

# MERGER CONTROL

## Zambia



# Merger Control

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights into legislation and regulators; scope of legislation; thresholds, triggers and approvals; notification and clearance timetable; substantive assessment; remedies and ancillary restraints; involvement of other parties or authorities; judicial review; enforcement record and reform proposals; and recent trends.

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## LEGISLATION AND JURISDICTION

### Relevant legislation and regulators

What is the relevant legislation and who enforces it?

The relevant legislation is the Competition and Consumer Protection Act No. 24 of 2010 (CCPA), which is enforced by the Competition and Consumer Protection Commission (the Commission).

*Law stated - 23 June 2022*

### Scope of legislation

What kinds of mergers are caught?

The types of mergers that are captured under the CCPA include horizontal, vertical and conglomerate mergers and full-function joint ventures.

*Law stated - 23 June 2022*

What types of joint ventures are caught?

The Commission distinguishes between full function joint ventures (JVs) and JVs that are 'auxiliary' to the activities of their parent enterprises. Not all JVs are subject to merger control.

Full-function JVs must be notified to the Commission as a merger if their asset or turnover value is above the notification threshold. By definition, such a JV performs on a lasting basis all functions of an autonomous economic entity, competes with other enterprises in a relevant market and has sufficient resources and staff to operate independently on the relevant market.

*Law stated - 23 June 2022*

Is there a definition of 'control' and are minority and other interests less than control caught?

Yes. Control is defined in section 24(3) of the CCPA, which states that a person controls an enterprise if the person:

Minority and other interests less than control are not caught.

*Law stated - 23 June 2022*

### Thresholds, triggers and approvals

What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A merger is notifiable to the Commission if either the combined Zambian turnover or the combined gross value of Zambian assets, whichever is higher, of the acquirer and the target in the relevant markets where the target is active exceed 50 million fee units (ie, 15 million Zambian kwacha in the latest full financial year).

There are circumstances in which transactions falling below the above thresholds may be investigated. The Commission may, where it has reasonable grounds to believe that a merger falls below the prescribed thresholds, review the merger if the following factors exist:

*Law stated - 23 June 2022*

### Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing is only mandatory when the notification threshold is met. Any party to a merger can provide mandatory pre-notification information to the Commission.

Exceptions exist where the threshold is not met, no control is gained, or there is no local nexus. Zambia's merger regime is suspensory.

*Law stated - 23 June 2022*

### Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Mergers that occur outside Zambia but that have a material bearing on the Zambian market will be considered to have a local connection (local nexus) and hence, are notifiable. In this regard, the Commission will only assert its jurisdiction if the transaction has an appropriate local nexus.

For companies that are wholly domiciled outside Zambia, local nexus may come as a result of their presence in the Zambian markets either through export sales or the presence of their subsidiaries. Having a subsidiary domiciled in Zambia is sufficient to establish a local nexus.

*Law stated - 23 June 2022*

### Are there also rules on foreign investment, special sectors or other relevant approvals?

The Commission has a guideline on dealing with collective investment schemes that guides it on how to proceed when dealing with those transactions. It also has a land guideline aimed at businesses that are party to land agreements.

*Law stated - 23 June 2022*

## NOTIFICATION AND CLEARANCE TIMETABLE

### Filing formalities

What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no deadlines; however, all notifications must be filed prior to the implementation of the merger. If the parties do file before the merger is implemented, the merger is considered void.

In terms of sanctions, section 37 of the Competition and Consumer Protection Act No. 24 of 2010 (CCPA) provides that an enterprise will be deemed to have committed an offence and will be liable to a fine not exceeding 10 per cent of annual turnover if it intentionally or negligently:

The sanctions are applied in practice.

*Law stated - 23 June 2022*

### Which parties are responsible for filing and are filing fees required?

There is no prescribed legal obligation regarding which party must notify the Competition and Consumer Protection Commission (the Commission): the law simply requires that parties to a merger that meets the prescribed threshold must apply for authorisation of the proposed merger; therefore, any party to the merger transaction can make the notification, provided all the information concerning both parties is provided.

