

Corporate Restructurings in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe

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ABSTRACT

The Zimbabwean economy rapidly declined over the past two decades. A record hyperinflationary environment and a collapse of the financial service sector coupled by lack of external lines of credit created a difficult operating environment for corporate businesses. Businesses thus either closed down operations or resorted to survival strategies. Corporate mergers and acquisitions emerged as natural favoured strategies in implementing survival corporate restructuring transactions. However, the success of such strategies largely depends on the effectiveness of the merger regulatory framework, that is, its ability to promote beneficial corporate restructuring transactions on one hand and to maintain the competitive structure of the market on the other hand.

This research analyses the current merger regulatory framework in Zimbabwe and assesses whether it is suited to promote beneficial corporate restructuring transactions implemented through mergers and acquisitions without unnecessarily distorting the competitive structure of the market. Employing the failing firm doctrine as the focal point, the research identified a number of shortcomings within the current merger regulatory framework that impacts upon its ability to effectively promote beneficial corporate mergers and acquisitions without sacrificing the competitive market structure.

Selected comparative jurisdictions were used to draw various lessons for Zimbabwe. The aim of the comparative study was not to provide an exhaustive analysis of these jurisdictions but to identify specific arrears that can be used to develop and suggest an effective merger regulatory framework for Zimbabwe.

In order to remedy the identified shortcomings inherent within the current Zimbabwean merger regulatory framework, this thesis proposes a number of amendments to the current Competition Act [*Chapter 7:01*] of 1996. These proposed amendments are aimed at bringing clarity, flexibility and strengthening the merger regulatory framework including the institutions tasked with such. The research is primarily a legal analysis of the Zimbabwean merger regulating statute and its implications on any decisions made by the competition authority. As such, the thesis states the status of legal development in Zimbabwe and the selected comparative jurisdictions as of 31 July 2013.

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TABLE OF CONTENTS

Acknowledgements.....	iii
Table of Contents.....	v
Abstract.....	xiv

PART 1

CHAPTER 1

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1. Background to the study.....	2
1.2. Why mergers and acquisitions.....	5
1.3. Why regulate corporate mergers and acquisitions.....	6
1.4. The research in context.....	7
1.4.1. The merger regulatory framework in Zimbabwe.....	8
1.5. The research statement and objectives of the study.....	8
1.6. The significance of the study.....	9
1.7. Definition of terms.....	12
1.8. Thesis.....	14
1.9. Methodology and approach.....	15
1.9.1. The Choice of South Africa, the US and the EU... ..	16
1.9.2. South Africa.....	16
1.9.3. The US.....	16
1.9.4. The EU.....	17
1.10. Limitations and delineation of the study.....	20
1.11. The structure of the thesis.....	22

CHAPTER 2

THE ORIGINS AND DEVELOPMENT OF COMPETITION LAW AND MERGER REGULATION IN ZIMBABWE

2.1. Introduction	25
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2.2. The evolution of competition law and policy in Zimbabwe: an overview.....	26
2.3. Regulation of monopolies and economic activities: 1980 to 1990.....	33
2.3.1. Regulation of economic activities in the first decade of independence (1980 to 1990).....	34
2.3.2. Measures to regulate economic activities.....	35
2.3.2.1. The creation of public enterprises.....	35
2.3.2.2. Foreign exchange control.....	38
2.3.2.3. Price controls.....	38
2.3.2.4. Labour market regulations.....	41
2.3.2.5. The implications of the economic regulatory measures: some comments.....	42
2.4. Competition law and policy as part of economic reforms: ESAP and the idea of a competition system.....	44
2.4.1. ESAP.....	44
2.4.2. The competition implications of ESAP.....	46
2.4.2.1. Trade liberalisation.....	47
2.4.2.2. Domestic deregulation.....	48
2.4.2.3. Labour market reforms.....	49
2.4.2.4. Reform of the public enterprises.....	50
2.4.2.5. ESAP and the development of a competition system: some general observations..	51
2.5. The IPC Study and the development of a competition system in Zimbabwe.....	55
2.5.1. The IPC Study.....	55
2.5.2. IPC Study findings.....	56
2.5.2.1. Degree of concentration in the manufacturing sector.....	56
2.5.2.2. Degree of concentration in the non-manufacturing sector.....	58
2.5.2.3. Barriers to entry.....	60
2.5.3. The IPC Study Recommendations.....	63
2.5.3.1. The need for a competition regime in Zimbabwe.....	63
2.5.3.2. The dimension of competition policy.....	67
2.5.4. The implications of the IPC Study: Post-IPC Study and the evolution of a competition	

regime.....	82
2.5.4.1. The Competition Council Committee of Zimbabwe.....	82
2.5.4.2. The Monopolies Commission: the guiding principles.....	83
2.5.4.3. The preliminary legislative phase.....	86
2.5.4.4. The underlying principles of the draft legislation.....	87
2.5.4.5. The consultative stage.....	92
2.6. The current regulatory framework: The Competition Act of 1996.....	96
2.6.1. Introduction.....	96
2.6.2. The main elements of the Competition Act.....	97
2.6.2.1. Aims of the Act.....	97
2.6.2.2. Application of the Act.....	99
2.6.2.3. The prevention and control of monopoly situations	102
2.6.2.4. Regulation of mergers and acquisitions.....	104
2.6.2.5. Prevention and control of restrictive practices.....	108
2.6.2.6. Institutional provisions.....	109
2.6.2.7. Other matters regulated by the Competition Act.....	112
2.7. Conclusion.....	113

CHAPTER 3

THE REGULATION OF CORPORATE MERGERS AND ACQUISITIONS IN ZIMBABWE

3.1. Introduction.....	117
3.2. The Competition Act: purpose and scope.....	123
3.2.1. The Long Title and the objectives of the Act.....	124
3.2.2. The purpose of the Act.....	127
3.3. The Competition Act and merger regulation.....	133
3.3.1. General.....	133
3.3.1.1. The pre-notification requirement: procedure and formalities.....	133

3.3.2. The Act and substantive aspects of merger regulation.....	145
3.3.2.1. A merger defined.....	145
3.3.2.2. The standard for merger assessment: the substantive assessment test.....	160
3.4. The Competition Act and merger regulating institutions.....	177
3.4.1. The CTC: functions, structure and independence.....	178
3.4.1.1. Functions of the CTC.....	178
3.4.1.2. The independence of the CTC.....	184
3.4.1.3. The Administrative Court and the right to appeal.....	191
3.5. Conclusion.....	194

CHAPTER 4

THE INTERPRETATION AND APPLICATION OF THE FAILING FIRM DOCTRINE IN ZIMBABWE

4.1. Introduction.....	196
4.2. The failing firm doctrine: a general overview.....	198
4.3. The Act and the failing firm doctrine.....	205
4.3.1. Statutory clarity.....	208
4.3.2. Administrative guidelines.....	211
4.4. The CTC approach to the failing firm doctrine: curing the statutory deficiencies?.....	214
4.4.1. <i>Rothmans of Pall Mall (Zimbabwe)/British American Tobacco (Zimbabwe)</i> : the lack of causality in failing firm doctrine.....	215
4.4.1.2. The significance of <i>BAT/Rothmans</i> merger on the development of the failing firm doctrine in Zimbabwe.....	218
4.4.2. <i>Aykroyd Insurance Brokers/Hunt Adams and Associates</i>	220
4.4.3. <i>National Insurance Company of Zimbabwe (Nicoz)/Diamond Insurance Company (Diamond)</i> : failing or ailing?.....	223
4.4.3.1. The significance of the <i>Nicoz/Diamond</i> decision.....	226
4.4.4. <i>Zimboard Products/PG Bison Mauritius</i> : the failing firm doctrine within the public interest	

realm.....	228
4.4.5. <i>Shashi Private Hospital/Premier Services Medical Investments (PSMI): saving an essential service provider.....</i>	233
4.4.5.1. Significance of the <i>PSMI/Shashi</i> decision.....	235
4.4.6. <i>Innscor Appliances Manufacturing/World Radio System Group (WRS).....</i>	235
4.4.7. Preventing the exit of a major market player.....	237
4.5. The CTC approach: curing the statutory deficiencies.....	237
4.6. Conclusion.....	241

PART II

CHAPTER 5

MERGER REGULATION, PUBLIC INTEREST AND THE FAILING FIRM DOCTRINE: THE SOUTH AFRICAN EXPERIENCE

5.1. Introduction.....	244
5.2. The origins of a broad-based competition system in South Africa.....	250
5.2.1. The roots of the Competition Act 89 of 1998.....	250
5.2.2. The shortcomings of previous competition legislation.....	252
5.2.2.1. The Regulation of Monopolistic Conditions Act of 1955.....	252
5.2.2.2. The Maintenance and Promotion of Competition Act of 1979.....	256
5.2.3. The influence of policy considerations.....	259
5.2.3.1. The ANC's Reconstruction and Development Programme (RDC).....	260
5.2.3.2. The White Paper on Reconstruction and Development of 1994.....	261
5.2.3.3. The Growth, Employment and Redistribution Strategy (GEAR) of 1996.....	262
5.2.3.4. The Proposed Guidelines for Competition Policy of 1996.....	263
5.2.3.5. Some remarks.....	267
5.3 Merger regulation under the Competition Act of 1998.....	268
5.3.1. General provisions relating to merger regulation.....	269
5.3.2. Substantive issues.....	270

5.3.2.1. Defining a merger.....	270
5.3.3. Merger classification and related aspects.....	277
5.3.4. The substantive assessment test for merger clearance.....	284
5.3.4.1. The first leg: the ‘pure competition’ test.....	284
5.3.4.2. The second leg: the efficiency and substantial benefit’ test.....	287
5.3.4.3. The final leg: the public interest compatibility test.....	288
5.4. Public interest provisions in merger assessment.....	290
5.4.1. Public interest and procedural aspects of merger regulation: implications for failing firms.....	290
5.4.2. Public interest, the substantive test and the failing firm doctrine.....	300
5.4.2.1. The failing firm doctrine in South Africa.....	301
5.4.2.2. The failing firm doctrine in practice.....	302
5.4.2.2.1. <i>Schuman Sasol/Price’s Daelite</i> : laying the criteria.....	303
5.4.2.2.2. <i>Iscor/Saldanha Steel</i> : the approach.....	307
5.4.3. The impact of the substantive test on the failing firm doctrine in South Africa.....	309
5.4.3.1. The South African approach and lessons for Zimbabwe.....	314
5.5. Conclusion.....	317

CHAPTER 6

REGULATING MERGERS WITH FAILING FIRMS IN THE EU: LESSONS FOR ZIMBABWE

6.1. Introduction.....	319
6.2. The EU merger regulatory framework.....	323
6.2.1. A general overview.....	323
6.2.2.1. EU merger control under the EU Treaty.....	324
6.2.2.2. The EU Treaty and merger control.....	326
6.2.3. The EU and merger control regulations.....	328

6.2.3.1. The Regulation 4064/89.....	328
6.2.3.2. The ECMR.....	333
6.2.4. The Horizontal Merger Guidelines and the failing firm doctrine.....	345
6.3. The criteria for a successful failing firm defence in the EU.....	348
6.4. Application of the failing firm doctrine in the EU: some selected decisions.....	359
6.4.1. <i>Aerospatiale/Alenia/de Havilland</i> : setting the tone for the failing firm defence in the EU.....	359
6.4.2.1. <i>Kali und Salz/MdK/Treuhand</i>	362
6.4.2.2. <i>Kali und Salz</i> : laying the criteria for the failing firm defence in the EU.....	364
6.4.3.1. <i>Saint Gobain/Wacker-Chemie/NOM</i>	370
6.4.3.2. <i>Saint Gobain/Wacker-Chemie/NOM</i> and the failing firm defence.....	372
6.4.4.1. <i>Bertelsmann/Kirch/Premiere</i> : a ‘failing company’ or ‘failing division’.....	373
6.4.4.2. <i>Bertelsmann/Kirch/Premiere</i> and the failing firm doctrine.....	376
6.4.5.1. <i>NewsCorp/Telepiu</i>	378
6.4.5.2. <i>NewsCorp/Telepiu</i> and the failing firm doctrine.....	379
6.4.6. After the Commission’s <i>Kali und Salz</i> criteria: development of the failing firm doctrine in the EU.....	382
6.4.6.1. <i>France v Commission</i> (the <i>Kali und Salz</i> appeal).....	383
6.4.6.2. <i>BASF/Eurodiol/Pantochim</i> : refining the <i>Kali und Salz</i> criteria.....	385
6.4.6.3.1. The <i>Ernst & Young France/Andersen France</i> decision: not only an alternative purchaser but a competition enhancing one.....	388
6.4.6.3.2. The rapid disintegration of Andersen’s network and the prospects of an alternative acquisition.....	390
6.5. Using the EU approach to develop an effective regulatory framework for Zimbabwe.....	393
6.6. Conclusion.....	400

CHAPTER 7

THE FAILING DIVISION DEFENCE: LESSONS FROM THE US

7.1. Introduction.....	402
7.2. The US merger regulatory framework.....	407
7.2.1. The general overview of the US merger regulation.....	407
7.3. Regulating mergers with failing firm divisions: section 7 of the Clayton Antitrust Act and the <i>Horizontal Merger Guidelines</i>	415
7.3.1. Section 7 of the Clayton Antitrust Act.....	415
7.3.2. The Horizontal Merger Guidelines and the failing division defence.....	419
7.4. The US practice in applying the failing division defence.....	430
7.4.1. Selected decisions on the failing firm defence.....	430
7.4.1.2. <i>International Shoe Co. v FTC</i> and the birth of the failing firm defence.....	430
7.4.1.3. <i>Brown Shoe Co. v United States</i> : failing business as a mitigating factor.....	435
7.4.1.4. <i>United States v General Dynamics Corp.</i> and the reformulation of the failing firm defence.....	439
7.4.2. Selected decisions on the failing division defence.....	446
7.4.2.1. <i>United States v Lever Brothers Co.</i>	446
7.4.2.1.2. The significance of the <i>Lever Brothers Co.</i> to the failing division defence.....	453
7.4.2.2. <i>United States v. Reed Roller Bit Co.</i>	455
7.4.2.2.1. The significance of the <i>Reed Roller Bit Co</i> : the <i>Brown Shoe Co.</i> ‘curse’.....	461
7.4.2.3. <i>Federal Trade Commission v Great Lakes Chemicals Corp.</i>	464
7.4.2.3.1. <i>Great Lakes Chemical Corp.</i> approach and significance to the failing division defence.....	468
7.5. Concluding remarks.....	471

