



COMPETITION AND SECTORAL REGULATION IN
TELECOMMUNICATIONS

SCENARIO 2 - Review of Merger of Company A and Company C

By

George K. Lipimile
Executive Director
Zambia Competition Commission

Introduction

Concurrent Jurisdiction

Most of the statutes establishing sector regulator provide for concurrent jurisdiction between the Commission and sector specific regulators. This has resulted into concerns expressed by industry players who urge that concurrent jurisdiction with the Commission on matters affecting the respective sectors may lead to uncertainty. This is the legal status in Zambia, and we recommend this model as appropriate for a developing country, where the learning curve in regulatory policy takes a long time.

It was recognised from discussions with regulatory officials in Zambia that there is a need for some kind of economic regulation that shall extend beyond the usual bounds of the Competition registration. The question of how to allocate tasks and responsibility for competition and regulation policies falls under the more general issue of the optimal organisation of government. The jurisdiction boundary between the Commission and regulators in promoting competition varies from sector to sector, depending on the statute creating the regulatory institution. The major question to consider is whether the statute creating the sector regulator gives power to the regulator to deal with competition matters. If the answer is 'yes' then we have a situation of concurrent jurisdiction. That is, both the sector regulator and the competition authority shall administer or enforce concurrently, competition in that given sector. This is the case of the telecommunication and the energy sector. If the statute is silent or does not give any powers to the sector regulator to administer and/or enforce competition, then the Commission shall be responsible for competition in the given sector. This is the case of the water and sanitation sector. Consequently, for concurrent jurisdiction to materialise, there ought to be an enabling provision in the creating statute.

In general, an agreement or conduct which relates to the industry sector of a regulator will be dealt with by that regulator although in some cases the Executive Director of the Zambia Competition Commission will deal with such a case. The concerned regulator and the Executive Director will always consult with each other before acting on a case where it appears that that they may have concurrent jurisdiction. The general principal will be that a case will be dealt with by whichever of the Zambia Competition Commission or the relevant regulator is better, or best, placed to do so. The factors considered is determining who deals with the matter include sectoral knowledge of a regulator, any recent experience in dealing with any of the undertakings or similar issues.

Although Zambia has short history of the regulatory regime, it has become necessary to address the need for coherence and integration in the Zambian regulatory framework, which has remained fragmented and often contradictory. Furthermore, a need to clearly differentiate types of regulation has emerged. Both the Commission and sector regulators despite having concurrent jurisdiction in certain sectors, need to develop approaches and strategies in dealing with broad issues affecting regulation in the country. The pursuit of competition should be fully compatible with other public policy goals. There is need to establish mechanisms to balance these other public policy objectives alongside competition objectives. More importantly, it is clear that the proper facilitation of current jurisdiction requires cooperation between sector regulators and the Commission.

SCENARIO 2

Review of Mergers

Zambia has a general competition law that applies across all industries and administered by a single competition authority, the Zambia Competition Commission. It has found this approach workable as it promotes consistency, certainty and fairness in the application of competition law. However, this approach recognises that there may be advantages in having industry-specific competition regulation in industries characterised by complex technology or having natural monopoly or other specific elements. The industry specific regulator in this case complements rather than replaces general competition law.

With this 'division of labour' between various regulators there is potential for some degree of overlap of functions between the competition authority, which administers competition regulation across all sectors of the economy, and those technical and economic regulators that operate within specific industries. For this reason, there are special provisions in the legislation establishment specific technical regulators which minimise uncertainty regarding the jurisdiction of particulars and avoid confusion for consumers and business community.

Predictability

Although regulatory uncertainty exists to some extent, this has been addressed by practice of both the officers of the regulator and the

Competition authority with on going experience in dealing with mergers involving the sector, the division of labour more clearer, and business is slowly appreciating the distinction.

Despite the concurrency of competition regulation in the telecommunications industry, only the competition authority has the mandate to review mergers, thus Company A and Company C would require to notify the transaction before effecting it. The parties may sign the agreement to merge, but they would not be able to legally effect the merger in the absence of express authorisation from the competition authority.

Predictability of notification is inherent in the fact that merger control regulation in Zambia requires prior or pre-merger notification. While persuasive merger guidelines exist, which explain the assessment procedures, statute does not provide readily predictable thresholds for determining the likely outcome of a merger review. Attempts have been made through the merger guidelines.

Merger guidelines do posit that any party to the merger, acting alone or on behalf of the other parties, may formally notify the transaction.

Process and Timetable

In accordance with the ICN Recommendations on Mergers, merger review should be completed within a reasonable period of time, and procedures should provide for expedited review and clearance where there are no substantive issues.

Administratively, under the Zambian setting, the merger of Company A and Company B would likely take at least 30 to 60 days to clear after the date of notification. The process of review is made public, which involves public inquiry as regards the likely effects of the merger between Company A and Company C.

However, after informative market place investigations and findings which do not point to adverse effects on competition, a preliminary approval may be issued within three weeks of formal notification, subject to final authorisation by the Board of Commissioners.

