Insight©

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DAWN RAIDS

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LEGAL PRACTITIONERS
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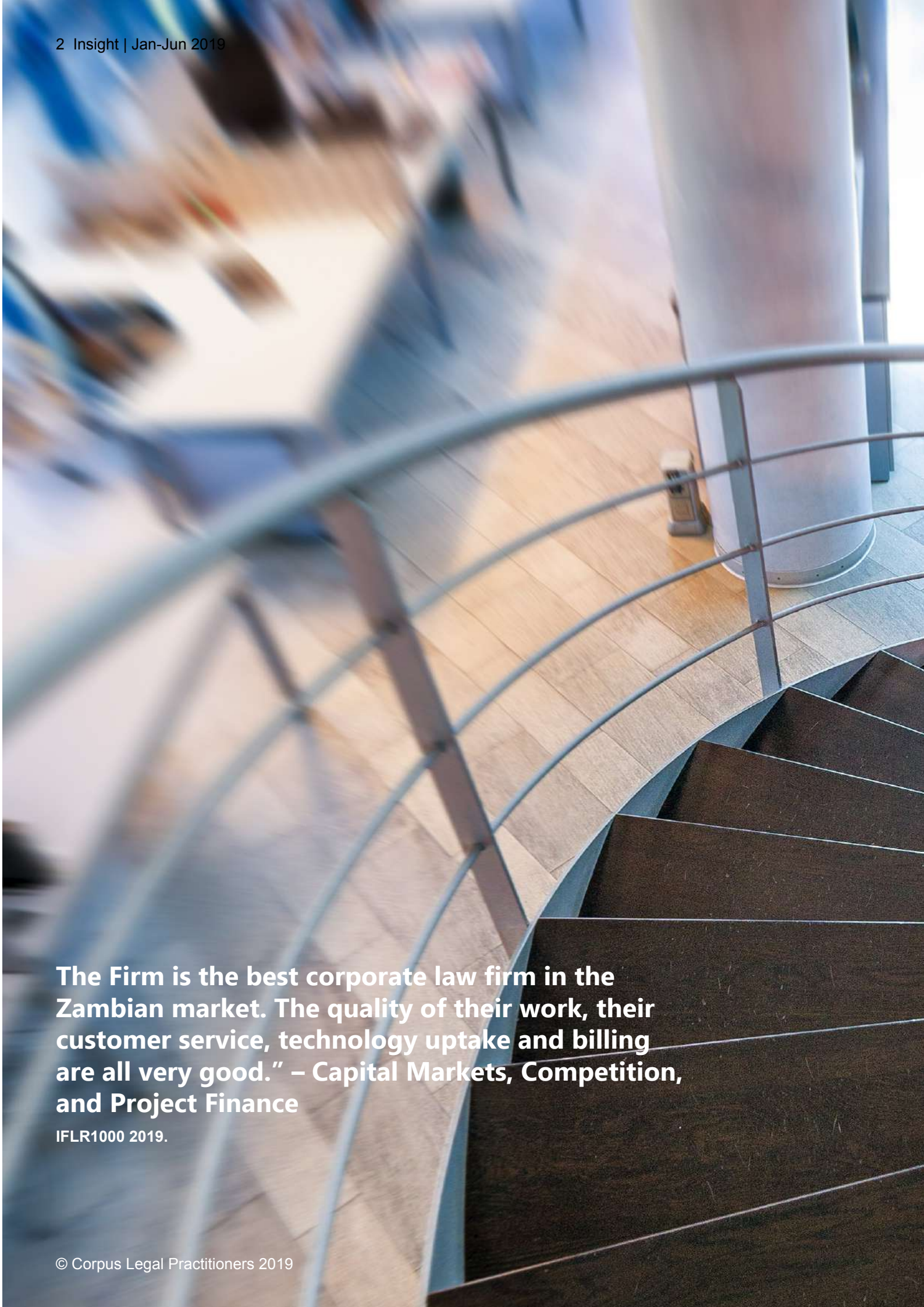

The Firm is the best corporate law firm in the Zambian market. The quality of their work, their customer service, technology uptake and billing are all very good." – Capital Markets, Competition, and Project Finance

IFLR1000 2019.

"They're professional, provide good service, are knowledgeable and know the local market and dynamic well."

Chambers Global Guide, 2019.

A warm welcome to the very first edition of our newsletter!

CHARLES MKOKWEZA
Senior Partner
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Welcome to the first edition of the bi-annual **Insight** newsletter, which aims to highlight pertinent legal issues, keep you current with legal and commercial matters that we consider important and beneficial to you and your business. We hope you will find of interest.