CHAPTER 8

AN IDEAL MODEL FOR EFFECTIVE REGULATION OF CORPORATE MERGERS AND ACQUISITIONS IN ZIMBABWE: SUGGESTIONS AND RECOMMENDATIONS

8.1. Introduction.....	474
8.2. Shortcomings of the current merger regulatory framework.....	475
8.2.1. An understated objective of the regulating statute.....	476
8.2.2. Unclear definition of a merger.....	477
8.2.3. The unclarified standard for merger assessment.....	479
8.2.4. Undefined public interest concept.....	480
8.2.5. The inadequate failing firm doctrine.....	481
8.2.6. A screwed institutional arrangement.....	484
8.3. Lessons from other jurisdictions: South Africa, the EU and the US.....	487
8.3.1. The rationale for the comparative study.....	487
8.3.2. The South African approach: lessons for Zimbabwe.....	489
8.3.3. The EU approach and lessons for Zimbabwe.....	495
8.3.4. The US approach to the failing division doctrine and lessons for Zimbabwe.....	499
8.4. Towards an effective merger regulatory framework: suggestions and recommendations for a suitable model	503
8.4.1. Rearranging the current merger provisions.....	503
8.4.2. Restating the objectives of the Competition Act.....	504
8.4.3. Redefining a merger and eliminating the artificial gap in the statutory definition.....	506
8.4.4. Defining the public interest concept.....	509
8.4.5. Clarifying the standard for merger assessment.....	513
8.4.6. Promoting and maintaining a balance between beneficial corporate transactions and the protection of a competitive market structure.....	516
8.4.7. Revamping the structure of the merger regulating authority.....	520
8.5. Concluding remarks.....	525

BIBLIOGRAPHY.....529

List of abbreviations

CAC	Competition Appeals Court (South Africa)
Co.	Company
Corp.	Corporation
CT	Competition Tribunal (South Africa)
CTC	Competition and Tariff Commission (Zimbabwe)
DOJ	Department Of Justice (United States of America)
EC	European Council
ECJ	European Court of Justice
EU	European Union
FTC	Federal Trade Commission
Inc.	Incorporated
ICN	International Competition Network
Ltd.	Limited
OECD	Organization for Economic Cooperation and Development
Pty/Pvt.	Private
SA	South Africa
SADC	Southern African Development Community
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
Zim	Zimbabwe

PART 1

Chapter 1: Introduction and overview of the study

1.1 Background to the study

The Zimbabwean economy had for a lengthy period experienced an unfortunate downturn. By 2008 the country's inflation reached unprecedented record levels.¹ The country's major economic sectors in agriculture, mining and manufacturing sharply declined thereby affecting exports.² Domestic production slowly declined. There was an acute shortage of basic goods and services such as foodstuffs and health care.³

The financial sector which naturally plays a key role in financing business was not spared from the meltdown with a number of key financial players either scaling down operations or completely closing down.⁴ This subsequently presented challenges for 'corporate'⁵ businesses

¹ It is difficult to place a measure at the magnitude of inflation in Zimbabwe at the height of the economic crisis. Makina noted that by 2009 the country's inflation figures could not be computed and placed the last known official figures at 237 million per cent as of July 2008 and independent sources placed the rate of inflation at 89.7 sextillion (million million million) per cent by November 2008. See Makina D 'Historical Perspectives on Zimbabwe's Economic Performance: A Tale of Five Lost Decades' (2010) (26) *Journal of Developing Societies* 99, 115. Some sources placed the inflation figures as of November 2008 at 516 quintillion per annum making it the highest ever recorded by a country outside a war zone surpassing the former Yugoslavia in 1994 and slightly behind Hungary in 1946. Official figures from the Central Statistics Office placed the inflation rate at 1.281.1. percentage points in December 2008. A Feature of these figures is that the inflation rate in Zimbabwe was way beyond imagination.

² See generally Jenkins C M and Knight J *The Economic Decline of Zimbabwe: Neither Growth nor Equity* (2002). In 2008, exports reportedly fall by minus 13.93 per cent. See United States of America (USA) Central Intelligence Agency *The World Factbook* (2008), available at <http://www.indexmundi.com/zimbabwe/exports.html>,

³ At the height of the economic crises, several public health facilities, particularly those operated by government experienced severe operational problems such as mass exodus of medical professionals and lack of essential medicines and equipment.

⁴ Two of the country's big and oldest financial institutions, the Barclays Bank and Standard Chartered Bank closed many of their branches in smaller towns due to primarily the decline in agricultural production for those branches were mainly supported by large scale commercial farmers. Other banks such as Founders Building Society, Royal Bank, Barbican Bank, Trust Bank, CFX Bank and Time Bank all closed down their operations. See Mucheche C 'Revisiting banks' collapse' *The Sunday Mail In-Depth* 22-28 July 2012, D4.

⁵ This term will be used interchangeably with 'firm', 'company', 'entity' or 'corporation' to denote any form of organised businesses regardless of whether it is incorporated or not.

that were deprived of sources of borrowing. The situation was militated by the absence of both external lines of credit to either the central government or individual private businesses and direct foreign investment due to primarily an unstable political and economic environment.⁶

A number of factors combined to create an unfriendly environment for investors thereby depriving the country of foreign exchange injection. These factors included the adoption of several populist economic measures aimed at appeasing the poor majority, namely, the introduction of price controls⁷ aimed at ensuring that basic commodities and services are affordable to the majority and introduction of the controversial land redistribution programme⁸ that was given statutory effect in various pieces of legislation.⁹ Despite the noble

⁶ The country has witnessed sustained periods of an unstable political environment following the disputed presidential elections in 2002. This instability aided the rapid economic decline that had started in the late 1990s.

⁷ The reintroduction of formal price control mechanisms into the economy has been met with mixed reactions. The Zimbabwean Government justified price controls as necessary to curb the rather unjustified spat of price increases at a time when the economy was facing shrinkages and a seemingly unabated inflation that was not matched by salaries. It thus perceived these increases as motivated by ulterior motives given that their timing coincided with general elections in 2000. See on this Kububa AJ 'Zimbabwe' in UNCTAD *Review of Recent Experiences in the Formulation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia and Zimbabwe (2005) UNCTAD/DITC/CLP/2005/2*, 303. The government added price monitoring as a function of the CTC by way of inserting section paragraph (h) of section 5(1) of the Competition Act of 1996 (this was effected by the Competition Amendment Act of 2001). The National Incomes and Pricing Commission Act [Chapter 14:32] was amended to create the National Incomes and Pricing Board in place of the National Incomes and Pricing Commission as an institution that was tasked, inter alia, with price monitoring and control. Furthermore, the Control of Goods Act [Chapter 14:05] also saw the reintroduction of a price inspection institution. Regardless of the noble rationale behind these developments, they failed to provide a lasting solution as basic commodities that were mainly target by control measures quickly disappeared from the shelves of supermarkets, a situation that further compounded the woes of the consuming public.

⁸ See generally on the economic implications of the land reform programme in Zimbabwe, Barry F, Honohan P and McIndoe T 'Postcolonial Ireland and Zimbabwe: Stagnation before Convergence' (2009) *Institute for International Integration Studies (IIS) Discussion Paper No.291/June 2009*.

⁹ The series of legal measures to give land reform the needed legal effect started as early as 1985 with the enactment of the Communal Land Act 21 of 1985 and then the Land Acquisition Act 21 of 1985 which both aimed at strengthening the government's powers to acquire land for resettlement. The Land Acquisition Act was further amended in 1992 by the Land Acquisition Act 3 of 1992 and it was further altered by executive

rationale behind land redistribution, the programme was implemented in a manner that largely disregarded property rights in Zimbabwe hence acting as a stumbling block to foreign investors.¹⁰

The Zimbabwean Government through the Reserve Bank of Zimbabwe (RBZ), which is the central bank, adopted a number of measures aimed at trying to stabilize and resuscitate the productive sectors of the economy.¹¹ These included the printing of bank notes, artificial valuations of the local currency and the divergence of the central bank from its core business of monitoring the financial sector to, *inter alia*, funding the government's land reform programme through acquisition of agricultural inputs that were then made available to 'new farmers' below market prices, thus technically subsidising the sector.¹²

measures through the Presidential Powers (Temporary Measures) Act 1 of 1986. Perhaps the most significant legal instruments came in the form of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] which criminalised failure to cease occupation of acquired land and the Constitutional Amendment Act 11 of 2000 which amended the Constitution of Zimbabwe of 1979 through the insertion of sections 16A and 16B which, *inter alia*, requires owners or occupiers of acquired land to cease occupation of that land within 90 days.

¹⁰ See *commercial Farmers Union/Bateleurs Peak Farm Holdings (Private) Limited /Chiredzi Ranching Company (Private) Limited/Louis Karel Fick/ Andrew Paul Rosslyn Stidolp/Lipgreen Farming (Private) Limited/Gradeur Ranching (Private) Limited/Chiriga Estates (Private) Limited and Busi Coffee Estates (Private) Limited v The Minister of Lands and Rural Resettlement/ The Minister of Justice/ The Commissioner General of the Zimbabwe Republic Police/ The Auditor General/ The Minister of Finance/ The Attorney-General and The Chairman of the Compensation Committee*, [2010] SC31/10 at 11 where it was stated that section 13B(3) of the Constitution as effected by the amendment referred to in note 9 above 'ousts the jurisdiction of the courts to enquire into the legality or otherwise of the acquisition of land.' This effectively deprives the aggrieved party of the right to protection by the law including the right to have their property protected regardless of the modus employed to deprive them of such a right. See generally, *Mike Campbell (Pvt) Ltd and Others v Minister of National Security Responsible for Land, Land Reform and Resettlement and Another* SC49/07.

¹¹ The Reserve Bank of Zimbabwe (RBZ) as established by the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] of 1999 which replaced the Reserve Bank of Zimbabwe Act [*Chapter 22:10*] is the central bank of Zimbabwe whose role includes regulating the monetary system; stabilising the currency and 'fostering the liquidity, solvency, stability and proper functioning of Zimbabwe's financial system and advancing general economic policies of the Government.' It is through the last stated function that the central bank found itself at the heart of trying to advance several of the Government's policies including financing the agricultural sector as a component of the country's economy.

¹² It is through the funding of the land reform policy that the central bank found itself at the heart of trying to advance several of the Government's policies including financing the agricultural sector as a component of the

The critical shortage of foreign exchange, dwindling industrial production, an artificial foreign exchange rate coupled by a hyperinflationary environment, resulted in a valueless local currency that was in short supply and was abandoned in 2009.¹³ The country then adopted a multicurrency regime in a bid to arrest inflation and stabilise the economy.¹⁴ However, although these developments had brought a measure of stability to the economy, corporate businesses are currently still experiencing viability challenges.¹⁵

The aforementioned shortage of foreign exchange and distortions in exchange rates created financial instability for those businesses that relied on exports for income and survival as they increasingly faced viability problems in trying to sustain exports that became increasingly expensive.¹⁶ The domestic market became smaller and smaller as large numbers of people were left unemployed following years of downsizing operations in a bid to survive the economic scourge.¹⁷

1.2 Why mergers and acquisitions?

Faced with an uncondusive operating environment, corporate businesses usually resort to corporate restructurings as survival strategies.¹⁸ Corporate restructuring in its broader sense refers to any activity that may be implemented in response to either internal or external

country's economy. See on the role of the RBZ in prolonging the economic instability, Makina (2010) (note 1 above) 112-13; Munoz S 'Suppressed Inflation and Money Demand in Zimbabwe' (2006) *International Monetary Fund Working Paper No. 15*; Coorey S, Clausen JR, Funke N, Munoz S and Ould-Abdallah B 'Lessons from High Inflation Episodes for Stabilising the Economy in Zimbabwe' (2007) *International Monetary Fund Working Paper WP/07/99*.

¹³ See Linzmayer O *The Banknote Book: Zimbabwe* (2012).

¹⁴ Ibid.

¹⁵ See generally Makina (2010) (note 1 above).

¹⁶ Ibid.

¹⁷ Media reports placed the unemployment figures at 94 per cent of the population, that is, only six per cent of the population was formally employed by 2008. See AFP 'Zimbabwe unemployment soars to 94%', quoting the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA), available at http://www.google.com/hostednews/afp/article/ALeqM5imTkGEP84_3QTVcSGu_8W3YrP8wA, (accessed 21 April 2009). Cf. Lubker M 'Employment, unemployment and informality in Zimbabwe: Concepts and data for coherent policy-making' (2008) *International Labour Organisation (ILO) Integrated Working Paper No. 90 and Issues Paper No. 32* (although the rate of formal unemployment is high, the unemployment rate relatively lower than 10 per cent due to informal employment).

