall not be earlier than the end of the period within which an appeal against the order may be brought under section *sixty-one*.

25

(7) Where a penalty has not been paid within the specified date and—

(a) an appeal against the order is not made under section *sixty*; or

(b) an appeal was made but dismissed or withdrawn;

30

the Commission may apply to the Tribunal for a mandatory order to enforce the payment of the penalty against the enterprise concerned.

Directions
relating to
distortion,
prevention
or
restriction
of
competition

59. (1) Where the Commission determines, after review, that an enterprise is a party to a restrictive agreement referred to under section *eight, nine, ten or twelve* or that it is a party to a dominant position within the terms of section *sixteen*, and that—

35

(a) in relation to the restrictive agreement, the agreement has

the object or effect of preventing, restricting or distorting competition; or

(b) in relation to the dominant position, any conduct of the enterprise—

(i) has the object or effect of preventing, restricting or distorting competition; or

(ii) in any other way, constitutes exploitation of the monopoly situation, the Commission may give the enterprise such directions as it considers necessary, reasonable and practicable to—

(A) remedy, mitigate or prevent the adverse effects on competition that the Commission has identified; or

(B) remedy, mitigate or prevent any detrimental effects on users and consumers so far as they have resulted from, or are likely to result from, the adverse effects on, or the absence of, competition.

(2) The Commission shall, in determining, in any particular case, the remedial measures required to be taken, have regard to the extent to which any of the offsetting benefits specified in subsection (2) of section *nineteen* are present in that case.

(3) Subject to subsections (1) and (2), a direction under this section may include a requirement that the enterprise to which it is given shall—

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct, including conduct in relation to prices;

(c) supply goods or services, or grant access to facilities;

(d) separate or divest itself of any enterprise or assets; or

(e) provide the Commission with specified information on a continuing basis.

(4) A direction given under this section shall be in writing.

60. A person who, or an enterprise which, is aggrieved with an order or direction of the Commission under this Part may, within thirty days of receiving the order or direction, appeal to the Tribunal.

Appeals

Remedies in
merger
control

61. (1) The Commission may, where it determines after an investigation that an enterprise is a party to a merger and the creation of a merger has resulted, or is likely to result, in a substantial lessening of competition within a market for goods or services, give the enterprise such directions as it considers necessary, 5 reasonable and practicable to—

- (a) remedy, mitigate or prevent the substantial lessening of competition; and
- (b) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial 10 lessening of competition.

(2) The Commission may, in the case of a prospective merger, require an enterprise to—

- (a) desist from completion or implementation of the merger insofar as it relates to a market in Zambia; 15
- (b) divest such assets as are specified in a direction within the period so specified in the direction, before the merger can be completed or implemented; or
- (c) adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in a direction as a 20 condition of proceeding with the merger.

(3) The Commission may, in the case of a completed merger, require an enterprise to—

- (a) divest itself of such assets as are specified in a direction within the period so specified in the direction; or 25
- (b) adopt, or to desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of maintaining or proceeding with the merger.

Interim
measures

62. (1) Where—

- (a) the Commission has reasonable grounds to suspect that 30 an enterprise is a party to a prohibited agreement and has not completed its examination of the matter, but believes that there is the risk of serious or irreparable injury to a particular person as a consequence of the agreement; 35
- (b) an enterprise is a party to an agreement which is subject to review, to a monopoly situation or to a merger, on which the Commission has opened but not completed an investigation, and the Commission is satisfied that—

(i) there is *prima facie* evidence that competition is being prevented, restricted, distorted or substantially lessened and that, in consequence, serious or irreparable damage may be caused to a particular person; or

(ii) the enterprise is taking steps that would effectively pre-empt remedial action being taken that would restore the conditions of competition existing prior to the investigation;

the Commission may, in writing, give such directions as it considers appropriate if, as a matter of urgency, it considers it is necessary to do so to—

(A) prevent serious or irreparable injury to a particular person or category of persons;

(B) protect the public interest; or

(C) prevent pre-empt action being taken by the enterprise under investigation.