The merging parties are required to pay a filing fee of 0.1 per cent of turnover or assets, whichever is higher, which is calculated based on the latest audited financial statements of the merging party with the highest turnover or assets. There is a cap of 5 million Zambian kwacha to the fee.

*Law stated - 23 June 2022*

### What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

The waiting period to assess a merger is 90 days. The Commission completes the assessment of notification and issues its determination on the case within 90 days of the full notification. The period can be extended for a further 30 days, in which case the Commission must give the parties 14 days' prior notice of the extension before the lapse of the 90-day assessment period.

Implementation of the transaction can only take place once the parties receive interim authorisation from the Commission pending final authorisation.

*Law stated - 23 June 2022*

### Pre-clearance closing

#### What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

The CCPA provides that when undertakings intentionally implement a merger without clearance, the parties commit an offence and are liable to a fine not exceeding 10 per cent of their annual turnover. The sanctions are applied in practice.

*Law stated - 23 June 2022*

#### Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

No, sanctions will only apply if the local companies merge without notifying the authorities.

*Law stated - 23 June 2022*



## What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The foreign-to-foreign merger may proceed with the exception of Zambian-based entities, which may require authorisation.

*Law stated - 23 June 2022*

## Public takeovers

### Are there any special merger control rules applicable to public takeover bids?

There are no special merger control rules that apply to public takeover bids.

*Law stated - 23 June 2022*

## Documentation

### What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The documentation required for the Commission to commence the formal review process is the prescribed Form 1 as well as a supplementary information request form, which are fairly detailed.

Form 1 specifies that the following documents must accompany the application:

- two copies of the latest annual report and audited accounts (including the balance sheet);
- a copy of the agreement or other documents relating to the transaction;
- a press release or other shareholders', the board's or the management's statement on the transaction;
- other market or industry reports that support the transaction; and
- strategic plans or minutes of the board on the transaction.

Notwithstanding the above, supplementary information requests may be made prior to assessment and during the assessment if needed.

Applicants for merger approval may have pre-notification meetings with the Commission to, among other things, determine the information required by the Commission and may result in a significant reduction in the information required to be submitted.

The Commission may, at any time, revoke an approved merger if a party to the merger submitted materially incorrect or misleading information in support of the merger.

*Law stated - 23 June 2022*

## Investigation phases and timetable

### What are the typical steps and different phases of the investigation?

Consultation with the Commission is possible and encouraged as it assists in determining the precise amount of

information required in a notification and, in the majority of cases, may result in a significant reduction of the information required.

The merger approval process is a two-step process. The Commission, through the Technical Committee (TC) of the Board of the Commission, issues interim authorisations, while final approval is granted by the full Board of the Commission. Where interim authorisation has been granted, the parties are allowed to proceed with the transaction as though final authorisation had been granted.

An interim decision is the basis on which an interim authorisation can be made. Interim authorisation is given by the TC of the Board, with reasons regarding why the interim authorisation has been given, pending final authorisation from the Board.

In short, the interim authorisation is embedded in an interim decision. The interim decision may contain a rejection as well. It is called interim because it is given pending the final determination of the merger review by the Board.

The two-phase investigation process applies to all merger cases. The Commission begins its investigation immediately after the complete notification has been submitted. The merger notification is presented to the TC for interim authorisation and to the final Board for final authorisation.

The Commission grants interim authorisation where it is concluded at the first phase that a merger is less than likely to harm competition and that no further evidence is likely to be uncovered to revise this finding. The interim authorisation is granted after the TC commissioners have considered the transaction after making a preliminary market assessment based on the information provided by the parties making the application, as well as information that was sourced from third parties.

The assessment is aimed at properly examining whether the proposed transaction would have the effect of substantially lessening competition in the relevant market or become detrimental to the public interest in the Zambian economy.