¹⁸ Kokkoris I and Olivares-Caminal R *Antitrust Amidst Crises* (2010) 103.

pressures that result in the partial or complete dismantling or reorganisation of a firm's assets, debts and other operational requirements such as its labour force.¹⁹

Corporate mergers and acquisitions have over the years emerged as the most favoured strategy of implementing corporate restructurings.²⁰ Given the hostile nature of a business operating environment characterised by a large volume of failing firms, these corporate restructuring transactions mainly involved acquisitions of those 'failing firms.' Thus these mergers can aptly be described as rescue mergers.²¹

1.3 Why regulate corporate mergers and acquisitions?

However, the fact that mergers in general and those involving firms facing financial difficulties in particular, may be beneficial, does not exempt them from the clutches of regulatory authorities (in this case, competition authorities or antitrust agencies as they are referred to elsewhere.)²² This is because mergers may also be potentially anti-competitive.²³ Such anti-competitiveness lies in the fact that a merger may either create or strengthen a

¹⁹ Kokkoris and Olivars-Caminal (2010) (note 18 above) 103; Gaughan PA *Mergers, Acquisitions and Corporate Restructuring* 4th ed (2007); DePamphilis D *Mergers, Acquisitions and other restructuring activities: An Integrated Approach to Process, Tools, Cases and Solutions* (2001) 5 (corporate restructurings refers to actions taken 'to expand or contrast a firm's basic operations or fundamentally change its assets or financial structure.')

²⁰ Valentine D 'Horizontal Issues: What's Happening and What's on the Horizon?' (2005), available at <http://www.ftc.gov/speeches/other/dvhorizontalissues.htm>, (accessed 28 March 2011). See also Kokkoris and Olivares-Caminal (2010) (note 18 above) 105. Other forms of corporate restructurings can involve debt restructuring if the company is failing to generate enough cash flows to meet its debt obligations and other liabilities.

²¹ See generally Hewitt G 'The Failing Firm Defence' (1995) (2) *OECD Journal of Competition Law and Policy* 113,119-139; McLaughlin TA *Nonprofit Mergers and Alliances* 2nd ed.(2010) 31.

²² In Zimbabwe, the Competition and Tariff Commission (CTC) is the unitary competition authority established and constituted under the Competition Act of 1996 in particular section 4. In South Africa, the Competition Act 89 of 1998 establishes and constitutes a three-pronged competition authority being the Competition Commission, the Competition Tribunal and the Competition Appeals Court. In the European Union (EU) the competition enforcement authority is bestowed upon the European Commission's Directorate General for Competition and in the United States of America (US) the competition authority, known as the federal antitrust agencies, are the Federal Trade Commission and the Department of Justice's Antitrust Division.

²³ Whish R *Competition Law* 6th ed. (2009) 799-800.

dominant market position that is capable of upsetting the competitive structure of the market.²⁴

Merger regulation is thus necessary to ensure that corporate restructuring transactions implemented through mergers and acquisitions do not negatively alter the competitive structure of the market by creating a dominant entity that will be able to abuse its dominant market position to the detriment of competition and the consuming public.²⁵ Maintenance of a competitive market structure is achieved through ensuring that mergers are adequately assessed to ensure that benevolent mergers are approved and those raising competition concerns are either prohibited or are modified so as to address any identified concerns.

1.4 The research in context

Mergers are generally beneficial as an economic welfare enhancing tool and particularly as an economic stabilising mechanism during a crisis environment. However, as indicated, they are also potentially anti-competitive. This anti-competitive aspect can result in a merger transaction eroding the welfare enhancing benefit of the transaction. Given that mergers with or without a failing firm component might possess both positive and negative attributes, it is clear that there is a need for a ‘trade-off’ between these two poles.²⁶ This ‘trade-off’ will ensure that beneficial corporate restructurings implemented through mergers involving failing firms in a crisis environment are promoted on the one hand and on the other hand that such promotion maintains the competitive structure of the market.

Maintaining a balance between promoting of beneficial corporate restructuring transactions implemented through mergers and acquisitions and the maintenance of the competitive market structure requires an effective merger regulatory framework. This effective regulatory

²⁴ Ibid, 806-808. A dominant position is where post-merger, the merged entity acquires market power, that is, ‘the power to influence market prices, output, innovation, the variety of goods and services, or other parameters of competition on the market for a significant period of time.’ See European Commission Directorate General Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005) par.24, available at <http://www.ec.europa.eu/comm/competition/antitrust/art82/index.html>, (accessed 23 November 2012) and further Landes WA and Posner RA ‘Market Power in Antitrust Cases’ (1981) 94 *Harvard Law Review* 937.

²⁵ Ibid.

²⁶ Kokkoris and Olivares-Caminal (2010) (note 18 above) 404.

framework relates to the adequacy of the statutory instruments enacted to regulate mergers and acquisitions and the institutions mandated with merger enforcement.

The focus of this thesis, as explained in more detail hereinafter, is on the competition law aspects of regulating mergers and acquisitions in a harsh economic environment.

1.4.1 The merger regulatory framework in Zimbabwe

The Competition Act²⁷ is the principal merger regulating statute in Zimbabwe. The Act provides for substantive and procedural aspects of merger regulation in addition to establishing and constituting the Competition and Tariff Commission (CTC) as the principal competition and merger regulating authority.²⁸ It is a combination of these aspects that determines the effectiveness of the Zimbabwean merger regulating system.

1.5 The research statement and objective

The study primarily aims at analysing from a competition law perspective, the current regulatory framework for mergers and acquisitions in Zimbabwe. It aims to identify and highlight the shortcomings within the system and develop and suggest a model regulatory framework that is suitable for Zimbabwe in general and particularly in the context of the perennial harsh business operating environment in which corporate mergers and acquisitions are a critical component not only for corporate survival but also for socio-economic stability.

The researcher primarily aims at assessing whether from a competition law perspective, the current state of merger regulation in Zimbabwe is adequately equipped to meet the demands of both promoting beneficial corporate restructurings implemented through mergers and acquisitions on the one hand and the promotion and maintenance of a competitive market structure on the other hand.

²⁷ Act 7 of 1996.

²⁸ Long title to Act and section 4 establishing and constituting the CTC. Section 3(3) confirms the status of the CTC as the principal merger regulatory authority in Zimbabwe by requiring sectorial regulators established under any other legislation to seek authorization of a merger within that sector from the CTC. See for instance *Merger of Aykroyd Insurance Brokers and Hunt Adams & Associates*, [2001] CTC/M&A/Jun01 where the Commissioner of Insurance applied for the authorisation of the merger between two insurance firms from the CTC.

The study will expose certain critical shortcomings within the current merger regulatory framework. It will then use established and developed comparative jurisdictions to adopt and adapt a model suitable and effective for selective and relevant aspects of merger regulation in Zimbabwe where the latter regime falls short. The study will develop and suggest a regulatory model that is suitable to strike and maintain a balance between the promotion of beneficial corporate restructuring transactions implemented through mergers and acquisitions and the established principles of merger regulation aimed at protecting the competitive process so as to maintain the competitive structure of the market.

1.6 The significance and relevance of the study

The significance of the study can be highlighted in the assumptions that can be made from the above exposition. These relate to the general importance of competition in a market and the rationale behind merger regulation and the need to promote beneficial corporate restructurings implemented through corporate mergers and acquisitions in a crisis environment such as the perennial harsh business operating environment facing corporate entities in Zimbabwe.

The study assumes that:

- (a) Competition is a necessary vehicle for achieving economic growth and development particularly in developing countries such as Zimbabwe; advances a broader socio-economic policy objective of the government and enhances the general welfare of citizens.
- (b) Corporate mergers and acquisitions are an essential tool for effecting corporate restructuring transactions that are necessary for (i) enhancing general efficiency in the market, (ii) enhancing economies of scale and scope;²⁹ (iii) ensuring business survival

²⁹ Economies of scale describe a situation where the average costs of production decreases in the long term through combining production facilities. Economies of scope refer to situations where the combined output of a single entity is greater than that which could be achieved by two different entities with each producing a single product. See generally Whish (2009) (note 23 above) 10-11.

through consolidation that ensures profitability and viability especially in a harsh economic operating environment.

- (c) Corporate mergers and acquisitions can however also be potentially harmful to the competitive structure of the market thereby negating the gains of competition through the elimination of an effective competitor and reduction of market participants. In the process it can create dominant firms that have the capacity and potential to engage in anti-competitive practices that are detrimental to consumer welfare.
- (d) There is a need to regulate corporate mergers and acquisitions in order to ensure that competition in the market is protected and maintained for the good of the economy and the consuming public.
- (e) An effective merger regulatory framework is necessary to achieve and maintain a balance between the promotion of beneficial corporate restructurings transactions on one hand and the protection of the competitive process on the other hand through meeting the current demands of the competitive market as well as adjusting to any future changes in the business operating environment that necessitates mergers, particularly ‘rescue mergers.’

It is acknowledged that the area of merger regulation has received substantial attention within academic circles. With this in mind, this study is aware of the dangers of trying to reinvent the wheel in this area hence acknowledges the existing academic work but at the same time firmly places at its epicentre two issues, namely:

- (a) The regulation of corporate mergers and acquisitions not only from a developing country perspective but also from a jurisdiction plagued by perennial economic crisis.
- (b) The interpretation and application of the failing firm and failing division doctrines in merger regulation in an environment where such doctrines are expected to be considered in many mergers brought before the regulatory authorities and in a framework that is evidently not adequately equipped to deal with the current merger

regulatory demands in a normal set-up and even less so in a changed business operating environment.

The above aspects distinguish the study from existing research. The existing research on the regulation of mergers and acquisitions in crisis periods focuses on established and developed jurisdictions³⁰ hence justifies, predictably so, the position that there is no need to alter the regulatory mechanism even in a changed business operating environment which in this instance is an economic operating environment that is in perennial crisis and may be referred to as a harsh economic operating environment. Whereas this study accepts the need to maintain a competitive market structure and hence a rigorous merger regulatory framework in any given situation, it questions whether the same can be said of Zimbabwe where the current merger regulatory framework is not equipped to deal with merger regulation in normal times and much less so in a changed business operating environment where survival transactions can be very contrived and complicated.

It must be pointed out that this must not be taken to mean that the researcher will argue for the weakening of merger regulation in a crisis environment but rather the advancement of the thesis is that before even considering whether the standards for merger regulation in Zimbabwe need to be altered in any way, the question that need to be addressed is whether the current regulatory framework is adequately equipped to adapt to any changes in the regulatory environment. This is because advocates of retaining the prevailing systems points to their being flexible and hence effective to meet any changes.³¹

Using the regulation of mergers involving either failing firms or the failing division of firms as the focal point, the researcher will investigate the approaches adopted in both the US and EU to assess their suitability for purposes of reform of the Zimbabwean merger regulatory

³⁰ See for instance, Kokkoris and Olivares-Caminal (2010) (note 18 above).

³¹ See Jenny F 'Foreword' in Kokkoris and Olivares-Caminal (2010) (note 18 above); Calvino N 'Brussels: Part of the Problem or Part of the Cure?' *EU Competition and Public Law Report, Brussels focus* (2009), available at http://abreuadrogados.com/xms/files/05_Comunicacao/Artigos_na_Impreusa/Iberia_Lawyer_Artigo-MMP_fEB.2009.PDF, (accessed 23 October 2010)(Nadia Calvino is the Deputy Director General of the Directorate General Competition of the EU.)

regime. The use of the South African merger regulatory system as a comparative third word jurisdiction will serve to show that it is necessary to effectively regulate mergers and acquisitions involving failing firms in a broader socio-economic context. Furthermore, its suitability for purposes of adapting the Zimbabwean merger regulatory regime will also be considered.

However, in a bid to come up with a suitable and distinctly unique regulatory model for Zimbabwe, caution needs to be exercised so as to avoid producing a framework that is not only alien to established principles of merger regulation but also one that defeats the very rationale behind merger regulation, namely, to ensure that corporate transactions implemented through mergers and acquisitions do not unnecessarily harm the competitive structure of the market in which the merging firms operates. Accordingly, it is submitted that the guiding principle must be to come up with an effective regulatory system, that is, one that is able to achieve two main objectives namely:

- (a) to meet the current needs in addressing the identified shortcomings in the *status quo* and;
- (b) to adapt to the changes in the regulatory environment necessitated by a changed business operating environment that is a breeding grounds for both benevolent and anti-competitive behaviour such as survival induced ‘rescue mergers.’

1.7 Definition of terms

The title of the research is ‘Corporate Restructurings in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe.’ The aim of the research is primarily to analyse the current merger regulatory framework in Zimbabwe so as to identify any shortcomings within the system in order to develop and suggest a model for effective merger regulation in Zimbabwe in general and during crisis periods in particular. From this, it is important to define some of the key terms that will be used in the study, namely:

- (a) Corporate restructurings: this term generally refers to any form of business reorganisation implemented to meet the demands of a particular business especially in response to the need to remain viable. The study will use this term to denote business reorganisations implemented through corporate mergers and acquisitions.

- (b) Corporate: will be used interchangeably with the terms ‘firm’, ‘corporate entity’, ‘company’ or ‘corporation’ to denote any form of organised business.
- (c) Mergers and acquisitions: these terms will be used interchangeably to describe any situation where one or more business entities acquires the whole or part of the business of another regardless of whether such an acquisition results in the creation of a new venture altogether or merely results in the merging of the acquired business with the acquiring entity. The study will assign the definition given by any statute when dealing with a particular jurisdiction as well as use the terminology therein, for instance, when discussing merger control in the EU, the term ‘concentration’ may be preferred.
- (d) Competition: refers to a state of rivalry. This study uses the term ‘competition’ to describe a state of inter-firm rivalry in the market.
- (e) Competition law: will be used to denote any form of legal rules, administrative instruments or principles developed from judicial decisions aimed at regulating the conduct of firms on the market so as to promote and maintain inter-firm rivalry. The term ‘competition law’ will also be used interchangeably with ‘antitrust law’ especially when discussing merger regulation in the US.
- (f) Competition policy: will be assigned a general meaning to encompass all mechanisms that are employed to protect, promote and maintain competition on the market. ‘Competition policy’ will be used interchangeably with ‘competition system’, ‘competition regime’ or ‘competition framework’ to include competition law.
- (g) Merger regulation: relates to the instruments used by the competition authorities to control the activities (transactions) employed by corporate businesses that potentially affect the competitive structure of the market. This term will also be used interchangeably with ‘merger control.’