In this inaugural issue, we shine spotlight on a number of issues, including energy financing, competition, and tax matters. We also anticipate that articles in future editions will cover several other areas of the law, characteristic of our numerous practice areas as a Firm. This will determine the face of the newsletter and set the stage for subsequent issues.

In the recent past, we have increasingly advised on various energy projects from both the development and financing aspect. We have also been privileged to advise on a novel alternative financing transaction. Thus, we invite you to read Joshua Mwamulima's article on the Africa GreenCo business financing model to learn how it answers some of the challenges of Africa's energy sector.

Thomas Sakala, shares insight on Zanbia's imminent shift from VAT to the Sales Tax system. Bwalya Chilufya has also authored a guide on how enterprises can best prepare for Dawn Raids, which have the potential to significantly disrupt business operations and productivity during and post the proceeding if you are not organised.

Using the newsletter inauguration as an occasion, I would like to thank many people who created the opportunity for the newsletter to be born and who made it happen. We welcome the opportunity to work more closely with the public regarding our newsletter or any other aspect of our Firm or service offering.

If you are interested in getting involved, then please contact Thomas Sakala, TSakala@corpus.co.zm

We look forward to hearing from you and hope you will find our newsletter informative.

Enjoy.

Charles Mkokweza

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ALTERNATIVE FINANCING MODEL TO MEET AFRICA'S ENERGY NEEDS

THE Zambian electricity sector ("ES") is a key driver for the economic growth as it facilitates activities in all sectors of the economy. It is therefore key that the supply of electricity should match the demands of the industry to sustain economic growth, raise living standards and reduce poverty.

Failure to achieve this equilibrium may result in high levels of electricity supply rationing to all consumers as was the case for Zambia in 2015.

The Seventh National Development Plan ("7NDP") attributed the rationing of electricity supply to inadequate and delayed investments in generation and transmission infrastructure and inadequate incentives to attract investment in the sector.

To ensure consistent supply of electricity in Zambia, there is need to attract investments in the sector as current projections are that the demand for power in Zambia will continue to increase at rate of between 150 MW and 200 MW per annum, with the peak demand for electricity in Zambia expected to reach 3,000 MW by 2021.

Investments by Independent Power Producers ("IPP"), however, is often perceived as an investment that comes with several risks which ought to be properly managed or mitigated. Among the major investment risks usually cited is the lack of creditworthy offtakers in Sub Saharan Africa.

In most Sub Saharan African countries, state utilities continue to dominate the power sector and operate as a regulated monopoly.

However, the financial standing and capacity of state utilities to make timely payments for the electricity supplied by an IPP is usually questioned. This perception makes state utilities not to be viable project partners as an off-taker.