(2) The Commission shall give an enterprise to which it intends to give a direction under this section an opportunity to make representations before the direction is given.

63. (1) The Commission shall keep under review the compliance with directions given by it and the performance of undertakings given by an enterprise.

Review of
directions
and
undertakings

(2) The Commission may, where it is satisfied that there has been a material change of circumstance—

(a) agree to vary or terminate a direction; or

(b) accept a variation to an undertaking, or release an enterprise from an undertaking.

64. (1) Where the Commission determines that an enterprise has failed, without reasonable cause, to comply with a direction or undertaking, it may, subject to subsection (2), apply to the Tribunal for a mandatory order requiring the enterprise to make good the default within a time specified in the order.

Enforcement
of directions
and
undertakings

(2) The Commission shall consider any representations an enterprise wishes to make before making an application under subsection (1).

(3) The Tribunal may provide in the order that all the costs of, or incidental to, the application shall be borne by the enterprise in default.

Enforcement
of
competition
law at request
of foreign
competition
authority

65. (1) Subject to the provisions of subsection (2), a foreign competition authority may, where it has reasonable grounds to believe that anti competitive practices in Zambia are damaging competition in the country of the authority, request the Commission to investigate and make an appropriate determination. 5

(2) Subsection (1) applies

(a) to requests from other members of the Common Market for Eastern and Southern Africa or of the Southern African Development Community by virtue of the obligations assumed by Zambia towards these 10 organisations; and

(b) where the Minister has certified by order, in the *Gazette*, that Zambia has entered into an agreement with one or more States or organisations whereby, on a basis of reciprocity, each party to the agreement shall exercise 15 the principle of comity on the basis described in subsection (1) in investigating and determining cases falling within its jurisdiction.

Regulations
relating to
investigations

66. The Minister may, by statutory instrument, on the recommendation of the Commission, make regulations to provide 20 for the manner in which investigations under this Part shall be carried out.

PART IX

THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL

Establishment
of
Competition
and
Consumer
Protection
Tribunal

67. (1) There is hereby established the Competition and 25 Consumer Protection Tribunal which shall consist of the following part-time members appointed by the Minister:

- (a) a legal practitioner of not less than ten years legal experience, who shall be the Chairperson;
- (b) a representative of the Attorney-General, who shall be 30 the Vice-Chairperson; and
- (c) three other members who shall be experts, with not less than five years experience and knowledge, in matters relevant to this Act.

(2) Subject to subsection (5), a member of the Tribunal shall 35 hold office for a period of four years from the date of appointment and may be re-appointed for a further term of four years.

(3) The Minister may appoint alternate members of the Tribunal referred to in paragraph (c) who shall have, and may perform, the functions of a member during a member's absence.

(4) A person shall not be appointed as a member of the Tribunal
5 if the person—

(a) is an undischarged bankrupt;

(b) is insane or of unsound mind;

(c) is in lawful custody or the person's freedom of movement
10 is restricted under any law in force within or outside
Zambia; or

(d) has been convicted of an offence under any law.

(5) The office of a member of the Tribunal shall become vacant—

(a) upon the member's death;

(b) if a member is absent without reasonable excuse from
15 three consecutive sittings of the Tribunal of which the
member had notice;

(c) if the member is removed by the Minister;

(d) if the member is adjudged bankrupt;

(e) if the member becomes mentally or physically incapable
20 of performing the duties of a member;

(f) if the member is convicted of an offence under any law
and sentenced therefor to imprisonment for a period
exceeding six months; or

(g) in the case of a member referred to in paragraphs (a) and
25 (b) of subsection (1), if that member ceases to practise
as a legal practitioner on disciplinary grounds confirmed
by the Law Association of Zambia.

(6) If a vacancy occurs in accordance with subsection (5), the
Minister may appoint a new member in accordance with subsection
30 (1), but the member shall hold office only for the unexpired period
of the term.