- (h) Failing firm doctrine: is the consideration from a competition law perspective of the financial status of a party to a merger in assessing whether or not such a merger can be approved on the basis that such status has the effect of neutralising the anti-competitive effects of the merger.

- (i) Failing division doctrine: is the consideration from a competition law perspective of the financial status of part of a business of a party to a merger, which part is the target of the acquisition and whether the possibility of the part failing and exiting the relevant market will have any negative effects on the competitive structure of the market and whether such effects can be neutralised by the proposed merger.

1.8 Thesis

The thesis of the research that will be developed through the structured arguments made therein are as follows:

- (a) The substantive and institutional framework for regulating corporate mergers in Zimbabwe is fundamentally deficient, ineffective and inadequate to ensure a balance between the benefits of an effective competitive market structure and beneficial corporate transactions.

- (b) Although there is no general justification that established principles of merger regulation should be altered during changes in a business operating environment, the deficiencies within the Zimbabwean merger regulatory system that renders it ineffective and inadequate even during normal times justify material changes.

- (c) There cannot be a one size-fit-all approach to the interpretation and application of the failing firm doctrine in merger analysis in different jurisdictions.

- (d) A clearly stated provision relating to the failing firm doctrine developed from established principles and tailor-made to the Zimbabwean system is required as part of the Zimbabwean merger regulating provisions.

- (e) A broad based clearly demarcated competition objective promotes corporate restructurings in Zimbabwe without sacrificing the established principles of merger regulation and the stated objectives of the competition system.
- (f) There is a need to amend the current merger regulation provisions in Zimbabwe to reflect the practical realities of the country's needs.

1.9 Methodology and approach

To adequately explore the research questions and come up with a balanced analysis, the researcher adopted a number of methods in addressing various aspects of the thesis.

Given that the regulation of corporate mergers and acquisitions in Zimbabwe is central to the thesis with the aim being to analyse so as to assess the adequacy of the regulatory framework in promoting corporate restructurings implemented through mergers and acquisitions, it was important to subdivide the issues necessary to achieve this goal. Firstly there is a need to put the Zimbabwean merger regulatory framework into historical context by providing an understanding of the historical developments of competition law in general and merger regulation in particular. This is meant to give an understanding of the factors that motivated the adoption of competition law and merger regulation.

Secondly an analysis of the current merger statute is given, its broader objective presented and an in-depth analysis of the provisions relating to merger regulation made. Competition authority decisions were utilised to assess the statutory provisions in action.

Thirdly the research employed mainly a comparative analysis approach. The South African, EU and US merger regulatory systems were identified and selected as comparative jurisdictions for various reasons as indicated below. In order to assess the adequacy of the Zimbabwean regulatory framework, there is a need to consider how similar aspects are treated in other jurisdictions. These jurisdictions are used to demonstrate selected aspects of merger regulation and as such no attempts are made to provide a complete analysis of their competition and merger regulatory systems.

The guiding principle utilised in employing the comparative method is not from top to bottom but rather from bottom to top. This implies that the researcher did not as a primary consideration, look at what other jurisdictions' approaches are and try to transplant them onto Zimbabwe but rather started with what Zimbabwe has, identified any shortcomings within its context, that is, in its endeavour to promote an effective merger regulatory system and considering the established principles of competition law in general and merger regulation in particular, thereafter considering how these shortcomings are addressed in other jurisdictions.

1.9.1 The choice of South Africa, the US and the EU

1.9.2 South Africa

Zimbabwe and South African are both developing countries. Although these two jurisdictions' regulatory frameworks operate in different socio-economic and political contexts, there are many similarities in the merger regulating statutes. Both the Zimbabwean and South African statutes defines mergers in almost a similar fashion although the South African statute provides clear additional information on what amounts to acquisition of control. Another important aspect of the two jurisdictions' statutes is the provision for non-competition factors in merger review under public interest provisions. The South African statute clearly defines the public interest concept. The impact of a broad based competition system on the regulation of mergers involving failing firms motivated the need to look at the South African model regarding public interest in an almost similar set up. Lastly, the lack of judicial decisions on public interest consideration in particular and merger regulation in general in Zimbabwe necessitates a look at South Africa with its body of competition law precedents and how the South African approach to the regulation of mergers involving failing firms within a broader public interest concept can influence the development of the Zimbabwean merger regulatory system involving the same.

1.9.3 The US

The US has probably the oldest formal merger regulatory system. Over the years the US system has developed a rich jurisprudence of antitrust principles that to a large extent had influenced the development of competition law in many other countries that adopted market based reforms emphasising a shift from centrally planned economies to market based

economic planning.³² One of these areas is the application of the failing firm doctrine in merger analysis. The US has developed through case law jurisprudence, articulate administrative guidelines that provide an analytical framework.³³ Importantly, the guidelines acknowledge the various variations of the failing firm defence.³⁴

Probably the most significant reason behind using the US as a comparative jurisdiction is that the failing firm doctrine, which is the focal point of the study, originated from the US.³⁵ It is imperative therefore that the present research takes into cognisance these developments in order to consider the extent to which the vacuum within the Zimbabwean system with regard to the interpretation and application of the failing firm doctrine in merger review, in particular its several variations, namely, the ‘failing division’ and the ‘weakened firm defence’, can be filled.

1.9.4 The EU

Like the US, the EU does not explicitly provide for the failing firm defence in its principal merger statute, the ECMR. However, the European Commission has provided guidelines on how the failing firm defence is applicable to merger review within the Community’s broader merger statutes and economic policy. These are contained in the Commission’s *Horizontal Merger Guidelines*.³⁶

The rationale for using the EU as a comparative jurisdiction lies in mainly two reasons. The first being that the South African Competition Tribunal in *Iscor/Saldanha Steel*³⁷ expressed

³² See Whish (2009) (note 23 above) 3; Kovacic WE ‘The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries’ (1996) 11(3) *American University International Law Review* 437-474, 438 (using Mongolia as an example); Hamner KJ ‘The Globalisation of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China’ (2001-2002) 11(2) *Journal of Transnational Law and Policy* 385.

³³ Section 11 of the Federal Trade Commission (FTC) and US Department of Justice (DoJ) Antitrust Division, *Horizontal Merger Guidelines* 2010.

³⁴ These variations are in the form of the failing division defence.

³⁵ See *Schuman Sasol (SA)/Price’s Daelite (Pty) Ltd* 23/LM/May01 par. 57.

³⁶ Par. 89 of the EC *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, [2004] OJ C31/5 (‘the *Horizontal Merger Guidelines*.’)

³⁷ *Iscor Limited/Saldanha Steel (Pty) Ltd* 67/LM/Dec01.

preference for the EU approach to failing firm doctrine.³⁸ Given that South Africa has been identified as the primary comparative jurisdiction given its closeness to the Zimbabwean system, it naturally makes sense for one to be curious as to what is it in the EU approach that attracted the South African authorities and whether there are any lessons that Zimbabwe can learn from such a system.

The second reason lies in the fact that the EU system presents a further development and departure from the US approach to the failing firm doctrine. The EU system particularly illustrates a consistent approach to the failing firm doctrine in which the lack of causality principle is at the heart of its assessment of mergers including those involving failing firms.³⁹

The research is primarily qualitative drawing on literature from both primary and secondary sources. Primary sources include analysis of various pieces of legislation from the selected jurisdictions.

The research also analyses the practical approaches adopted in the interpretation and application of the failing firm doctrine in merger analysis from different selected jurisdictions. As such, both judicial and administrative decisions will be analysed.

Secondary sources have also been considered and utilised. These include published materials such as books and academic journal articles, official documents, reports and conference papers. For instance, the researcher could not locate the communications between various government ministries that were critical in the formulation of principles underlying

³⁸ Ibid, par.110 (3).

³⁹ Article 89 of the EC Horizontal merger guidelines provides that ‘the Commission may decide that an otherwise problematic merger is nevertheless compatible with the ‘internal market’ if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competent structure that follows the merger cannot be said to be caused by the merger.’ This was reiterated in almost every case in which the failing firm was invoked in the EU. See for instance Case No. IV/M 308 *Kali und Salz/MdK/Treuhand* [1994] OJ L186/46 pars.50 and 72; Case IV/M. 1221 *Rewe/ Meintl* [1999] OJ L 274/1.par. 63; Case IV/M. 993 *Bertelsmann/Kirch/Premiere* [1999] OJ L 53/1, L53/14 par 69; Case IV/M. 890 *Blokker/ Toys ‘r’ Us* OJ L326/1 par. 111. See generally on lack of causality principle, Baccaro V ‘Failing firm defence and the lack of causality: doctrine and practice in Europe of two closely related concepts’ (2004) *European Competition Law Review* 11; Bavasso A and Lindsay A ‘Causation in EC Merger Control’(2007) 3(2) *Journal of Competition Law and Economics* 181-202.

competition law and policy hence had to rely on the available secondary source in either the CTC study or conference presentations by CTC staff.

The researcher also consulted sparingly non-legal sources particularly on facts, statistics and non-legal principles given that the research adopted primarily a qualitative approach. This was used mainly to support certain arguments as proved by established principles for instance economic principles underlying certain aspects of mergers and their impact on market power such as the degree of competition as a level of industrial concentration.⁴⁰

Another important technique employed by the researcher was the use of both the print and electronic media to trace developments within the corporate business environment especially corporate transactions involving mergers and acquisitions. Here the World Wide Web (the

⁴⁰ It is accepted that a market with a high concentration ratio is generally anti-competitive hence regulatory authorities are cautious in approving mergers that are likely to increase the already concentration ratios. See *United States v General Dynamics Corp.*, 415 U.S. 486, 495, 504 39 L ED.2d 530, 94 S Ct.1186(1974) ; *Brown Shoe Co.v United States* 370 U.S. 294,333, 8 L ED.2d 510, 82 S Ct. 1502 (1962) (court rejected arguments that the relevant market was characterised by a large number of vigorous competitors and held that the prevailing trend in the industry revealed a trend towards concentration. See also *United States v Philadelphia National Bank* 374 US 321, 368, 10 L Ed 2d 915, 83 S Ct. 1715 (1963). Market concentration ratios thus become an important indicator of the actual or potential level of competition in a given market hence a barometer for projecting the likely competitive effects of a given transactions. There are basically two established formula for determining concentration levels in a given market. These are (a) the Herfindahl Index also known as the Herfindahl-Hirschman Index (HHI) named after two prominent economists Herfindahl, O.C and Hirschman, A.O. The HHI is a measure of the size of firms in relation to the industry and indicates the level of competition among them. It is defined as ‘the sum of the squares of the market shares of the 50 largest firms (or summed over all the firms if there are fewer than 50) with the industry where the market shares are expressed as fractions.’ The result produced is proportional to the average market share, weighted by market shares and such it ranges from 0 to 1.0 moving from a huge number of very small firms to a single monopolistic producer. An increase in the HHI index generally indicates a decrease in competition and an increase of market power, whereas a decrease indicates an increase in competition and a decrease in market power. See Hirschman AO ‘The Paternity of an Index’ (1964) 54(5) *The American Economic Review* 761; US Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines* (2010) par.5.3 and (b) the concentration ratio (CR) which is a measure of the sum output produced in an industry by a given number of firms in the industry (the leading firms). The four-firm concentration ratio (CR4) is one of the common concentration ratios which are the proportion of output originating from the four largest enterprises. It is a more generalised method of estimating the level of concentration in a given industrial sector and as such rarely used by competition authorities. See generally Hirschman M *Fundamentals of Managerial Economics* (2008) 529.

internet) became an important source for tracing these developments. Where online sources were consulted, the researcher adequately cited them ensuring that their origins are traceable. Efforts were made to verify the authenticity of the sources before relying on them and as such only reliable sources were consulted. Credibility of the online source was given where the same provided information on the author thereof.

1.10 Limitations and delineation of the study

The concept of corporate restructurings is mainly employed in industrial reorganisation and economics. Similarly, the concept of corporate mergers has its roots in economics as it involves a number of complex economic considerations. Merger regulation itself is an interdisciplinary subject that involves the movement of securities⁴¹ and the protection of several stakeholders of the parties involved, for instance shareholders and creditors. This set-up presents a number of practical and theoretical challenges that might impact on the achievement of the objectives of the study.

In order to provide a focused study, the research title had been carefully chosen to limit aspects of corporate restructurings to legal regulation from a competition law perspective. No attempts were made to provide in-depth analysis of economics and industrial reorganisation save for instances where economic principles were indispensable in arriving at a legal concept, for instance, understanding the rationale behind regulation of monopoly situations as they potentially negatively impact upon the competitive structure of the market.

Legal aspects of regulation are still broad enough to encompass securities and corporate law aspects. There are limitations to these regulatory aspects. The securities regulations are only concerned with securities of regulated companies, that is, those that are listed on regulated financial markets.⁴² Given that mergers can be implemented in various forms that might not necessarily always involve securities, it is logical that the research adopts an open-minded approach to merger regulation to accommodate all known facets thereof rather than limiting it

⁴¹ The term security describes a wide range of financial products, including but not limited, to shares, stocks, depository receipts, derivative instruments, bonds and debentures that can be traded on a regulated stock market. See section 2(1) of the Zimbabwean Securities Act [*Chapter 24:25*] (Act No.17 of 2004) and the South African Securities Services Act 36 of 2004.

⁴² Section 3 of the Securities Act [*Chapter 24:25*] of 2004 establishes the Securities Commission as the regulatory authority mandated with the regulation of the marketing and investment in securities.

to those involving regulated securities. Accordingly, securities regulations were not considered.