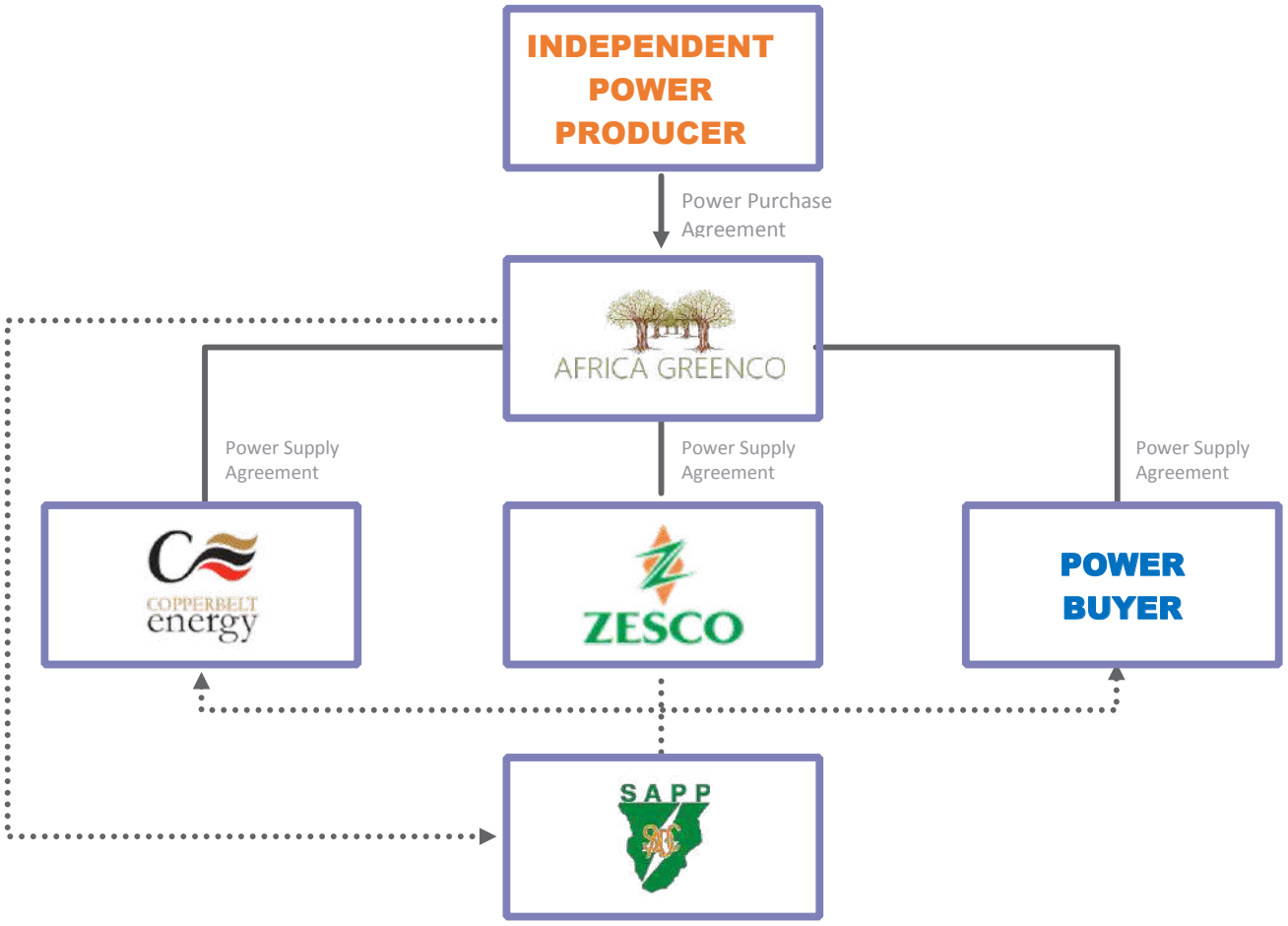
The use of sovereign guarantees for purposes of guaranteeing payment obligations of the state utilities as an offtaker is the preferred and common traditional model of mitigating the credit risk associated with state utilities. Depending entirely on this traditional model, however, needs to change as Governments are now reluctant to incur additional financial obligations through issuance of guarantees.

The Zambian Government, for instance, through the Ministry of Finance announced that Government may not guarantee any future obligations of parastatal bodies.[1] The same sentiments were confirmed in June 2019, when cabinet approved and announced some self-imposed austerity measures aimed at cutting down public expenditure.

In the absence of a Government guarantee, an IPP would find it difficult to invest in the ES unless other innovative business models are used instead. One such alternative

[1] https://www.lusakatimes.com/2018/06/15/no-more-loans-orders-president-lungu-as-he-bans-travel-and-suspends-financing-of-unfinished-projects/

Figure 1. Africa GreenCo business model



business model of encouraging investment in the ES by mitigating the credit risk associated with state utilities one being proposed by Africa GreenCo ("GreenCo").

The GreenCo business model seeks to establish a government co-owned regional creditworthy intermediary offtaker of power ("Creditworthy Intermediary"), which will purchaser electricity produced by multiple private sector IPP's for onward sale to state utilities or other private offtakers.

The value add for the Creditworthy Intermediary to the ES is its creditworthiness and ability to spread both supply and demand risks across the multiple buyers by trading power as a member of the Southern African Power Pool should demand from its contracted off-takers such as the national utility fall. It is expected that by doing so, this business model will reduce project risk profile for investors, cost and tariff.