68. The functions of the Tribunal are to—

Functions of
Tribunal

(a) hear any appeal made to it under this Act; and

(b) perform such other functions as are assigned to it under
35 this Act or any other law.

Secretariat of
Tribunal

69. The Ministry responsible for commerce shall provide the necessary secretarial and accounting services to the Tribunal to perform its functions under this Act.

Proceedings
of Tribunal

70. (1) Three members of the Tribunal shall form a quorum.

(2) Any question at a sitting or meeting of the Tribunal shall be decided by a majority of the votes of the members of the Tribunal at the sitting or meeting and in the event of an equality of votes, the person presiding at the sitting or meeting shall have a casting vote in addition to that person's deliberative vote.

(3) A party to a hearing of the Tribunal may be represented by a legal practitioner or, if the party so elects, by any other person or in person.

(4) A decision of the Tribunal shall be in the form of a reasoned judgment and a copy thereof shall be supplied to each party to the proceedings and to every person affected by the decision.

(5) If a person is present at a meeting of the Tribunal at which any matter is the subject of consideration, and in which matter the person or that person's spouse is directly or indirectly interested in a private capacity, that person shall, as soon as is practicable after the commencement of the meeting, disclose the interest and shall not, unless the Tribunal otherwise directs, take part in any consideration or discussion of, or vote on, any question relating to that matter.

(6) A disclosure of interest made under this section shall be recorded in the minutes of the meeting at which it is made.

(7) The Tribunal may, for the purpose of any proceedings, use such assessors or experts as the Tribunal may determine.

(8) The Tribunal shall cause to be kept a record of its proceedings.

Powers of
Tribunal

71. (1) The Tribunal may—

(a) order the parties or either of them to produce to the Tribunal such information as the Tribunal considers necessary for purposes of the proceedings; or

(b) take any other course which may lead to the just, speedy and inexpensive settlement of any matter before the Tribunal.

(2) The Tribunal may summon witnesses, call for the production of, or inspection of, books, documents and other things, and examine

witnesses on oath, and for those purposes, the Chairperson is hereby authorised to administer oaths.

(3) A summons for the attendance of any witness or the production of any book, document or other thing shall be signed by the Chairperson and served in the prescribed manner.

72. A person who knowingly gives false evidence regarding any matter which is material to a question in any proceedings before the Tribunal commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both.

False
evidence

73. (1) The Tribunal may, if a merger is implemented in contravention of this Act—

Determination
of Tribunal
in respect of
mergers

- (a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or
(b) declare void any provision of an agreement to which the merger was subject.

(2) The Tribunal may, in addition to or in lieu of making an order under subsection (1), direct any firm, or any other person, to sell any shares, interest or assets of the firm if the prohibited practice—

- (a) cannot adequately be remedied in terms of another provision of this Act; or
(b) is substantially conduct by that firm previously found by the Tribunal to have been a prohibited practice.

(3) An order made in terms of subsection (1) or (2) may set a time for compliance and any other terms that the Tribunal considers appropriate, having regard to the commercial interests of the party concerned.

74. (1) The Tribunal may make an order as to costs as it may consider just having regard to the merits of the matter.

Costs

(2) Subject to subsection (1) the costs and charges in connection with proceedings before the Tribunal shall be the costs reasonably incurred by the person in connection with the proceedings or such part of those costs as is determined by the Tribunal.

75. A person aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination.

Appeal to
High Court

76. The expenses and costs of the Tribunal shall be paid out of funds appropriated by Parliament for the performance of the Tribunal's functions under this Act.

Expenses of
Tribunal

Allowances
of members
and
secretariat

77. There shall be paid to the members and the secretariat of the Tribunal such allowances as the Minister may determine.