Corporate law provides for the regulation of corporate mergers. However, there are also a number of factors that render an investigation into the regulation of corporate mergers from a corporate law perspective undesirable for attaining the objectives of this research. Firstly, corporate law regulates companies as defined, that is, the application of the provisions relating to corporate mergers and acquisitions under corporate law is limited to regulated companies. This implies that where the merging parties are not regulated companies then the merger is beyond the regulatory scope. Given that mergers can involve unregulated entities, it was necessary to select inclusive regulatory mechanisms. Secondly the corporate law perspective concerns the substance of the transaction and not the effects thereof, that is, corporate law's focus is not whether there are any benefits or disadvantage arising from the proposed merger but rather whether the transaction in question complies with the statutory formalities. This aspect was deemed as incompatible with the objectives of the research for it defeats the crucial component of the research, that is, to ensure a balance between the benefits and advantages of corporate mergers.

Whereas it is admitted that the legal aspects might be interlinked, the focus of the study was limited to competition aspects as the competition authorities in Zimbabwe have the final say on whether a merger must be approved or prohibited even if other sectoral regulators had made their decisions regarding same.⁴³

Although the study is perceived as relevant in trying to provide an effective regulatory model suitable for Zimbabwe, there are a number of challenges that the researcher either identified or encountered that potentially limits the attainment of the study's objectives. The first relates to the lack of any judicial decisions on the regulation of mergers and acquisitions in general and those involving either failing firms or failing divisions in Zimbabwe. The effect thereof is that these doctrines are not given any judicial interpretation. CTC decisions has been used which were found to be inadequate and skeletal.⁴⁴ There are many limitations to them as they are in most cases executive summaries that give a summarised version of the

⁴³ See section 3(5) of the Competition Act of 1996.

⁴⁴ It must be reiterated that the CTC decisions are not judicial decisions hence their usefulness as legal sources is limited.

issues rather than an in-depth analysis or discussion. The researcher had to rely on comparative jurisdictions with similarly worded provisions for interpretation.

The second limitation relates to the nature of corporate transactions that sometimes involves trade secrets that cannot be divulged even for academic purposes. This situation is frustrating for it relegates the researcher to comment on the black letter aspects of merger regulation without actually getting involved in the practicalities of the matter. A practical case is where some staff from the CTC were not even willing to go beyond providing certain information on particular mergers as they considered doing so as potentially placing them in danger of violating breach of confidentiality.⁴⁵

The above challenges were compounded by the absence of academic writings on the subject from a Zimbabwean point of view. Competition law and merger regulation is a relatively new area with the Zimbabwean Competition Act only having been effective since 1998. Although one can point to South Africa where the current regulatory system was also adopted during the same time, there are no known academic publications in Zimbabwe. The researcher had to rely mostly on presentations made by regulatory authorities that amounted to no more than policy documents or overview of the system. However, this presented a rather interesting and welcome challenge for the researcher who had to dig deeper to come up with meaningful contributions.

1.11 The structure of the thesis

The thesis is structured in a manner that logically develops the arguments advanced to support the thesis through exploring the aims and objective of the research. It is divided into two broad parts that are further subdivided into several chapters. Part I includes Chapter 1 which provides a general introduction to the entire study and acts as a roadmap to the research by highlighting the aims and objectives of the study the methodology and approach

⁴⁵ The protection of confidential trade secrets is also profound even in jurisdictions where decisions are reported. See for instance *Schumann Sasol /Price's Daelite* (note 35 above) par 60 and *Kali und Salz* (note 39 above) par. 7 information deleted since considered as trade secrets). During the information gathering stage of this study, the researcher visited the CTC in Harare and was only able to access the CTC Study (Competition and Tariff Commission of Zimbabwe *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part (1) Mergers and Acquisitions* (2006) (unpublished, on file with writer) from which the CTC decisions were extracted, albeit as executive summaries devoid of substantive analysis or discussion.

adopted in advancing the research thesis. Chapter 2 follows with a background to the key concepts of the study, that is, traces the origins and development of general competition law and policy in Zimbabwe with the aim of placing merger regulation within the broader context of competition enforcement in the country. Chapter 2 importantly attempts to provide a nexus between the key events leading to the formulation and adoption of formal competition regulation in Zimbabwe and the influence they have had on the current principles underlying merger regulation, for instance the promotion of public interest as part of broader policy objectives through competition law and policy.

Chapter 3 is the heart of the thesis as it introduces merger regulation in Zimbabwe. The chapter analyses and discusses critical issues relating to merger regulation in Zimbabwe with the aim of exposing some shortcomings within the system. This is followed by a discussion of the application of the failing firm and failing division doctrines in Zimbabwe in Chapter 4. Here the aim is to assess the extent to which the shortcomings identified in Chapter 3 impacts upon the effectiveness of the merger regulatory framework in promoting corporate restructuring transactions implanted through mergers and acquisitions in an environment that is favourable to mergers involving failing firms or failing divisions.

Part II of the thesis is devoted to drawing lessons for Zimbabwe that are critical for addressing the shortcomings identified in Part I. Chapter 5 analyses and discusses the implications of public interest considerations on the interpretation and application of the failing firm doctrine in merger regulation by using the South African approach as a model for Zimbabwe. Chapter 6 focuses on the application of the failing firm doctrine in the EU whereas Chapter 7 discusses the application of the failing division doctrine in the US and aims at drawing lessons for Zimbabwe on how to develop an effective provision that gives effect to the statutory acknowledgement of the fact that business is divisible hence a corporate restructuring transaction can be implemented through a merger that involves the disposal and acquisition of a failing division of a business.

Chapter 8 concludes the thesis highlighting the main conclusions drawn by the study. Crucially, it develops and suggests a model system for effective merger regulation in Zimbabwe that is considered capable of striking and maintaining a balance between the promotion of beneficial corporate restructuring transactions implemented through mergers

and acquisitions involving failing firms and the protection and maintenance of a competitive market structure in a crisis environment.

Chapter 2: The origins and development of competition law and merger regulation in Zimbabwe

What is required is an optimal degree of competition which would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the micro-economic level, but not so much competition that it would deter the propensity to invest.¹

Strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.²

2.1 Introduction

This Chapter primarily traces the origins and development of Zimbabwean competition law and policy in general and further specifically of Zimbabwean merger regulation. It aims at laying the foundation for the appreciation of the current merger regulation policy that influences the merger regulatory system in Zimbabwe. It is only after understanding the policy framework in which the current merger regulatory system operates that one will be in a better position to not only to assess whether or not the system is effective³ but crucially how best it can be adapted to be such.

Accordingly, this chapter will give an overview of the historical developments of competition law and policy in general in Zimbabwe and will then place the current merger regulatory framework within such a set-up. This will be done in Part II and will be followed by a detailed discussion of the early measures aimed at regulating economic activities in the post-

¹ Singh A and Dhumale R 'Competition Policy, Development and Developing Countries' (1999) *South Centre Trade Related Agenda (T.R.A.D.E) Working Paper 7*.

² Stiglitz JE 'Competing over Competition Policy' (2001) *Project Syndicate*, August 2001, available at <http://www.project-syndicate.org/competing-over-compt-policy>, accessed 21 February 2013.

³ For purposes of this chapter and study, the term 'effective' will be used to describe and denote the ability of a merger regulatory system to strike and maintain a balance between the traditional goal of competition law, which is the protection of a competitive market structure through regulation of activities that have the likely effect of upsetting such a structure on one hand and the achievement of other equally important goals such as the advancement of non-competition goals captured in public interests considerations and the promotion of beneficial corporate transactions implemented through corporate mergers and acquisitions that are potentially anti-competitive.

colonial Zimbabwe in Part III with a view to highlighting how such measures influenced the development of competition law and policy in general and merger regulation in particular. Part IV traces the economic reforms that follow the early attempts to regulate economic activities. In other words, Part IV discusses the contribution to the development of competition law and policy of the reform measures implemented to correct the adverse effects of the economic regulation attempts. This will be followed in Part V by a discussion of the early efforts to formulate a formal competition policy where focus will be on the studies conducted with the aim of developing and formulating an enforcement mechanism to give effect to economic reforms and how competition enforcement was mooted as an effective option.

Part VI presents an overview of the current competition regulatory framework and discusses the general issues relating to the competition statute before laying the foundation for further discussing the merger regulatory aspects of the competition system in follow up chapters. The chapter will conclude by reiterating that the current competition system encompassing merger regulation is not only a reflection of the country's economic historical development but also a product of its broader policy objectives. It is thus not surprising why these factors continue to exert considerable influence on the current system as well as the approach and thinking of the regulatory authorities in merger regulation. However, the question that this study in general will pose is whether this observation has any implications on the effectiveness of the merger regulatory system in Zimbabwe? If so, to what extent have such implications influenced the system's ability or lack thereof in advancing not only the goals of the system in general but also its effectiveness?

2.2 The evolution of competition law and policy in Zimbabwe: an overview

This part will give a brief background to some of the critical issues that led to the adoption of a formal competition system in Zimbabwe. It will thus present a general guide to the chapter.

The enactment of the Competition Act⁴ in 1996 heralded an era of formal competition regulation in Zimbabwe. Typical of developing economies, this adoption of a formal competition regime was pursuant to broader market-based economic reforms.⁵ The competition regulatory system became an integral component of the economic reforms adopted in response to both internal and external factors⁶ particularly those impacting upon the country's economic performance and resultant social challenges experienced during the first decade of independence.

Internally, the changing socio-economic landscape in Zimbabwe influenced the Government's decision to adopt a range of reform measures.⁷ Upon attaining internationally recognised independence in 1980⁸ the new Government inherited an economy and infrastructure which was relatively developed and advanced in comparison to other sub-

⁴ Competition Act 1996 [*Chapter 14: 28*] (Act No. 7 of 1998) which become operational in 1998 and was amended by the Competition Amendment Act 29 of 2001. Unless specified, any reference made to the Competition Act hereinafter shall refer to the Act as so amended.

⁵ The term competition regimes will be used for purposes of this chapter interchangeably with the term 'competition system' to refer to formal aspects of competition law and policy. Thus policies, laws (rules and regulations) and institutions designed to govern competition issues, constitutes the same. See Singh and Dhumale (1991) (note 1 above) 1. Everest-Phillips M 'Tackling the "Tyranny of Vested Interests" (2009) in Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* 43-88, 48.

⁶ Zimbabwe's adoption of a competition policy can be attributed to a combination of many factors. See generally Mhamhare G 'Southern African Development Community (SADC) regional competition policy' in Drexl J, Bakhom M, Fox EM, Gal MS and Gerber DJ (eds.,) *Competition Policy and Regional Integration in Developing Countries* (2012) 56-65, 58.

⁷ See generally Brett EA 'From Corporatism to Liberalisation in Zimbabwe: Economic Policy Regimes and Political Crisis, 1980-1997' (2005) 26(1) *International Political Science Review* 91-106, 93. See also Implementing Policy Change (IPC) *Study of Monopolies and Competition Policy in Zimbabwe* (March 13, 1992) 6. ('*the Study of Monopolies and Competition Policy (1992)*') (on file with the writer).

⁸ Like many African states, Zimbabwe was under minority colonial rule since the late 19th Century. In 1965 the minority Ian Smith led government declared independence from the British in a historical event known as the Unilateral Declaration of Independence (UDI). This was not recognised as independence by the international community as it was not sanctioned by the colonial power hence regarded as nothing more than an act of defiance. After a protracted armed struggle, the country was officially granted independence under the black majority rule in 1980. See on history of Zimbabwe. See generally, Zvodgo CJM *A history of Zimbabwe, 1980-200 and postscript, Zimbabwe 2001-2008*(2009); Raftopoulos B and Mlambo AS *Becoming Zimbabwe: a history from the pre-colonial period to 2008* (2009).

Saharan states.⁹ This status was largely due to a number of events that preceded the independent state. Chief amongst them was the central and mostly favourable role that the then Southern Rhodesia (present day Zimbabwe) played during the defunct Federation of Rhodesia and Nyasaland between 1953 and 1963.¹⁰ Southern Rhodesia immensely benefited from being the Federation's industrial epicentre and supplier of manufactured goods to other federation member states who in turn provided markets, raw materials and cheap labour.¹¹ The country's manufacturing sector remarkably increased production boasting economic growth.¹² This growth was further enhanced by infrastructural developments in the form of higher education institutions,¹³ rail and road network and the construction of energy power generation facilities.¹⁴ These developments were not matched in any of the member states.

On the political front, the Unilateral Declaration of Independence by the Ian Smith led-administration in 1965 also influenced the economic status of the pre-independent state.¹⁵

⁹ Brett (2005)(note 7 above) 92,96; Arrighi G 'The Political Economy of Rhodesia' (1966) 39 *New Leftist* 35-65, 64.

¹⁰ The Federation of Southern Rhodesia and Nyasaland also known as the Central African Federation was formed in 1953 and dissolved in 1963 and was comprised of Southern Rhodesia (present day Zimbabwe) which was a self-governing colony and the two British protectorates in the Northern Rhodesia (present day Zambia) and Nyasaland (present day Malawi). See generally, Hazelwood A (ed.,) 'The Formation of Federal and Dissolution in Central Africa' in *African Integration and Disintegration; Cases in Economic and Political Union* (1967) and also Wills AJ *An Introduction to the History of Central Africa* (2nd ed) (1967) particularly Chapter VIII 'Three Territories.'

¹¹ Moyo PN 'Some Critical Issues in the Industrialisation of Zimbabwe' (1989) *Working Paper Series No. 57*, 3. Presentation at ISS Industrial Seminar, 14 April 1989, available at http://www.iese.ac.mz/lib/saber/09_125.pdf. (accessed 28 August 2011). The author even argued that Southern Rhodesia utilised Zambia's copper revenue for its infrastructural development.

¹² Moyo (1989) (note 11 above) 4. The number of manufacturing establishments in Southern Rhodesia rose from a mere 299 in 1938 to 962 in 1960 and the economic growth rate increased above nine percentage points between 1953 and 1960.