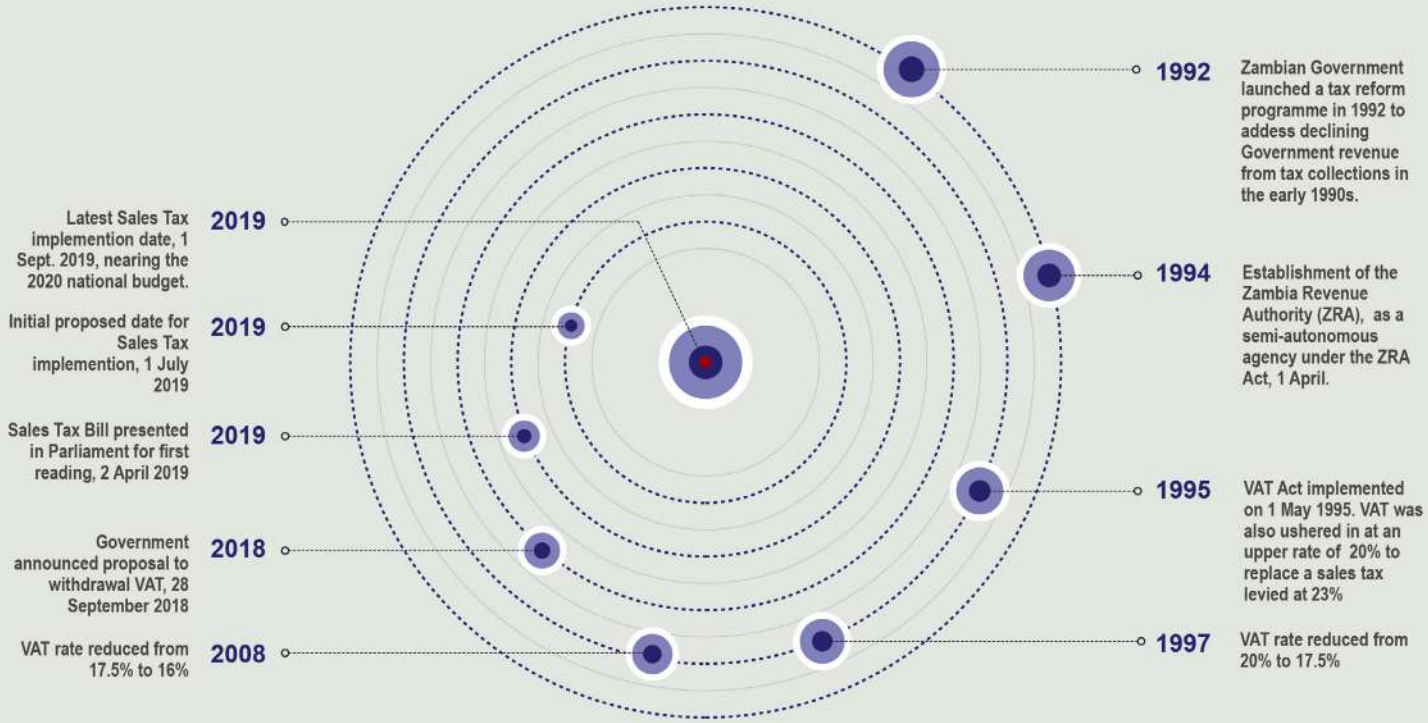
The business model for GreenCo is not to own any physical infrastructure or replace the existing state-owned utilities. Rather, the objective is to complement the existing structures and attract investment in the ES by acting as a credit risk mitigating entity for private financed projects.

> **"The AGC business model establishes a government co-owned regional creditworthy intermediary offtaker of power to sit between multiple private sector IPP's on the one hand and a state owned and private sector offtakers on the other."**

The successful implementation of the GreenCo business model has a potential to make a positive impact on the electricity sector in Zambia. To Government, it will aid the attainment of the objectives of the 7NDP through expansion of generation capacity by attracting more private investment in Zambia through the reduction of credit risk profiles for investors and project costs for IPPs enhance the current electricity generation mix as the focus of GreenCo is renewable energy, while at the same time limiting financial liabilities for the Zambian Government.

To the state utility Zesco Limited, it will avail funds to Zesco for performance improvement programmes as GreenCo will not demand of payment guarantees, provide cheaper power as result of low project costs and facilitate wider power sector development and implementation of Zesco's vision for Zambia becoming the power trading hub of the region. And to the ES in general, the increase in the numbers of IPP's would increase competition and ultimately a positive impact on the tariff for the end users and quality of supply.

JOSHUA MWAMULIMA
Associate



SCRAPPING VAT, SETTLING FOR SIMPLER SALES TAX

ON 28 September 2018, Zambia proposed a shift from the current Value Added Tax (VAT) system to a Sales Tax, making it the first country in Africa to implement a Sales Tax regime, once effected in September this year.

VAT collections rose from 3.7 percent of GDP in 2016 to 5.8 percent in 2017, and by mid-year 2018, about three quarters of the annual VAT target was collected.

The Treasury requires a replacement tax to raise the same level of revenue. For example, in 2019, VAT is expected to raise about 17.1 percent of the country's ZMW86.807, 894,727 budget or 5 percent of the gross domestic product (GDP).

That is a deep wallet to fill, even though according to the Zambia Institute for Policy Analysis and Research (ZIPAR), a think tank that conducts research and policy analysis to inform public policy, VAT and Sales Tax can supposedly yield equal amounts of revenue for the Government.