Rules

78. (1) The Chief Justice may, by statutory instrument, make rules relating to—

- (a) the manner and form for lodging of appeals under this Part; 5
- (b) the mode of summoning persons before the Tribunal;
- (c) the form and manner of service of a summons requiring the attendance of a witness before the Tribunal and the production of any book, record, document or thing; 10
- (d) the procedure to be followed and rules of evidence to be observed in proceedings before the Tribunal; and
- (e) the functions of the assessors and experts to the Tribunal.

(2) Rules made under this section may, in particular, provide—

- (a) that before any matters are referred to the Tribunal they shall, in such manner as may be provided by the rules, have been brought before and investigated by the Commission in this respect; 15
- (b) for securing notices for the proceedings and specifying the time and manner of the proceedings; and 20
- (c) for securing that any party to the proceedings shall, if that person requires, be entitled to be heard by the Tribunal.

PART X

GENERAL PROVISIONS

25

Leniency
programme

79. (1) The Commission may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act. 30

(2) The details of a leniency programme under subsection (1), shall be set out in any guidelines of the Commission.

Jurisdiction
over acts
committed
outside
Zambia

80. (1) A court of competent jurisdiction shall have jurisdiction over any person for any act committed outside Zambia which, if it had been committed in Zambia, would have been an offence under this Act. 35

(2) Any proceedings against a person under this section which would be a bar to subsequent proceedings against the person, for the same offence, if the offence had been committed in Zambia, shall be a bar to further proceedings against the person under any written law relating to the extradition of persons, in respect of the same offence outside Zambia.

(3) The Mutual Legal Assistance in Criminal Matters Act shall apply to proceedings under this Act.

Cap. 98

81. Notwithstanding anything contrary contained in any written law, where a judgment or order has been obtained against the Commission, no execution or attachment, or process of any nature, shall be issued against the Commission or against the property of the Commission, but the Executive Director shall cause to be paid out of the revenue of the Commission such amounts as may, by the judgment or order, be awarded against the Commission to the person entitled to the amounts.

No execution
on property
of
Commission

82. A person who contravenes a provision of this Act for which a specific penalty is not provided for under this Act, commits an offence and is liable, upon conviction, to a fine not exceeding one hundred thousand penalty units or to imprisonment for a period not exceeding one year, or to both.

General
penalty

83. Where an offence under this Act is committed by a body corporate or unincorporate body, every director or manager of the body corporate or unincorporate body shall be liable, upon conviction, as if the director or manager had personally committed the offence, unless the director or manager proves to the satisfaction of the court that the act constituting the offence was done without the knowledge, consent or connivance of the director or manager or that the director or manager took reasonable steps to prevent the commission of the offence.

Offences by
body
corporate or
unincorporate
body

84. (1) In the exercise of its functions under this Act, the Commission may make such guidelines as are necessary for the better carrying out of the provisions of this Act.

Commission
to issue
guidelines

(2) The Commission shall publish the guidelines issued under this Act in a daily newspaper of general circulation in Zambia, and the guidelines shall not take effect until they are so published.

(3) The guidelines issued by the Commission under this Act shall bind all persons regulated under this Act.

Dissemination
of
information

85. The Commission may disseminate in such manner and form as it considers appropriate, information and advice concerning the operation of this Act.

Fines

86. (1) A fine payable under this Act shall be a debt due to the State and shall be summarily recoverable as a civil debt. 5

(2) Wherever in this Act a fine is required to be paid in relation to the annual turnover of a person or an enterprise, the percentage to be retained by the Commission shall be as may be prescribed in accordance with subsection (3).

(3) The Minister responsible for finance may, by statutory 10 instrument, prescribe the percentage of the turnover paid by a person or an enterprise that is to be retained by the Commission.