*Law stated - 23 June 2022*

### What is the statutory timetable for clearance? Can it be speeded up?

The Commission completes the assessment of a notification and issues its determination on the case within 90 calendar days of the date of full notification. There is a possibility to extend the period for another 30 days. In general, the process cannot be speeded up.

*Law stated - 23 June 2022*

## SUBSTANTIVE ASSESSMENT

### Substantive test

#### What is the substantive test for clearance?

The substantive test against which a merger will be tested and assessed is whether the merger is likely to reduce competition in a market within Zambia. The following factors are considered:

- calculation of the market shares and market concentration;
- benefits to consumers;
- barriers to entry and market entry;
- availability of substitutes;
- removal of vigorous competitors; and

- the extent of import competition.

The Competition and Consumer Protection Commission (the Commission) carries out a competition assessment, market assessment and public interest assessment.

*Law stated - 23 June 2022*

## Is there a special substantive test for joint ventures?

The following factors are considered:

- calculation of the market shares and market concentration;
- benefits to consumers;
- barriers to entry and market entry;
- availability of substitutes;
- removal of vigorous competitors; and
- the extent of import competition.

*Law stated - 23 June 2022*

## Theories of harm

### What are the 'theories of harm' that the authorities will investigate?

In the investigation and assessment of potential or likely violations of the competition provisions of the Competition and Consumer Protection Act No. 24 of 2010, the Commission takes a multiple assessment approach; it carries out various tests to ascertain whether the alleged violations have or are likely to result in any negative effects on the market to the consumer or the economy in general. The tests include:

- the substantial lessening of competition or effect test – this test assesses whether the merger is likely to prevent or substantially lessen competition and takes into account the likely and actual factors that affect competition in a defined market in Zambia;
- the dominance test – this test assesses whether the transaction, through abuse or acquisition of a dominant position of market power, would or is likely to limit access to markets or otherwise unduly restrain competition, or has or is likely to have an adverse effect on trade or the economy in general;
- the public interest test;
- the abuse of dominant position test;
- the efficiency test; and
- the coordinated effects test – this test assesses whether the merger will result in such a high market concentration that illegal coordination becomes a risk.

*Law stated - 23 June 2022*

## Non-competition issues

### To what extent are non-competition issues relevant in the review process?

The Commission will consider public interest issues in assessments of mergers that result in a significant benefit to

the public, a rich transfer of skills and knowledge to locals living and working in the locality of a proposed merger and the overall positive economic benefits a merger promises to provide.

The Commission in reviewing mergers will consider whether the public interest issues outweigh the effects on competition. If the merger is likely to result in a public benefit that outweighs the competition concerns, the Commission will normally approve the transaction with conditions addressing the competition concerns and vice versa.

The following are the assessments that the Commission will take into consideration when reviewing public interest issues:

- the extent to which the proposed merger is likely to result in a benefit to the public that would outweigh any detriment attributable to a substantial lessening of competition;
- the extent to which the proposed merger promotes, or is likely to promote, technical or economic progress and the transfer of skills, or otherwise improves the production or distribution of goods or the provision of services in Zambia;
- the saving of a failing firm;
- the extent to which the proposed merger maintains or promotes exports from Zambia or employment in Zambia;
- the extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests, of microenterprises and small business enterprises in Zambia;
- the extent to which the proposed merger may affect the ability of national industries to compete in international markets;
- relevant socioeconomic factors; and
- any other factor that bears upon the public interest.

*Law stated - 23 June 2022*

## **Economic efficiencies**

To what extent does the authority take into account economic efficiencies in the review process?

The Commission considers economic efficiencies in its review of public interest. One public interest is the extent to which the proposed merger promotes, or is likely to promote, technical or economic progress and the transfer of skills, or otherwise improves the production or distribution of goods or the provision of services in Zambia. This amounts to a consideration of efficiencies, although it extends the consideration to a merger's impact on national social, industrial and economic objectives.