¹³ The University College of Rhodesia Nyasaland was established in the then Salisbury (the Federation capital) in 1955 and become the University of Rhodesia in 1971 and upon independence in 1980 was renamed the University of Zimbabwe. See generally Kirkwood K 'The Early History of the University of Rhodesia: a review' (1979) 5(1) *Oxford Review of Education* 23 and also Gelfand M A *Non -Racial Island of Learning: a history of the University College of Rhodesia from its inception to 1966* (1978).

¹⁴ The Kariba dam was constructed between 1955 and 1959 and completed in 1977 with the Hydro-electricity power station being in existence since 1960.

¹⁵ See generally on the economic development implications of UDI, Moyo (1989) (note 11 above).

UDI was followed by an international backlash led by Britain which caused the imposition of a series of economic sanctions in 1966.¹⁶ However, the Smith regime devised various survival strategies in a bid to circumvent these sanctions¹⁷ including an industrial import substitution policy between 1967 and 1974¹⁸ which resulted in growth in domestic manufacturing as a result of the decline in exports hence the creation of a demand on the local market.¹⁹

In a bid to preserve scarce resources, tight foreign exchange control and allocation policies were introduced. Businesses that were deemed as the regime's strategic partners in the sanctions-bursting strategy were favoured in the allocation process.²⁰ These big businesses who became willing partners in the scheme, in return enjoyed state protected monopolies and oligopolies that exercised unregulated market dominance. This unregulated dominance was mostly abused to the detriment of competition.²¹

¹⁶ The United Nations (UN) between 1965 and 1979 adopted a series of resolutions to effect mandatory economic sanctions on the then- Ian Smith's regime in Southern Rhodesia. The economic sanctions imposed by the UN Security Council under Chapter VII of the UN Charter included an extensive ban on trade in goods and a prohibition on credits and payments as well as sea and air transportation. See UN Security Council Resolution 232 of 16 December 1966 which was one of the resolutions adopted against the Smith regime after UDI. (Available at http://en.wikisource.org/wiki/United_Nations_Security_Council_Resolution_232. (Accessed 29 August 2011). UDI was regarded as a means to perpetuate an apartheid society. See for reasons for the sanctions, Arrighi (1966)(note 9 above) 60-61, 64.

¹⁷ See on the sanctions bursting strategies, Davis R, Rottso J and Torvik R 'Short-Run Consequences of Trade Liberalization: A Computable General Equilibrium Model of Zimbabwe' (1998) 20/3 *Journal of Policy Modelling* 305 at 306; Moyo (1989) (note 11 above) 5.

¹⁸ Ibid.

¹⁹ Moyo (1989) (note 11 above) 5.

²⁰ See Kububa AJ 'Zimbabwe' in United Nations Conference on Trade and Development (UNCTAD) *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Countries; Thailand, Lao, Kenya, Zambia and Zimbabwe* [UNCTAD/DITC/CLP/2005/2] (2005 ed) 279. Kububa is the Executive Director and Chief Executive Officer of the Competition and Tariff Commission of Zimbabwe.

²¹ Entities abuse their dominant market position if they use such a position to, *inter alia*, if is a producer, restrict output and or favour a particular supplier; fix prices of a particular product or service and commonly increase the prices without necessarily being influenced by sound economic reasoning such as the influence of supply and demand. See generally on abuse of dominance Case 6/7 *Continental Can Co. Inc., v Commission* [1973] ECR 215, [1973] CMLR 199 par. 26

The highly regulated and closely controlled economic structure was retained albeit for different reasons by the post-colonial regime.²² The post-colonial regime acknowledged the strength of the existing economic structure thus, on the one hand, necessitating the retention of a strong economic base and on the other hand, appreciating the need to meet the high expectations of the poor majority.²³ The Government adopted a largely populist Socialist ideology²⁴ to guide its socio-economic and political policies.²⁵ This ideology placed emphasis on the advancement of several critical social objectives such as the provision of free education and health care facilities, housing as well as job creation.²⁶ However, this was only possible with a strong economic base hence the need to retain the pre-colonial economic structure which benefited the white minority.²⁷ There was thus a need to adjust the economic structure in order to accommodate the newly adopted policies.

The Government increased its direct participation in the economy in a bid to, *inter alia*, limit big businesses' influence on the economy.²⁸ These businesses have played a crucial role in sustaining the erstwhile regime and it was natural that the post-independence Government viewed them with scepticism.²⁹ Big businesses were considered a threat to the advancement of a Socialist state as they were regarded as advocates of capitalism³⁰ for their monopolistic situations allowed them to engage in exploitative practices that largely affected the

²² Brett (2005) (note 7 above) 96.

²³ Brett (2005) (note 7 above) 95; Kovacic WE 'Competition Policy, Economic Development, And the Transition to Free Markets In the Third World: The Case of Zimbabwe' (1992-93) 61 *Antitrust Law Journal* 250-270, 255.

²⁴ Knight VC 'Growing Opposition in Zimbabwe' (1991) 20 *A Journal of Opinion* 23. See also Sigmund PE *The Ideologies of Developing Nations* (1967) 11-21 (socialism animated many post-colonial development programs to such an extent that it become as if it was the only path ideal for their development). See also Kovacic (1992-93)(note 23 above) 253. This ideology advocated for a system of governance characterized by centrally planned or common ownership of the means of production and the distribution of goods in a society.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Kububa AJ 'Overview of Competition Policy and Law in Zimbabwe' (2009). *Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa*, Pretoria (3-4 September 2009) 1.

²⁹ See Herbst J 'The Consequences of Ideology in Zimbabwe' in Baynom S (ed.,) *Zimbabwe in Transition* (1992) 54

³⁰ Ibid.

government's primary concern: the poor majority. Thus several measures were put in place to curb these practices.³¹ These policy measures included the creation and strengthening of public enterprises, maintaining of price controls and foreign exchange control and allocation system; labour and wage regulations.³²

The creation of new and strengthening of existing public enterprises³³ was meant to neutralise the influence of private big businesses by ensuring direct state participation in the economy.³⁴ Regulation of the labour market through imposition of mandatory minimum wages and prohibition of dismissals³⁵ was meant to both counter exploitative practices by big businesses where they could exploit the labour force in order to achieve huge profits as well as promote socialist ideologies of protecting the rights of the workers.³⁶ Other measures such as price controls, tight foreign exchange controls and allocations, as well as investment regulations were retained to neutralise private big businesses' influence on the economy as well as to promote direct economic participation by Government.³⁷

The desire to curb big businesses monopolies through several policy measures created a number of problems. The creation and strengthening of public enterprises that were heavily subsidised and economically inefficient not only caused a budgetary burden but also perpetuated the monopoly situation as they simply replaced the private sector monopoly with public monopolies.³⁸ Price control, labour market regulations and foreign exchange controls and allocation erected entry barriers that impeded economic growth resulting in a stagnant economy and bred rent-seeking among the incumbents.³⁹ Thus these measures combined to

³¹ See generally on measures, Kububa (2005)(note 20 above) 280; Kububa (2009) (note 27 above) 1.

³² Ibid. For detailed discussion see 2.3 below.

³³ See Robertson J 'Public Finance' in Baynam SC (ed.), *Zimbabwe in Transition* (1992) 113-4.

³⁴ Kububa (2005)(note 20 above) 280; Kovacic (1992-93) (note 23 above) 256; Brett (2005) (note 7 above) 96.

³⁵ Kububa (2009)(note 28 above) 2.

³⁶ Ibid.

³⁷ Ibid.

³⁸ See generally, Nziramasanga MT and Lee M 'Redistributive Policies and Economic Growth' in Mumbengegwi C (ed.), *Macroeconomic and Structural Adjustment Policies in Zimbabwe* (2002) 56 (the heavily subsidised parastatals contributed to government debt).

³⁹ Rent seeking is when a monopoly reaps abnormally huge profits due to its charging of monopoly prices that it could not due in a competitive market environment. See Brett (2005)(note 7 above) 96.

create an uncompetitive market, stagnant economy, declining investment levels, rising unemployment levels and poverty.⁴⁰

The adverse effects of the early policy measures on the economy to a large extent forced the government into rethinking its economic strategies resulting in the introduction of market-based reforms in the early 1990s.⁴¹ It is through these reforms that the need for a regulatory and enforcement mechanism became apparent hence the adoption of a competition regime as a tool to provide impetus to the reforms through the prospect of dealing with the multitude of socio-economic ills as well as spurring economic growth.⁴²

A number of external factors also contributed to the adoption of a formal competition regime in Zimbabwe. It is strongly believed that the collapse of the former Soviet Union in 1989 was a chief contributor to this cause.⁴³ The Government had upon independence in 1980, modelled its economic and political ideologies on the Soviet model.⁴⁴ This event created an ideological vacuum in many developing economies such as Zimbabwe that were then forced to contemplate market-based liberal reforms.⁴⁵

The ever increasing momentum of the global and regional trade arrangements that advocated for liberal markets also influenced the adoption of a formal competition system.⁴⁶ A central

⁴⁰ Kovacic (1992-93) (note 23 above) 256.

⁴¹ Brett (2005) (note 7 above) 99 (the crisis generated consensus among divergent interests groups that there was a need to replace the old central economic planning with market based reforms.)

⁴² Kovacic (1992-1993)(note 23 above) 253.

⁴³ See generally, Hamner KJ 'The Globalisation of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China' (2001-2002) 11(2) *Journal of Transnational Law and Policy* 385,398 Although this article focused on the US, the EU , China and Latin America, the circumstances surrounding the reforms of previously centralised economies in a bid to revive the economies of most third world countries are almost similar and applicable to the Zimbabwean situation in the early years of independence

⁴⁴ Ibid.

⁴⁵ Kovacic WE 'The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries' (1996) 11(3) *American University International Law Review* 437-474, 438 (using Mongolia as an example).

⁴⁶ Kovacic WE 'Creating New Competition Policy in Transition Economies' (1997-98) 23 (2) *Brooklyn Journal of International Law*(1997-98) 403; Hatzenberg T 'Competition Policy in SADC ' (2002) Annual Forum, Glenburn Lodge, Muldersdrift, South Africa (giving the example of the Southern African Customs Union (SACU) Agreement which requires each member country to have a competition policy). See also Hamner (2001-2002)(note 43 above) 387 (the average worldwide tariffs had dropped due to the rise of multilateral trade

feature of these trade arrangements is the dismantling of unnecessary trade restrictions.⁴⁷ To enable the domestic industries to benefit from these arrangements, there was a need to enhance the competitiveness of these domestic industries by allowing domestic competition that encourages efficiency in production of goods and services rather than relying on restrictive trade practices.⁴⁸ The liberal market movement also opened up domestic markets to foreign producers and exposed the former to unfair trade practices such as dumping.⁴⁹ This necessitated the need to have an effective regulator and enforcement mechanisms that competition regulation could provide.⁵⁰

The introduction of market-based economic reforms highlighted the need for an effective formal competition regime in Zimbabwe. Studies conducted to explore the possibilities of formulating and implementing a competition system in Zimbabwe revealed that various policy measures that were in place had resulted in an uncompetitive economic structure characterised by monopolies and oligopolies that potentially engaged in anti-competitive

agreements and the reduction of national trade and investment barriers). See further Pitsofsky R 'FTC Staff Report on Competition Policy: Six Months After' (1996) Remarks before the *American Bar Association Section of Antitrust Law* (November 7, 1996), available at <http://www.ftc.gov/speeches/pitofsky/rpabag11.htm>. (accessed 20 September 2011).

⁴⁷ For instance, the Preamble to the General Agreement of Trade and Tariff (GATT) of 1947 provides that the multilateral agreement aims at 'substantially reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.' These goals are still part of the World Trade Organisation which in 1994, replaced GATT but still adopted GATT as one of its legal instruments. Articles 3 and 6 of the Southern African Development Committee (SADC) Protocol on Trade of 1996 also reiterated the need for a unrestricticted trade. Article 6 in particular requires Member States to 'adopt policies and implement measures to eliminate all existing forms of Non-Tariff Barriers (NTBs) and refrain from imposing any new NTBs.') Article 49 of the Common Market for Eastern and Southern Africa (COMESA) Treaty of 1994 also provides for unrestricted trade. See generally on regional trade agreements and competition law and policy, Heimler A and Jenny F 'Regional Agreements' (2013) in Lewis D (eds.), *Building New Competition Law Regimes: Selected Essays* 183-203.

⁴⁸ Hamner (note 43 above) 386.

⁴⁹ Dumping refers to the sale of a product in an expert market at a price lower than what the same product is sold in the domestic market by the exporting firm. On negative effects of a free market- dumping, see generally Wooton I and Zarnadi M 'Trade and Competition Policy: Anti-Dumping versus Anti-Trust' (2002), available at <http://homepages.strath.ac.uk/~hbs03116/Research/Trade%20and%20Competition%20Policy%20Final.pdf>, (accessed 10 January 2013) and Tylor M *International Competition Law: A New Dimension for the WTO?* (2006).

⁵⁰ Singh and Dhumale (1999)(note 1 above) 5; Taylor (2006)(note 49 above) 260.

behaviour and practices to the detriment of the wider economy and consumers.⁵¹ The IPC Study played an important role in the formulation of a competition regulatory framework in Zimbabwe. The study identified the competition concerns in the economy and explored several options for a suitable regulatory framework before crucially recommending the adoption of a formal competition regulatory system.⁵²

Having provided an overview of the origins of the formal competition regulation system in Zimbabwe and accordingly a roadmap to this chapter, focus will now turn to a detailed discussion of the features highlighted above.

2.3 Regulation of monopolies and economic activities: 1980 to 1990.

2.3.1 Regulation of economic activities in the first decade of independence (1980 to 1990)

In 1980, the independent state realised that there were a number of issues that posed serious challenges and required attention.⁵³ It is submitted that these realisations were largely a need for the Government to satisfy its ideological mandate as a Socialist state to the poor majority. Thus the fact that the Government retained a corporatist system of economic management⁵⁴ that was used by its predecessor was not surprising.⁵⁵ Policy measures such as price controls, foreign exchange controls and allocation, direct participation in productive economic sectors through public enterprises as well as labour market regulations were adopted.⁵⁶ Whereas the erstwhile regime had utilised tight control and a highly regulated system to deal with the

⁵¹ *Study of Monopolies and Competition Policy* (1992).