A Sales Tax Bill has since been tabled in parliament to provide the legal framework, which specifies a dual rate system as follows:

- 9 percent in the cases of goods and services supplied within the Republic;
- 16 percent in the case of imported goods and services.

Further, Sales Tax will not apply on imported or locally sourced inputs into production that are on the exemption list, including:

- Capital Goods;
- Inputs (as prescribed in the exemption schedule);
- Designated basic and essential goods or services,
- Designated supplies to privileged persons; and
- Exports.

Generally, the items included on the Sales Tax Input Exemption List meet one or more of the following criteria: industry submissions; items with customs duty of 0 percent and 5 percent; non-consumables; capital items (excluding parts and accessories of machinery, equipment and structures); chemicals for industrial use (excluding those with multiple uses and possibility for domestic use); and inputs purchased in bulk.

VAT is an idea embraced by majority of the countries around the world, including China. Some of the few countries implementing the sales tax regime include Canada, Malaysia and the USA, which is the major one. Arguably, the USA does not have VAT because sales taxes are local in the USA and they just cannot get their heads around how to make VAT work as a result.

In Britain, trounced Prime Minister aspirant, Michael Gove, sweared to replace VAT if he become Prime Minister, succeeding Theresa May.

In practice, VAT allows a registered entity to pay VAT on their purchases, then charge VAT on their sales and in their tax return, they compute the difference between what they charged and what they paid.

The computation of this difference is what is known as the VAT credit mechanism. If this difference is positive, they remit it to the tax authority but if the difference is negative then it constitutes a refund claim which the tax authority must verify and pay.

Like stated above, the computation of this difference is what is known as the VAT credit mechanism.

A negative difference constitutes a refund claim which the tax authority must verify and pay, the Zambia Revenue Authority (ZRA) in Zambia.

This styles VAT as a transactional tax applied to every transaction throughout a supply chain, though the economic burden only stings the final consumer, not the traders in the supply chain.

Though others have reasoned that all the above complexities combine to give VAT a fair degree of legal and commercial certainty.

On the other hand, the proposed Sales Tax will be paid on the selling price at defined stages in the supply chain (See Figure downpage).

Registered suppliers will pay the Sales Tax on taxable purchases and they will charge on taxable sales. They will then remit the collected Sales Tax to the tax the ZRA. There will be no credit mechanism under the Sales Tax.

Thus, the consideration of Sales Tax as less complex for Government's revenue collection; it resolves the VAT refund challenge, requiring an approximate ZMW1.4 billion per month.

Even then, it is in this simplicity that others have made a case about its vulnerability to tax evasion, rated against the VAT system where authorities can smoothly trail revenues earned and expenditures incurred by businesses across the value chain.

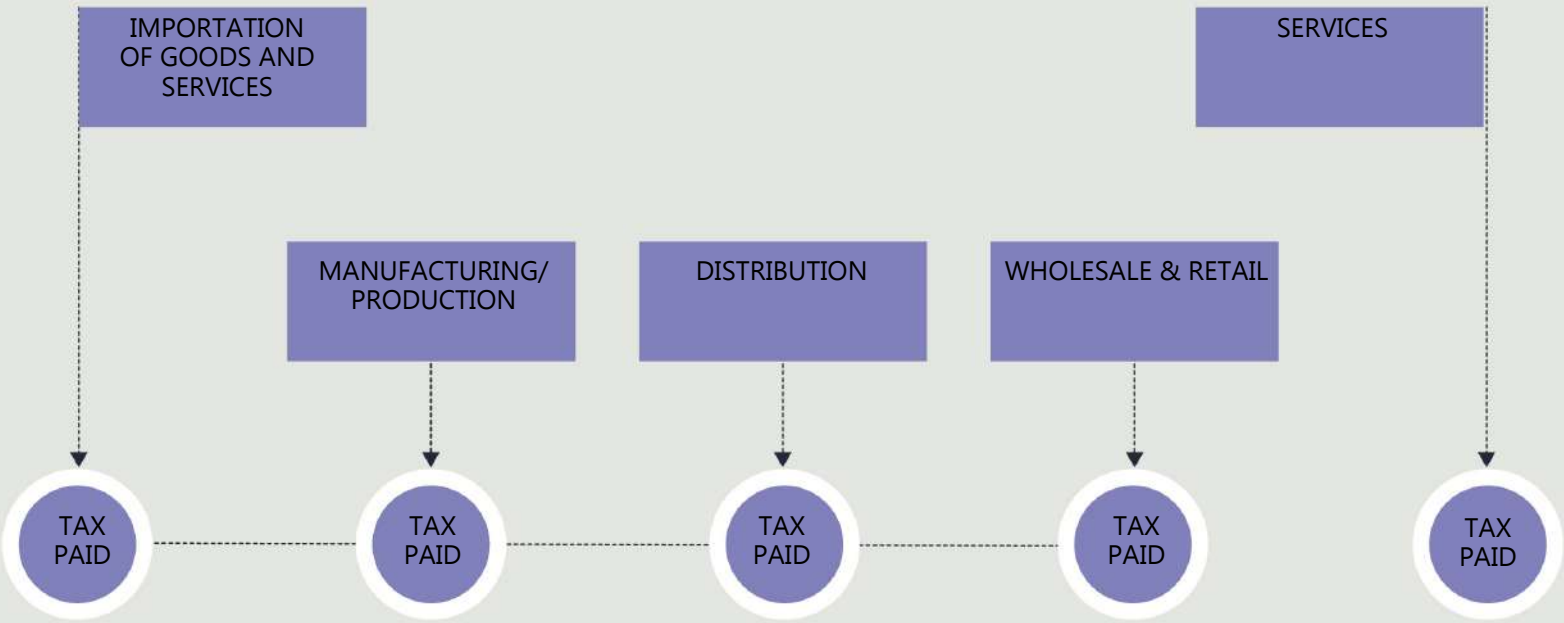
Zambia's imminent shift from VAT to Sales Tax practically overlaps with the operationalisation of the African Continental Free Trade Area (AfCFTA), which the country is yet to ratify.