*Law stated - 23 June 2022*

## **REMEDIES AND ANCILLARY RESTRAINTS**

### **Regulatory powers**

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition and Consumer Protection Commission (the Commission) has the power to suspend or revoke a merger approval if it has cause to believe that the merger approval was obtained fraudulently or tainted with deceit owing to information being withheld.

*Law stated - 23 June 2022*

## Remedies and conditions

Is it possible to remedy competition issues, for example, by giving divestment undertakings or behavioural remedies?

Yes. When the Commission establishes that a merger transaction will result in the substantial lessening of competition, it writes to the parties to provide plausible solutions to the issues raised. The merging parties may offer undertakings, which the Commission may or may not accept.

If the Commission does not accept the plausible solutions or undertakings from the merging parties, it can approve the transaction by providing behavioural or structural remedies in the form of conditions or undertakings to remedy the competition concerns.

*Law stated - 23 June 2022*

What are the basic conditions and timing issues applicable to a divestment or other remedy?

The Commission will always indicate the period within which a remedy or directive given is to be complied with or adhered to in order to encourage compliance within a measurable amount of time. The basic conditions that the Commission normally gives will aim to remedy competition or public interest issues.

These conditions are not standard and are made on a case-by-case basis; however, previous divestments that have been given have lasted between one year and six years.

*Law stated - 23 June 2022*

What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

In recent years, the Commission has not reviewed any foreign-to-foreign merger transactions requiring remedies.

*Law stated - 23 June 2022*

## Ancillary restrictions

In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

A clearance decision may cover ancillary restrictions in circumstances in which the arrangement lessens competition or constitutes abuse.

*Law stated - 23 June 2022*

## INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

### Third-party involvement and rights

Are customers and competitors involved in the review process and what rights do complainants have?

The review process is open to the customers and competitors. The Competition and Consumer Protection Commission

(the Commission) at times requests members of the public to give submissions in relation to the merger.

In the merger review process, the Commission generally takes into account views from third parties, such as customers, competitors, regulatory authorities and other industry players. The complainants have the right to approach the Commission and raise any concerns they may have regarding the merger, which the Commission will then assess on the merits of each case.

*Law stated - 23 June 2022*

### **Publicity and confidentiality**

**What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?**

The process of assessment of the merger by the Commission is private until a decision of the board is rendered. The decisions rendered and appeal judgments made by the Commission's Tribunal are uploaded on its website and publicised in executive summary-style statements.

To protect commercial information, confidential information is redacted for the reports, decisions and judgments of the Commission. Parties with confidential information given during merger notification can declare the confidential information as being confidential and give reasons.

Confidential treatment may be requested for any information falling within the meaning of 'confidential information' as defined under section 2 of the Competition and Consumer Protection Act No. 24 of 2010 (CCPA) as meaning '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'.

*Law stated - 23 June 2022*

### **Cross-border regulatory cooperation**

**Do the authorities cooperate with antitrust authorities in other jurisdictions?**

Yes, the Commission cooperates with the Southern African Development Community, the Common Market for Eastern and Southern Africa and the International Competition Network. It also cooperates with the competition authorities in other jurisdictions, such as those in Tanzania, Malawi, Kenya, South Africa and Eswatini.

Further, section 65 of the CCPA provides that a foreign competition authority may, where it has reasonable grounds to believe that anticompetitive practices in Zambia are damaging competition in the country of the authority, request the Commission to investigate and make an appropriate determination.

*Law stated - 23 June 2022*

## **JUDICIAL REVIEW**

### **Available avenues**

**What are the opportunities for appeal or judicial review?**

Section 60 of the Competition Act provides for an appeal process by which decisions of the Competition and Consumer Protection Commission (the Commission) can be appealed to the Competition Tribunal within 30 days of the Commission rendering its decision.