⁵² *Ibid*, 5, 65, 71-80.

⁵³ Competition and Tariff Commission (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe : Part 1- Mergers and Acquisitions* (2006) (on file with writer) 14.

⁵⁴ Wiarda HJ *Corporatism and comparative politics: The other Great 'Ism'* (1996) 23-24. Wiarda defines corporatism as ' a system of economic, political, or social organisation that involves division of people of the society into corporate groups, such as agricultural, business, ethnic, labour, military, patronage, or scientific affiliations, on basis of common interests.'

⁵⁵ Brett (2005) (note 7 above) 95, CTC 15; Kovacic (1992-93)(note 23 above) 253. Kovacic noted that 'the "socialism-for-whites" regulatory machinery that was established under UDI provided a platform for the transferring of social and economic power to black majority.' 'Socialism-for-whites' describes the colonial administrative system that was screwed in favour of whites. See Herbst J *State Politics in Zimbabwe* (1990) 120.

⁵⁶ Brett (2005)(note 7 above) 95.

economic sanctions,⁵⁷ the new regime maintained the same as part of its socialist oriented economic ideology.⁵⁸

The Government acknowledged the need for a strong economy that would support its social policies like improving the education and health care sectors. However, the existing economic structure was designed to exclusively benefit the white minority who owned and controlled the means of production.⁵⁹ Private big businesses in particular had played a pivotal role in sustaining the erstwhile regime and enjoyed unrestricted monopoly.⁶⁰ The Government identified them as a threat to the new socialist ideology due to their potential to exploit the poor through rent-seeking and other exploitative practices such as low wages.⁶¹ Limiting the influence of these monopolies on the economy became central to Government's policies.⁶² These measures and their implications of the country's competitive economic structure will be discussed below.

2.3.2 Measures to regulate economic activities

2.3.2.1 The creation of public enterprises

Public enterprises were created and those in existence were further strengthened.⁶³ This policy which was another of the many that were retained from the predecessor regime saw a number of utilities being brought under the Government's ownership or control.⁶⁴ This was meant to limit the influence of private big business monopolies and oligopolies on the economy.⁶⁵ The Government was wary of these businesses' ability to influence the economy through the abuse their dominant market positions by engaging in exploitative and restrictive

⁵⁷ Ibid, 96.

⁵⁸ Ibid.

⁵⁹ *Study of Monopolies and Competition Policy* (1992) 1 par.1.1. See generally, Arrighi (1966)(note 9 above) .

⁶⁰ Kububa (2005)(note 20 above) 297.

⁶¹ Herbst (1992) (note 29 above) 54.

⁶² Brett (2005) (note 7 above) 93.

⁶³ Robertson (1992) (note 33 above) 113-4.

⁶⁴ Ibid.

⁶⁵ Kububa (2005) (note 20 above) 280.

behaviour and practises that would harm the economy to the detriment of the poor.⁶⁶ Public enterprises also ensured that the Government directly participated in the country's industrial and commercial sectors.⁶⁷

In order to ensure the survival of these public entities, government provided a rather conducive though uneconomic environment for them to operate. Public enterprises were heavily subsidised.⁶⁸ Government through various legislative measures, created statutory parastatals or public enterprises and gave them exclusive rights to produce, market and distribute particular goods or services.⁶⁹ This scenario had two main effects on the country's economic performance as well as the competitive structure of the market.

On the overall economy, the creation and maintenance of public enterprises that were heavily subsidised contributed to the Government's debt and sustained the budgetary deficit due to the burden they placed on the financial resources.⁷⁰ Given that public enterprises were created to deal with, *inter alia*, the problems created by monopolies in the economy, one would have expected them to do as such. Unfortunately, their creation and strengthening was merely a replacement of one form of monopoly with another.⁷¹ This is true particularly where the Government through certain pieces of legislation or other administrative practices such as licensing requirements,⁷² exclusively conferred upon statutory bodies or parastatals certain

⁶⁶ Brett (2005)(note 7 above) 96. These practice generally includes the ability of dominant firms on the market to manipulate prices through such practices as predation which in the long run creates entry barriers to new entrants who might not be able to compete with the incumbents thereby lessening competition, monopoly-rent seeking through price hiking.

⁶⁷ Ibid.

⁶⁸ Nziramasanga and Lee (2002)(note 38 above)56.

⁶⁹ *Study of Monopolies and Competition Policy* (1992) 38; Kububa (2009)(note 28 above)1-2.

⁷⁰ See Nziramasanga and Lee (2005) (note 38 above) 56; Robertson (1992) (note 33 above) 106.

⁷¹ See Singh and Dhumale (1999)(note 1 above) 8.

⁷² An example is the Broadcasting Services Act (No.3 of 2001) establishing the Broadcasting Authority of Zimbabwe (BAZ) as the authority responsible for broadcasting licensing. The broadcasting laws of Zimbabwe has been at the centre of many Constitutional challenges due to their administrative deficiencies that despite several legislative amendments, have seen the public broadcaster enjoying broadcasting monopoly in an industry that is supposed to be liberalised. In *Capital Radio (Pvt) Ltd v The Minister of Information, Post and Telecommunications* S-99-200, the Supreme Court of Zimbabwe declared unconstitutional section 27 of the Broadcasting Act [Chapter 12:01] of 1973 which provided that only the ZBC can carry our broadcasting services in Zimbabwe and section 14 of the Radio Communications Services Act on the basis that the provisions

privileges to produce, market or distribute certain goods or services.⁷³ This creation of Government controlled monopolies can be said to have had a telling effect on both the economy and the market structure. It is submitted that economically they continued to drain the state resources. Competitively, they fermented the culture of monopolies that were generally inefficient and the privileges they enjoyed acted as an ‘entry barrier’⁷⁴ to new entrants who could not in most cases clear the administrative hurdles and compete profitably with the subsidised products.⁷⁵

It can be concluded that although the motive behind the creation or strengthening of public enterprises was to counter the mostly negative monopolistic and oligopolistic culture of big private businesses that was encouraged by the erstwhile regime, this largely succeeded in creating a different form of government controlled public monopolies and oligopolies and thus significant entry barriers.⁷⁶

infringed upon the Constitutionally guaranteed right to freedom of expression in terms of section 20(1) of the Constitution of Zimbabwe. However, the Government’s response whenever a court ruled against it was either to effect an amendment to the statute or introduce some regulations which one way or the other ensured the status quo. See further examples of *Retrofit (PVT) Ltd v The PTC* (1995) 90 (ZSC) BCLR 1262 (2) where a private telephone operator successfully challenged the constitutionality of the monopoly entrusted by the Government owned Post and Telecommunications Corporations (PTC).

⁷³ Nziramasanga and Lee (2002)(note 38 above) 56.

⁷⁴ Entry barriers are difficult to define with the matter turning on the Chicago-Realist debate. The former group view barriers to entry as the cost that the new entrants must pay which costs were not incurred by the incumbents. See Armentano D *Antitrust Policy* (1986) 31-44; Stigler G *The Organization of Industry* (1968) 67-70; Demsetz ‘Barriers to Entry’ (1982)72 *American Economic Review* 47 and generally Bork R *The Antitrust Paradox: A Policy at War with itself (with a new introduction and epilogue)* (1993) 310-329. The Realists broadly describes barriers to entry as any ‘instrumental concept that determine the nature and extent of forces outside the market that may increase the reaction of the incumbents to consumer wants and needs’. See for the latter view, Fox EM and Sullivan LA ‘Antitrust Retrospective and Prospective: Where are we coming from? Where are we going?’ (1987) 62 *New York University Law Review* 936, 974; Bain J *Barriers to New Competition* (1956) (barriers to entry are factors that allow incumbents to raise prices that are above cost without attracting entry). However, this writer prefers a mid-way house whereby the phrase is defined to include any hindrance to entry, be it a result of actions of the incumbents or due to some policy measures.

⁷⁵ This practice is prevalent in the agricultural marketing sectors where state agencies such as the Grain Marketing Board (GMB) and the Cotton Company of Zimbabwe (COTTCO) still enjoys the greater share of the market despite the presence of the smaller players.

⁷⁶ Kovacic (1992-93)(note 23 above) 256.

2.3.2.2 Foreign exchange control

At independence, as the case in most developing economies, the majority of big businesses operating in Zimbabwe were either owned by the minority white population or multinational corporations.⁷⁷ Whereas the colonial regime had used the foreign exchange system to preserve scarce resources in the face of economic sanctions as well as to fund strategic industries,⁷⁸ the post-independent Government retained the policy to exert its control on the economy by curbing the influence of big businesses that were predominantly minority or foreign owned.⁷⁹ It can thus be submitted that this measure, besides serving as an important tool in preserving scarce foreign exchange, also served to whip businesses in line with the Government's pro-majority policies that were anti-market exploitation.

Most significantly, foreign exchange allocation was used as an informal mechanism for diluting the influence these big businesses were perceived to be having on the economy.⁸⁰ However, taken in the big scheme of things, these measures created an uneven playing field in that they potentially discriminated against certain businesses in favour of others. This created entry barriers as certain groups that failed to meet the criteria for allocation were resultantly excluded from economic participation.⁸¹ This latter group included mostly small black entrepreneurs who felt excluded from Government's economic policies and provided a source for political discontentment. Thus it has been argued that the adoption of market reforms in this regard was an essential strategy to silence dissenting voices who felt marginalised.⁸²

2.3.2.3 Price controls

A market dominated by monopolies and oligopolies is always a potential breeding ground for anti-competitive behaviour and practices.⁸³ Although monopolies and oligopolies are not per

⁷⁷ *Study of Monopolies and Competition Policy* (1992) 50 and Kububa (2005)(note 20 above) 280.

⁷⁸ Kububa (2005)(note 20 above) 279.

⁷⁹ See *Study of Monopolies and Competition Policy* (1992) 50 and Kububa (2005)(note 20 above) 280.

⁸⁰ *Study of Monopolies and Competition Policy* (1992) 50.

⁸¹ Kovacic (1992-1993) (note 23 above) 258.

⁸² *Ibid.* See also Brett (2005)(note 7 above) 93.

⁸³ A single (pure monopoly) or even two (oligopoly) entity(ies) on any given market yield the power to engage in anti-competitive practices for they have no motivation to be competitive. In other words, they can still restrict

se anti-competitive or harmful to competition, they have the potential and capacity to engage in practices that are anti-competitive. The existence of monopolies and oligopolies on the Zimbabwean economy posed this threat.⁸⁴ Big businesses monopolies enjoyed a dominant market position and power hence the potential to abuse it.⁸⁵ Abuse of market power and dominant positions on the market took the form of such anti-competitive practices as collusion, where firms could agree on maintaining certain pricing⁸⁶ to the detriment of the consuming public who in the case of Zimbabwe were the poor.

Price control measures were maintained on several goods and services.⁸⁷ These were meant to both shield the poor majority from unscrupulous business practices that could deprive them from affording and accessing basic foodstuffs and other necessities as well as to curb the latter's influence on the economy.⁸⁸

The price control measures provided evidence of early legislative attempts to regulate restrictive business practices (RBPs).⁸⁹ The Control of Goods Act of 1954⁹⁰ though in a

pout in order to create an artificial shortage on the market and affect the supply of such a product or service thereby justifying price increases. See generally, Czinkota MR *Global Business* (3rd ed)(2001) 268.

⁸⁴ *Study of Monopolies and Competition Policy* (1992) 18.

⁸⁵ *Ibid*, 38. See also Hamner (2001-2002) (note 43 above) 388 (monopolistic power enables firms to engage in anti-competitive practices such as output restriction and in the process reap monopoly profits at the expense of consumers who must pay abnormally higher prices than they would otherwise pay for in a competitive environment. See also Czinkota *et al* (2001)(note 83 above) 268.

⁸⁶ Collusion describes a situation where firms in a given industry or market coordinate their pricing and output decisions with the result that prices are either increased or maintained and output is restricted not on the basis of economic consideration but rather artificially. See Hamner (2001-2002)(note 43 above) 389 and generally Czinkota *et al* (2001)(note 83 above) 268-70.

⁸⁷*Study of Monopolies and Competition Policy* (1992) 49-50. It must be noted however that the price control measures were not new for they were statutes inherited from the colonial regime that dealt with the same. An example of such legislation included the Control of Goods Act 12 of 1954 that was later repealed in 1989 by *Statutory Instrument* (S.I) 153B of 1989.

⁸⁸*Study of Monopolies and Competition Policy* (1992) 49; Kububa (2009)(note 28 above) 1.

⁸⁹ *Study of Monopolies and Competition Policy* (1992) 49; Kububa (2009)(note 28 above) . Restrictive Business Practices denotes a form of abuse of market dominant position whereby dominant firms acting individually or collectively engages in practices that either prevents or restricts the entry onto the market of new firms or restrain or hamper fair competition on the market through, *inter alia*, apportioning of customers or markets amongst the dominant firms or colluding to fix prices and output.