As a guide, the process for assessment of the merger of Company A and Company C would, all things being equal, take the following process:

Event	Completion Time
1. Review of Notification form & documents	1 st week
2. Third Party Consultations (incl. regulator)	3 rd week
3. Preliminary Assessment Report	4 th week
4. Further market research and analysis	5 th week
5. Draft Final Assessment Report	6 th week
6. Final Assessment Report	7 th week
7. Staff Paper to the Board of Commissioners	8 th week
8. Board determination	10 th week

General Expertise

It is common that regulatory authorities do not possess the necessary competences in analysing mergers using the competition principles. Most of the staff members of such institutions tend to be technical persons without or with little training in market or competition analysis. The competition review of merger shall consequently, depend on the competence of the staff of the competition authorities.

As result of lack of training in competition analysis, although the statutes creating sector regulators give them jurisdiction to deal with competition matters, such powers have been rarely used.

Assessment Criteria

With all the relevant information collected on Company A and Company C, competition analysis should follow, using the SLC test principally, and if necessary and/or as a last resort, the public interest test.

In view of Section 7(1) of the Act, the following would be addressed under the **SLC Test**:

The Market Concentration

The market structure is oligopolistic, in the circumstances of market shares of Company A – 60%; Company B – 30%; and Company C 10%. Where Company A takes over Company C, this is likely to alter the market structure and lead to the creation of a duopoly with the dominant firm controlling 70% of the market. At 70%, this would be considered a monopoly undertaking under the Zambian competition legislation. While the legislation does not prohibit the existence and/or creation of monopolies per se, the concern would be on the likely abuse of enhanced market power.

Barriers to entry

Where the market is likely to remain open despite the new Company A/C, and/or where barriers to entry exist that have no causal relationship to the existence of Company A/C, the matter of foreclosure would not be attributable to the transaction. However, where Company A is a virtual monopolist as a result of trade mark, economies of scope and other peculiar competitive traits that make its mere market presence scare away prospective entry, its proposed merger with Company C is likely to entrench its market stronghold and consolidate the barriers to entry. Company A's pricing policies, product packaging strategies and any international strategic alliances would have to be considered to ascertain the likely effect on market entry prospects. The entry and subsequent takeover of Company C would provide the

Removal of a vigorous competitor

At 10% market share, Company C would not be considered as a vigorous competitor to Company A. However, where the transaction is likely to lead to the removal of a competitor and thus altering the market structure to the advantage of Company A, which already enjoys a 60% market share. It would also be necessary to scrutinise the motive of Company A for merging with Company C. Where the motive is to restrict competition, this would raise a serious competition concern.

Substitutability

Using the Small but Significant Non-transitory Increase in Price (SSNIP) test, where Company A, based on previous business conduct and likely post-merger conduct, is able to raise its prices between 5%-10%, without a consumer and competitive response, then a competition concern would be raised as to the effect of the merger of Company A and Company C.

Effective remaining competition

With the entry of Company C only a year ago, it would be expected that this was likely to enhance and/or spur competition and innovation in the market that was previously duopolised by Company A and Company B. The proposed takeover is therefore a competition concern where it returns the market to the previous duopolised era.

Public Interest test

Hypothetically, it would appear that the proposed takeover between Company A and Company B would appear not to satisfy the key variables under SLC test and perhaps we would go a step further to consider the transaction under the public interest test. While the Act does not explicitly mention public interest, this would be inferred under Section 13 as a persuasive approach, generally in the public interest. The public interest test would consider whether the likely benefits of the transaction to the public are so significant that they would, or would be likely to outweigh the adverse effects on competition (i.e. detriment). Where the public benefits outweigh any detriment, then the transaction would be favourably considered. While such benefits are debatable and may be speculative, they would include:

1. whether Company A is actually salvaging Company C as a failing firm or filling in the vacuum of an divesting shareholder
2. whether Company A is the only company that is willing to takeover Company C (i.e. Company B and other prospective entrants are not willing to buy Company C)
3. Expected synergies between Company A and Company C
4. Whether the merger would facilitate the build-out programme
5. Whether the merger leads to more efficient use of resources, enhanced product portfolio and elaborate consumer choice
6. Other public interest considerations may include: the equitable distribution of wealth; prevention of unemployment, need to implement an industrial police; to indigenise national economics.

Remedies

In view of the adverse effects on competition, where Company A and Company C are allowed to merge, the following remedies could be considered:

1. Company A would have to give undertakings not to engage in conduct that is likely to disadvantage the sustainable competitive existence of Company B in the market;
2. Where Company A controls any bottle-neck facilities, such facilities should be accessible at an agreed competitive market rate to Company B and other would-be entrants;

3. In the build-out programme, the merged entity should take a developmental approach in the industry, which should include infrastructural development; and
4. There should be no actions from the merged entity aimed at frustrating potential entry.

Where the merger is not authorised, it would likely be because:

1. The motive of the merger is to prevent, restrict or distort competition in the relevant market;
2. Where SLC is the dominant test, then failure to satisfy the test automatically disqualifies the merger from taking effect;
3. The speculative benefits to the public do not appear to likely outweigh the detriment to competition; and
4. The cause of competition would be progressed if Company B, and not Company A, merged with Company C; and
5. Company C could sustain its market position and grow generically without the merger

George K. Lipimile
Executive Director

Zambia Competition Commission
4th Floor, Main Post Office
Cairo Road
P O Box 34919
LUSAKA.

Tel: (01) 222775, 222787
Fax: (01) 222789
Email: zcomp@zamtel.zm
Website: www.zcc.com.zm