*Law stated - 23 June 2022*

## Time frame

What is the usual time frame for appeal or judicial review?

An appeal must be filed with the Competition Tribunal within 30 days of the decision.

*Law stated - 23 June 2022*

## ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

### Enforcement record

What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The Competition and Consumer Protection Commission (the Commission) has not recently imposed any fines for violations of merger regulations as there have been no violations in the past year.

According to the 2021 year-end performance update issued by the Commission on 31 January 2022, the Commission handled a total of 68 merger applications in 2021, as compared with the 83 merger applications handled in 2020. In terms of clearance, it reviewed and closed 56 of the 68 in 2021, as compared with the 66 that were cleared and closed in 2020. This represents a 22.1 per cent reduction in the total number of merger applications handled, and a 17.9 per cent reduction in the total number of merger applications reviewed and closed in 2021.

*Law stated - 23 June 2022*

### Reform proposals

Are there current proposals to change the legislation?

None that have been publicised yet, but there are invitations to amend the legislation.

*Law stated - 23 June 2022*

## UPDATE AND TRENDS

### Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?






The Competition and Consumer Protection Commission recently approved the merger between Huaxin Investment Company Limited and Lafarge Zambia PLC. The transaction involved an acquisition of shares by Huaxin in the target company from Pan African Cement Limited and Financière Lafarge SAS. The transaction resulted in Huaxin holding a 75 per cent shareholding in the target entity.










*Law stated - 23 June 2022*

## Jurisdictions

	<b>Albania</b>	Wolf Theiss
	<b>Australia</b>	Allens
	<b>Austria</b>	Freshfields Bruckhaus Deringer
	<b>Belgium</b>	Freshfields Bruckhaus Deringer
	<b>Bosnia and Herzegovina</b>	Wolf Theiss
	<b>Brazil</b>	TozziniFreire Advogados
	<b>Bulgaria</b>	Boyanov & Co
	<b>Canada</b>	McMillan LLP
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	<b>Denmark</b>	Kromann Reumert
	<b>Ecuador</b>	Bustamante Fabara
	<b>Egypt</b>	Zulficar & Partners
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	<b>Faroe Islands</b>	Kromann Reumert
	<b>Finland</b>	Roschier, Attorneys Ltd
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	<b>Greenland</b>	Kromann Reumert



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	<b>Indonesia</b>	ABNR
	<b>Ireland</b>	Matheson
	<b>Italy</b>	Freshfields Bruckhaus Deringer
	<b>Japan</b>	Freshfields Bruckhaus Deringer
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	<b>Malta</b>	Camilleri Preziosi
	<b>Mexico</b>	Castañeda y Asociados
	<b>Morocco</b>	UGGC Avocats
	<b>Netherlands</b>	Freshfields Bruckhaus Deringer
	<b>New Zealand</b>	Russell McVeagh
	<b>Norway</b>	Wikborg Rein
	<b>Pakistan</b>	Axis Law Chambers
	<b>Peru</b>	Payet Rey Cauvi Pérez Abogados
	<b>Poland</b>	WKB Wiercinski Kwiecinski Baehr
	<b>Portugal</b>	Gomez-Acebo & Pombo Abogados
	<b>Romania</b>	Wolf Theiss
	<b>Saudi Arabia</b>	Freshfields Bruckhaus Deringer
	<b>Serbia</b>	Wolf Theiss
	<b>Singapore</b>	Drew & Napier LLC
	<b>Slovakia</b>	Wolf Theiss
	<b>Slovenia</b>	Wolf Theiss
	<b>South Korea</b>	Bae, Kim & Lee LLC
	<b>Spain</b>	Freshfields Bruckhaus Deringer
	<b>Sweden</b>	Mannheimer Swartling

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	<b>United Arab Emirates</b>	Freshfields Bruckhaus Deringer
	<b>United Kingdom</b>	Freshfields Bruckhaus Deringer
	<b>USA</b>	Davis Polk & Wardwell LLP
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