Regulations

87. (1) The Minister may, by statutory instrument, on the recommendation of the Commission, make regulations for the better carrying out of the provisions of this Act. 15

(2) Without prejudice to the generality of subsection (1), regulations under that subsection may make provision for—

- (a) the forms, fees payable and the procedure for applications to be made under this Act;
- (b) the information and documents to be submitted in support 20 of applications to be made under this Act;
- (c) the form of an exemption and the conditions therefor;
- (d) the form of the negative clearance and the conditions under which it is issued;
- (e) the threshold for prior notification to the Commission of a 25 merger transaction;
- (f) the manner and form of lodging appeals or reports with the Commission;
- (g) the manner and form of serving notices on any person;
- (h) the manner and form of service of a notice requiring the 30 attendance of a person before the Commission and the production of any book, record, document or thing;
- (i) the manner in which the Commission shall carry out an investigation under this Act;
- (j) the manner and form in which the Commission shall institute 35 an inquiry under this Act; and

(k) generally the carrying into effect of the purposes of this Act.

88. (1) The Competition and Fair Trading Act, 1994, is hereby repealed.

Repeal of
Act
No. 18 of
1994

5 (2) Notwithstanding subsection (1), the provisions of the Second Schedule shall apply in respect of the matters specified therein.

(3) Notwithstanding subsection (1), a person who immediately before the commencement of this Act held office as a member of the Board of the former Commission shall hold office as a member
10 of the Board for a period of three months after which the Minister shall appoint the members of the Board in accordance with the provisions of this Act.

FIRST SCHEDULE

(Section 4(3))

ADMINISTRATION OF COMMISSION

PART I

THE BOARD OF THE COMMISSION

5

Composition
of Board of
Commission

1. (1) There is hereby constituted a Board of the Commission which shall consist of the following members appointed by the Minister:

(a) a representative from the Ministry responsible for commerce;

10

(b) a representative of the Attorney General; and

(c) five other members, with experience and knowledge in matters relevant to this Act, appointed by the Minister.

(2) The Chairperson and the Vice Chairperson of the Board shall be appointed by the Minister from amongst the members of the Board.

(3) A person shall not be eligible for appointment as a member of the Board if —

(a) that person is under any written law, adjudged or otherwise declared to be of unsound mind;

20

(b) that person is adjudged or declared bankrupt under any written law in Zambia; or

(c) that person has been convicted of an offence under this Act or any other law.

Seal of
Commission

2. (1) The seal of the Commission shall be such device as may be determined by the Commission and shall be kept by the Executive Director.

(2) The Chairperson or the Vice-Chairperson, the Executive Director or any other person authorised by a resolution of the Commission to so act, shall authenticate the affixing of the seal.

30

(3) Where a contract or instrument is not required to be under seal, the Executive Director or a person authorised by the Commission in that behalf, may execute the contract or instrument on behalf of the Commission without seal.

(4) A document purporting to be a document under the seal of the Commission or issued on behalf of the Commission, shall be

35

received in evidence and shall be executed or issued, as the case may be, without further proof, unless the contrary is proved.

3. (1) A member of the Board shall, subject to the other provisions of this Schedule, hold office for a term of four years and may be re appointed for a further term of four years.

Tenure of
office and
vacancy of
member

(2) Upon the expiration of the term for which a member is appointed, the member shall continue to hold office until another member is appointed, but in no case shall any extension of the period exceed three months.

10 (3) The office of a member shall be vacated —

(a) upon the member's death;

(b) if the member is adjudged bankrupt;

15 (c) if the member is absent from three consecutive meetings of the Commission, of which the member has had notice, without the prior approval of the Commission;

(d) upon the expiry of one month's notice of the member's intention to resign, given by the member in writing to the Minister;

20 (e) if the member becomes mentally or physically incapable of performing duties as a member;

(f) if the member is removed by the Minister; or

(g) if the member is convicted of an offence under this Act or any other law.

25 (4) Where there is a vacancy in the membership of the Board before the expiry of the term of office, the Minister shall appoint another person to replace the member who vacates office but that person shall only hold office for the remainder of the term.

4. (1) Subject to the other provisions of this Act, the Board may regulate its own procedure.

Proceedings
of Board

30 (2) The Board shall meet for the transaction of its business at least once in every three months at such places and times as the Board may determine.