It is highly likely that the free trade will have an economic and administrative impact considering that the other countries in the region have adopted a VAT system, which is more conducive to easy movement of goods across borders. As of July 2019, 27 countries had ratified the instruments of the AfCFTA.

Zambia has earmarked August 2019 as likely ratification timeline.

THOMAS SAKALA
Business Development Executive

The Chr. Michelsen Institute (CMI) reports that currently, around 80 percent of the countries in sub-Saharan Africa levy a VAT, but the productivity of the VAT – the ratio of actual to potential collections – is much lower here [sub-Saharan Africa] than in any other region.



NATIONAL HEALTH INSURANCE SCHEME OPERATIONALISED

THE National Health Insurance Act ("NHI Act"), enacted in April 2018 and fully implemented in April 2019, to expand coverage and bring about a new era of health-care access in Zambia.

The NHI Act imposes an array of new regulations on employers, including requiring them to register an employee with the the National Health Insurance Management Authority ("NHIA") within thirty days of the commencement date of the contract of employment.

The contributory rate by all employers and employees towards the National Health Insurance Scheme ("Scheme") has been set at 1 percent of the gross salary (2 percent of income). It is envisioned that contributors and their registered beneficiaries will access health services without having to pay out of pocket.

The employer shall pay, at the end of each month, to the Scheme an employee's contribution consisting of the employer's contribution and the employee's contribution, currently set at 1 percent of the gross salary.

The Scheme also carters for retirees, self-employed citizen and established resident.

In the interim, the NHIA revealed that beginning July 2019, civil servants will start contributing under a pilot that will later be extended to the rest of the public sector and eventually to those in the private sector.

Contributing members will start accessing health care in November 2019.

This comes at the time that employers are wrestling with making the necessary changes to the employee benefits under the Employment Code Act of 2019.

Noteworthy, the health insurance is separate from general tax that the Government collects.

It is anticipated that the Scheme, which is basically one of the Government's health financing strategies, will reduce the financial burden of purchasing health care by pooling funds (estimated ZMW1.2 billion per year [USD95,816,400]) and sharing the risk of unexpected health events.

The Scheme adopts a solidarity model, where contributions from those who are healthy, young and wealthy will subsidize the cost of care for those who are ill, old and poor.

Health insurance coverage in Zambia is currently at 4 percent (96 percent dependent on out of pocket payment), and government has an ambitious goal of Universal Health Coverage (UHC), which is a global health policy agenda that has been adopted as one of the health targets of the Sustainable Development Goal (SDG) number 3 which is to 'Ensure healthy lives and promote wellbeing for all at all ages'.

THOMAS SAKALA
Business Development Executive

FAMOUS, BUT UNREGISTERED TRADEMARKS IN ZAMBIA NOT PROTECTED

IT is commonly known that the success of any business enterprise depends largely on its ability to associate itself with products of certain quality or standard.

Customers tend to assume that when a manufacturer produces a good quality product, then all the products in their product portfolio must be of the same high quality.

Trademarks have been used to enable suppliers or producers stand out from competitors.

To prevent competitors from using the same (or closely similar) designs, which may cause confusion among consumers and dilute the brand, it is generally assumed that a well- known mark is protected and the proprietor of that well know mark enjoys protection even if that mark is not registered.

Generally, the principle is that an application for a trademark will be rejected for registration if it resembles a well known or famous but unregistered trademark.

Based on the above principle, applicable in many countries, there is a tendency with multinational companies intending to expand their business into Zambia, to adopt a relaxed approach and assume that their famous brand will have priority and receive automatic protection in Zambia.

However, unlike other countries, the Zambian legal system by virtue of a decision of the Supreme Court of Zambia, takes a different position.

It does not provide any protection to a trademark not registered under the Trademark Act, Chapter 401 of the Laws of Zambia, no matter how renowned it is.

Therefore, as protection of trademarks in Zambia is based on "first to file" principle, there is a risk that if a multinational company does not register its trade mark in Zambia, another person may do so.

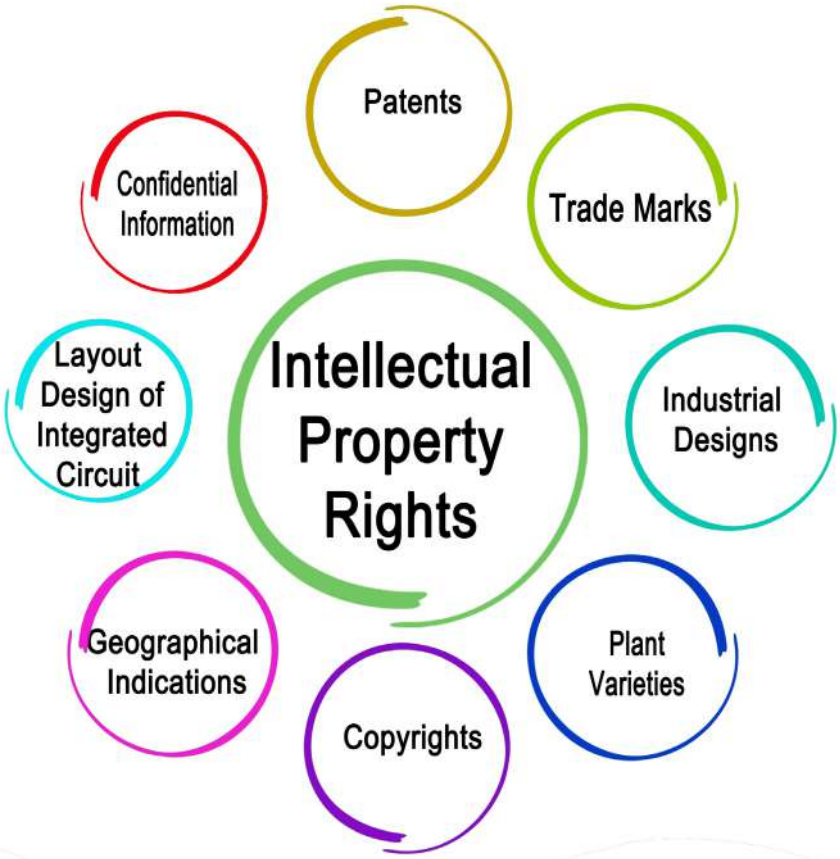
This has an effect of delaying the multinational's plan to expanding its business into Zambia.

In the absence of registration, the only available remedy is an action for passing off, which requires proof of prior use and establishment of goodwill in Zambia.

The prevailing position in Zambia has been criticised by various Intellectual Property practitioners for protection registered but well-known marks.

Despite these criticisms, multinational with intention of expanding into Zambia must register their trademark to mitigate any risks until such a time the Supreme Court reverses its decision, or the Act is amended or revised.

JOSHUA MWAMULIMA
Associate



WEATHERING A DAWN RAID STORM

ENFORCEMENT ACTION BY THE ZAMBIAN COMPETITION AND CONSUMER PROTECTION COMMISSION (THE "CCPC")

The CCPC reported that in the year 2018, they investigated a total of 10 abuse of dominance cases and 64 restrictive business practices' cases with 19 cases carried over from 2017. This is in comparison to 2017[1] where the CCPC investigated 13 abuse of dominance cases were investigated with fines being levied for discriminatory pricing, unfair pricing and exclusionary conduct, 37 restrictive business practices' cases and 7 cartel cases.[2]

As at the date of this article, the CCPC confirmed that they had conducted two dawn raids for the year 2018 whilst none was conducted in the year 2017. It is clear that there is increased enforcement of the Competition and Consumer Protection Act No. 24 of 2010 (the "Competition Act") and that the market is likely to see an increase in dawn raids on businesses in the future.