(3) Upon giving notice of not less than fourteen days, a meeting of the Board may be called by the Chairperson and shall be called if not less than one third of the members so request in writing:

35 Provided that if the urgency of a particular matter does not permit the giving of any notice, a special meeting may be called upon giving a shorter notice.

(4) Four members of the Board shall constitute a quorum.

(5) There shall preside at a meeting of the Board—

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice Chairperson;
or

(c) in the absence of the Chairperson and the Vice
Chairperson, such member of the Board as the members
present may elect from amongst themselves for the
purpose of that meeting.

(6) A decision of the Board on any question shall be by a majority
of the members present and voting at the meeting and, in the event
of an equality of votes, the person presiding at the meeting shall
have, in addition to a deliberative vote, a casting vote.

(7) Where a member is for any reason unable to attend any
meeting of the Board, the member may, in writing, nominate another
person from the same organisation to attend a meeting in that
member's stead and such person shall be deemed to be a member
for the purpose of that meeting.

(8) The Board may invite any person whose presence, in its
opinion, is desirable to attend and participate in the deliberations of
a meeting of the Board, but that person shall have no vote.

(9) The validity of any proceedings, act or decision of the Board
shall not be affected by any vacancy in the membership of the
Board or any defect in the appointment of any member or by reason
that any person not entitled to do so, took part in the proceedings.

(10) The Board shall cause minutes to be kept of the proceedings
of every meeting of the Board.

Committees

5. (1) The Board may, for the purpose of performing its
functions under this Act, constitute a committee and delegate to
the committee such functions of the Board as it considers necessary.

(2) The Board may appoint as members of a committee
constituted under sub paragraph (1), persons who are or are not
members of the Board and such persons shall hold office for such
period as the Board may determine.

(3) Subject to any specific or general direction of the Board,
any committee constituted under this paragraph may regulate its
own procedure.

6. A member of the Board or any committee of the Board thereof shall be paid such allowances as the Board may, with the approval of the Minister, determine.

Allowances

7. (1) If any person is present at a meeting of the Board or a committee of the Board at which any matter, in which that person or any member of the person's immediate family is directly or indirectly interested in a private capacity, is the subject of consideration, that person shall, as soon as practicable after the commencement of the meeting, disclose that interest and shall not, unless the Board or the committee otherwise directs, take part in any consideration or discussion of, or vote on any question relating to that matter.

Disclosure of
interest

(2) A disclosure of interest made under this paragraph shall be recorded in the minutes of the meeting at which the disclosure is made.

8. (1) A person shall not, without the consent in writing given by, or on behalf of, the Board, publish or disclose to any unauthorised person, otherwise than in the course of that person's duties, the contents of any document, communication or information whatsoever, which relates to, or which has come to that person's knowledge in the course of that person's duties under this Act.

Prohibition
of
publication
of, or
disclosure of
information
to
unauthorised
person

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

(3) A person who, having information which to the knowledge of that person has been published or disclosed in contravention of subparagraph (1), unlawfully publishes or communicates the information to any other person, commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.

9. An action or other proceedings shall not lie or be instituted against a member of the Board, a committee of the Board or a member of staff of the Commission, for or in respect of any act or thing done or omitted to be done in good faith in the exercise or performance, or purported exercise or performance, of any of the powers, functions or duties conferred under this Act.

Immunity of
member and
staff

PART II

FINANCIAL PROVISIONS

Funds of
Commission

10. (1) The funds of the Commission shall consist of such moneys as may

(a) be appropriated by Parliament; 5

(b) be paid to the Commission by way of fees, levies, grants or donations; or

(c) vest in or accrue to the Commission.

(2) The Commission may—

(a) accept moneys by way of grants or donations from any source in Zambia and, subject to the approval of the Minister, from any source outside Zambia; 10

(b) raise by way of loans or otherwise, such moneys as the Commission may require for the discharge of the Commission's functions; or 15

(c) in accordance with the regulations made under this Act, charge and collect fees for services provided by the Commission.

(3) There shall be paid from the funds of the Commission—

(a) the salaries, allowances and loans of members of staff of the Commission; 20

(b) reasonable travelling, transport and subsistence allowances for members of the Commission or members of any committee of the Commission when engaged in the business of the Commission, at such rates as the Commission may, with the approval of the Minister, determine; and 25

(c) any other expenses incurred by the Commission in the performance of the Commission's functions.

(4) The Commission may invest, in such manner as the Commission thinks fit, funds that the Commission does not immediately require for the performance of the Commission's functions. 30

Financial
year

11. The financial year of the Commission shall be the period of twelve months ending on 31st December in each year. 35

12. (1) The Commission shall cause to be kept proper books of accounts and other records relating to the Commission's accounts. Accounts

(2) The accounts of the Commission shall be audited by the Auditor-General or by auditors appointed by the Auditor-General.

5 (3) The auditor's fees shall be paid by the Commission.

13. (1) As soon as practicable, but not later than ninety days after the end of the financial year, the Commission shall submit to the Minister a report concerning its activities during the financial year. Annual report

10 (2) The report referred to in subparagraph (1), shall include information on the financial affairs of the Commission and there shall be appended to the report—

(a) an audited balance sheet;

(b) an audited statement of income and expenditure; and

15 (c) such other information as the Minister may require.

(3) The Minister shall, not later than seven days after the first sitting of the National Assembly next after receipt of the report referred to in subparagraph (1), lay the report before the National Assembly.

20 SECOND SCHEDULE

(Section 88(2))

SAVINGS AND TRANSITIONAL PROVISIONS

1. (1) For the avoidance of doubt, a person who, before the commencement of this Act, was an officer or employee of the former Commission, shall continue to be an officer or employee of the Commission, as the case may be, as if appointed or employed under this Act. Staff of Commission

(2) The service of the persons referred to in subparagraph (1) shall be treated as continuous service.

30 (3) Nothing in this Act affects the rights and liabilities of any person employed or appointed by the former Commission before the commencement of this Act.

2. (1) On or after the commencement of this Act, there shall be transferred to, vest in and subsist against the Commission by virtue of this Act and without further assurance, all assets, rights and obligations which immediately before that date were the assets, rights, liabilities and obligations of the former Commission. Transfer of assets and liabilities

(2) Subject to subparagraph (1), every deed, bond and agreement, other than an agreement for personnel service, to which the former Commission was a party immediately before the commencement of this Act whether or not of such a nature that rights, liabilities and obligations could be assigned, shall, unless its subject matter or 5 terms make it impossible that it should have effect as modified, as provided under this paragraph, have effect as if —

- (a) the Commission had been party to it;
- (b) for any reference to the former Commission there was substituted, with respect to anything falling to be done 10 on or after the commencement of this Act, a reference to the Commission; or
- (c) for any reference to any officer of the former Commission, not being a party to it and beneficially interested, there were substituted, as respects anything falling to be done 15 on or after the commencement of this Act, a reference to such officer of the Commission as the Commission shall designate.

(3) Where under this Act, any assets, rights, liabilities and obligations of the former Commission are deemed to be transferred 20 to the Commission in respect of which transfer a written law provides for registration, the Commission shall make an application in writing to the appropriate registration authority for registration of the transfer.

(4) The registration authority, referred to in subparagraph (2), 25 shall make such entries in the appropriate register as shall give effect to the transfer and, where applicable, issue to the transferee concerned a certificate of title in respect of the property or make necessary amendments to the register and shall endorse the deeds relating to the title, right or obligation concerned and no registration 30 fees or other duties shall be payable in respect of the transaction.

Legal
proceedings

3. (1) Any legal proceedings or application of the former Commission pending immediately before the commencement of this Act by or against the former Commission may be continued by or against the Commission. 35

(2) After the commencement of this Act, proceedings in respect of any right, liability or obligation which was vested in, held, enjoyed, incurred or suffered by the former Commission, may be instituted by or against the Commission.