WHAT IS A DAWN RAID?

A dawn raid is an investigation carried out by an investigating authority without notice, usually in the early hours of the morning.

A dawn raid is unannounced and is usually a surprise to the business being investigated. Investigators will enter and search the premises as well as persons on the premises and examine documents having a bearing on the investigation.

DOES THE CCPC HAVE THE POWER TO CONDUCT DAWN RAIDS?

The CCPC is empowered to conduct dawn raids under the Competition Act where they are of the view that a business may be involved in restrictive business practices or could be abusing its dominance in a relevant market. The CCPC may, among others, review any document or article (both physical and electronic) considered relevant to the investigation, except for documents inadmissible before a court of law.

WHAT LIABILITIES IS A BUSINESS EXPOSED TO IF IT IS IN BREACH OF THE COMPETITION ACT?

A business found to be in breach of the Competition Act may be liable to a fine up to 10 per cent of the business' annual turnover.

Additionally, employees in senior management positions may be liable,

[1]Times of Zambia Friday February 1, 2019 page 7
[2]CCPC's End of Year Media Briefing https://www.ccpc.org.zm/index.php/media-releases/news/89-2017-end-of-year-media-briefing-by-executive-director-of-ccpc-mr-chilufya-sampa

> "It is imperative that employees are prepared for a dawn raid to ensure that the interests of the business are protected and the risks the business is exposed to are avoided or mitigated."

on conviction, to a fine not exceeding ZMW150,000 or to imprisonment for a period not exceeding 5 years or to both.

The following actions are considered criminal during a dawn raid and will cost a business a fine not exceeding ZMW60,000 or to imprisonment not exceeding two years or to both:

(a) delaying or obstructing an investigator;

(b) giving an investigator false information in answer to any inquiries made by an investigator; and

(c) refusing to give an investigator assistance in order for the investigator to exercise the investigator's powers.

WHAT CAN YOU DO?

Because a dawn raid is without notice there is likely to be a great deal of disorganisation and confusion in the manner in which employees in the business respond, it is also likely to be stressful as it disrupts the normal operation of the business.

In defence of the business, employees may innocently delay an investigator or restrict an investigators access to certain information in breach of the law thereby exposing the business to liability that could be avoided with sufficient preparation.

On the other hand, an employee in fear of breaching the law may disclose privileged information to an investigator also exposing the business to unnecessary fines.

It is therefore imperative that employees are prepared for a dawn raid to ensure that the interests of the business are protected and the risks the business is exposed to are avoided or mitigated.

BWALYA CHILUFYA-MUSONDA
Partner

SOME IMMINENT LEGISLATION

The Income Tax (Amendment) Bill, 2019

To amend the Income Tax Act, to revise the turnover tax threshold from ZMW800,000 per annum to ZMW500,000 per annum. Captures more smaller business for tax accounting to the benefit of the tax collector at the same time, makes it easier for smaller business to comply given that turnover tax is less complex to compute.

New Public Procurement Law

Aimed at ensuring value for money and improving on contract management, by introducing price benchmarking and price referencing. The current law focuses on process.

Food Safety Bill, 2019

The Bill is aimed at tightening surveillance on food-related diseases. It will also enable the Health Ministry to collaborate with food safety stakeholders in the fight against food contamination. Basically, food companies must put in place safety measures that will ensure that the entire food production chain is sanitized.

GAMING AND BETTING INDUSTRY EXPOSURE

THE nature of security threats to the gaming and betting industry in Zambia are likely to change as technology evolves, but generally and like all other Designated Non-Financial Businesses and Professions (DNFBPs), the industry remains vulnerable to be used as a vehicle for money laundering and or terrorism financing.

This is corroborated by the Financial Intelligence Centre's 2018 Trends Report on Money Laundering and Terrorist Financing:

> "Some casinos do not hold bank accounts in Zambia. It was however noted that persons, especially from foreign jurisdictions working for these casinos, had bank accounts in Zambia that received large cash deposits which were followed by large outward transfers, mostly to their home jurisdictions. Further, some casinos were using employees and shareholders as cash couriers.

The Report also notes that some of the country's casinos are not compliant with the local law requirements prescribed by ZRA or the Licensing Committee under the Ministry of Tourism and Arts.

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