⁹⁰ Control of Goods Act 12 of 1954.

limited scope, contained a number of provisions that dealt with certain aspects of RBPs.⁹¹ The Act notably prohibited the collective establishment of prices, a practice commonly referred to as horizontal price-fixing (a practice tantamount to collusive behaviour or price cartels).⁹² Section 10 of this statute was headed the ‘Prohibition Against Establishing Prices by Associations and Others’ and provided that

No association or group of persons who in the course of their individual business sell any commodities or render the services of delivery of any commodities shall, without the prior approval of the Minister, establish a uniform price or uniform prices or uniform margin of profit for observance by the members of such association or group or any other person in respect of the supply of such commodities or the service of delivery thereof.⁹³

Although the wording of this provision created an impression that price cartels were in some instances allowed, one can argue that the measure was somehow plausible as a little step towards the regulation of otherwise anti-competitive conduct by an association or group of businesses that potentially negatively impacts upon consumers and non-members of such association or group. The Act further prohibited ‘Conditional Selling’ whereby a seller avails certain products to the buyer on condition that the latter purchases certain of the products or services from the former.⁹⁴

Although the statutory price control measures had their shortcomings as an effective mechanism to regulate anti-competitive business behaviour especially given their limited scope of application,⁹⁵ they were an important step towards the formulation and adoption of a formal competition regime. The Control of Goods Act of 1954 and later the *Statutory*

⁹¹ See 92 below.

⁹² Price cartels denotes any form of agreement, tacit or express, in which supposed competing sellers fix the process of the products they sell to the detriment of consumers. See generally Posner RA *Economic Analysis of Law* (8th ed) (2011) 369.

⁹³ Section 10 of the Control of Goods Act of 1954 (repealed by Control of Goods (Amendment Regulation) in *Statutory Instrument* 153B of 1989).

⁹⁴ This practice is commonly referred to as ‘tying.’

⁹⁵ The Control of Goods Act only applied to prices of certain controlled goods implying that sellers were free to practice other forms on anti-competitive conduct in relation to goods that were outside the purview of the statute without sanctions.

Instrument 153b of 1989⁹⁶ both provided a foundation upon which the legal framework of a modern competition law regime could be established.

2.3.2.4 Labour market regulations

Employment creation and protection was a central priority to the post-independent Government.⁹⁷ The regulation of the labour market was thus necessary in both achieving this aim and exerting control over business.⁹⁸ Labour regulations included the prohibitions against dismissals without Government approvals.⁹⁹ These approvals were not readily granted.¹⁰⁰ These measures restricted businesses' freedom to retrench employees as such practices were deemed as exploitative and therefore the labour regulations aimed at providing employees with job security.

The Government also adopted legislative measures to fix mandatory wage increases.¹⁰¹ These regulatory measures were deemed necessary to control big businesses' ability to obtain huge profits as a result of their monopolies and exploitation of the workforce.¹⁰² The effectiveness

⁹⁶ Note 93 above.

⁹⁷ See note 54 above.

⁹⁸ Kububa (2009)(note 28 above) 2.

⁹⁹ The state's approval was required whenever an employer contemplated dismissing or retrenching on notice employees. The Emergency Powers (Termination of Employment) Regulations Statutory Instrument (S.I) 714B/1982 prohibited employers from dismissing employees on notice or retrenching workers without obtaining approval from the Minister of Labour. See also Kovacic (1992-93) (note 23 above) 256.

¹⁰⁰ Kovacic (1992-93)(note 23 above) 256.

¹⁰¹ The Minimum Wages Act No 4 of 1980 empowered the state to issue mandatory minimum wage notices. Examples of such included the Minimum Wages (Specification of Wages) Notice. Statutory Instrument (S.I.) 367/1980 providing for substantial real increases to the black working class including the agricultural and domestic sectors. See also Gwisai M *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* (2006) 24 and *Study of Monopolies and Competition Policy* (1992) 50.

¹⁰² For instance the 1985 Labour Relations Act conferred upon the state regulatory powers in respect of virtually every aspect of the employment relationship and these regulations superseded any contract or collective bargaining agreement. Examples of such regulations included the Labour Relations (General Conditions of Employment) Regulations, Statutory Instrument (S.I.) 371/1985 which provide for a compulsory state approval for dismissals and retrenchment. Furthermore, the Minister of Labour was empowered to suspend or vary any such collective bargaining agreements in the interest of consumers or members of the public. See also Gwisai (2006)(note 101 above) 24.

of these measures insofar as regulating monopolies is concerned is somewhat questionable. One can argue that an increase in labour costs can contribute to a business' production costs and hence motivate the need to raise prices for products to offset the same. Another factor which greatly militated against such measures was the potential barrier it erected for new entrants who feared the strictly regulated labour market.¹⁰³ However, the idea of attempting to control the ability of businesses to exercise market power as a result of their monopolies was plausible though the effectiveness of such measures is questionable.

Labour market regulations that were meant to protect workers from exploitative business practices as well as dilute the influence of business on the economy yielded mostly negative results. Employment creation remained low and unemployment levels increased.¹⁰⁴ The Government through the public service and parastatals remained the major employer, a situation that continued to exert pressure upon the country's budgetary needs.¹⁰⁵ It has been argued that whereas wage restrictions cannot be seen to have contributed towards rising unemployment levels, control over dismissals certainly did.¹⁰⁶ It is submitted that employers were even scared to hire new workers given the difficulties they might face in trying to lay them off. This inevitably erected entry barriers thereby contributing to a stagnant economy.

2.3.2.5 The implications of the economic regulatory measures: some comments

The early measures adopted between 1980 and 1990 to control the influence of monopolies on the economy enabled the Government to directly participate in the economic activities of

¹⁰³ On regulated labour market as an entry barrier. See Fallon PR and Lucas REB 'Job security Regulations and the Dynamic Demand for Industrial Labour in India and Zimbabwe' (1993) 40 *Journal of Developmental Economics* 241-275, 54.

¹⁰⁴ Herbst (1992)(note 29 above) 58 (employment creation averaged a mere 10,000 jobs per annum over the first decade of independence, that is between 1980 and 1990). See also Government of Zimbabwe 'Retrenchment Figures per Industry as from 10.01.91 to 31.12.1995' Ministry of Labour (1996) (between 1991 and 1995, about 576 firms reported to have retrenched 26.323 workers). Kovacic (1992-93)(note 23 above) 257 noted that by 1991 approximately 200,000 Zimbabweans leave school and enter the employment market which can only absorb no more than 30,000 people with majority being in the public service.

¹⁰⁵ Kovacic (1992-93)(note 23 above)256. The Government relied heavily on parastatals to achieve its employment objectives with the Government owned Zimbabwe Steel Company (ZISCO) doubling its workforce in 1980 against a drop in production.

¹⁰⁶ Fallon and Lucas (1993) (note 103 above) 54.

the country, a situation that in many ways reflected the similarities in policies with its predecessor regime who had also sought direct participation in the economy. One notable achievement of these measures was that the Government was able to exert a substantial degree of influence and control over monopolies and oligopolies thereby limiting their ability to realise excessive and exploitative profits. This was evidenced by the foreign owned firms' inability to repatriate excess profits.¹⁰⁷ To some extent, price controls and labour market regulations combined to remove the traditional wage differentiations and stabilised prices ensuring predictability.¹⁰⁸

Significantly, these measures heavily impacted upon the competitive structure of the economy. Creation of public enterprises merely replaced private monopolies and the fact that they enjoyed privileged positions through either statutory provisions or administrative measures erected high entry barriers.¹⁰⁹ It is submitted that instead of dealing with monopolies and the problems they pose to the economy and the public, this only preserved the *status quo*. The only difference being that the very ills that were meant to be addressed by the measures were masked in a different cloak. Price controls and labour regulations presented high operational risk for new entrants thereby contributing to the already high entry barrier.¹¹⁰ Further deterrents came in the form of foreign exchange allocation mechanisms and licensing requirements.¹¹¹ These deterrents to a larger extent provided incentives for incumbent firms to engage in anti-competitive practices such as collusive dealings and other forms of restrictive business practices.¹¹²

The early measures aimed at regulating monopolies combined to produce negative socio-economic results that presented challenges to the Zimbabwean Government. These included rising levels of unemployment, low levels of investment, stagnant economic growth

¹⁰⁷ *Study of Monopolies and Competition Policy* (1992) 51.

¹⁰⁸ See a contrary view from Gwisai who argued that the numerous early labour reforms exhibited a continuous trend of state corporatism and to a large extent was not beneficial to workers. He pointed out in particular the introduction of collective bargaining councils and what he termed as 'employer controlled codes' that replaced state control of wages and dismissals as contributing to the exploitation of workers in an increasingly capitalist society. See Gwisai (2006)(note 101 above) 24 and 27.

¹⁰⁹ See 2.3.2.1 above.

¹¹⁰ See 2.3.2.1 and 2.3.2.4 above.

¹¹¹ See 2.3.2.2 above.

¹¹² *Study of Monopolies and Competition Policy* (1992) 51.

characterised by persistent fiscal deficit, increase in poverty levels, sluggish export growth accounting for shortages of foreign exchange.¹¹³ These effects were seen as major factors that inhibited the economic growth and as a potential source for political instability.¹¹⁴ This resulted in the adoption of liberal market-based reforms in the early 1990s.¹¹⁵ It was the formulation and subsequent adoption of comprehensive market-based economic reforms that highlighted the need for a complementary regulatory mechanism that was to be provided by formal competition law. It was realised that market-based reforms on their own were not adequate to achieve the Government's multiple objectives.¹¹⁶

The economic reform measures contained in the Government's *Framework for Economic Reforms* encompassed the Enhanced Structural Adjustment Programme (ESAP).¹¹⁷ The following part will exclusively discuss how ESAP influenced the development of a formal competition system in Zimbabwe.

2.4 Competition law and policy as part of economic reforms: ESAP and the idea of a competition system

2.4.1 ESAP

¹¹³ Brett (2005) note 7 above) 97 (planning inhibited dynamism in the domestic economy). The regulatory constraints that were imposed upon investments negatively weighed on the country's monetary performance as evidenced from sustained fiscal deficit. See Robertson (1992) (note 33 above)106 (in the 123 years post-independence, the fiscal deficit only dipped below 10 % once.) A dismal economic performance was also evidenced from the country's Gross Domestic Production (GDP) (which is a market value of all the finished products and services produced within a country in a given period of time) which stood at 4.0% between 1986 and 1990 and plummeted to below 15 between 1991 and 1995. See Robertson J 'Macroeconomic Performance in Structural Adjustment: An Essay on Latrogenic Effects' (2002) in Mumbengegwi C (ed.,) *Macroeconomic and Structural Adjustment Policies in Zimbabwe* (2002) 26-31; Kovacic (1992-93) (note 23 above) 257 (policies failed to generated the growth needed to create employment).

¹¹⁴ Brett (2005) (note 7 above) 96 (the measures did not only fail to make any efforts to encourage, they suppressed the development of independent new African businesses whose rise were perceived as posing a threat to the ruling elite). See also Kovacic (1992-93) (note 23 above) 258 (measures were introduced partly to appease the previously marginalised indigenous entrepreneurs who were increasingly becoming discontented).

¹¹⁵ Ibid.

¹¹⁶ *Study of Monopolies and Competition Policy* (1992) 9.

¹¹⁷ See Government of Zimbabwe *Zimbabwe: A framework For Economic Reform 1991-1995* (1991); *Study of Monopolies and Competition Policy* (1992) 9.

In 1991 the Zimbabwean Government published its economic reform strategy. This comprehensive economic reform framework encompassed ESAP which was adopted in 1992.¹¹⁸ The economic reforms were adopted largely in response to the country's poor economic performance during the first decade of independence.¹¹⁹ This programme, despite being led and funded by multilateral donor and financial institutions such as the Bretton Woods Institutions,¹²⁰ was supported by the local 'elite',¹²¹ who interestingly perceived it as a 'home-grown' solution to the economic stagnation.¹²²

ESAP was designed to address the economic problems associated largely with a centrally planned economy.¹²³ These market based reforms were aimed at addressing macro-economic instability associated with persistent budgetary deficits.¹²⁴ One of the chief causes of this persistent budget deficit was increased Government expenditure that was not matched by

¹¹⁸ Kovacic (1992-93)(note 23 above) 254; Brett (2005)(note 7 above) 99; *Study of Monopolies and Competition Policy* (1992) 9.

¹¹⁹*Study of Monopolies and Competition Policy* (1992) 9. However see Brett (2005)(note 7 above) who argued that the reforms were a Government's response to strong pressure from indigenous groups. It is submitted that either way, the poor economic performance put the Government under immense pressure both from economic and political quarters. See also Kovacic (1992-93)(note 23 above) 258.

¹²⁰ The Bretton Woods institutions were established as a system of monetary management for commercial and financial relations among the industrialised states following the signing of the Bretton Woods Agreement in 1944 at the United Nations Monetary and Financial Conference held at Mount Washington Hotel in Bretton Woods, New Hampshire. The institutions comprise the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) which today forms part of the World Bank Group. Although the institutions' role have over the years changed from the original reconstruction of the infrastructure that was shattered by the World War II in the 1940s and the promotion of international economic co-operation, the latter still very much part of the system. ESAP in particular was funded by the institutions' (World Bank) Structural Adjustment Loan and Credit, the International Monetary Fund Extended Arrangement. See Bretton Woods Project 'Background to the Issues (Bretton Woods Project)' available at <http://www.brettonwoodsproject.org/background/index.shtml>. (Accessed 30 August 2011).

¹²¹ Brett (2005)(note 9 above) 99 commented that the decade of economic crisis generated consensus among the country's economic technocrats led by the then Minister of Finance, Dr. Bernard Chidzero that reforming the centrally planned economy was need to deal with the crisis.

¹²² Gwisai (2006) (note 97 above) 26.

¹²³ See note 119 above.

¹²⁴ ESAP (1992) 5. See also Brett (2005)(note 7 above) 99.

economic growth.¹²⁵ Price controls were replaced by market forces determinations.¹²⁶ Labour market regulations, administrative controls on investment decisions and foreign exchange allocation mechanisms that had contributed to low levels of unemployment, investment and economic stagnation, were all targeted for reforms.¹²⁷

2.4.2 The competition implications of ESAP

It has been shown that the Socialist oriented central economic planning and control created a hugely stagnant economy characterised by low levels of job creation,¹²⁸ lack of investment, lack of foreign exchange, high state expenditure,¹²⁹ and perennial fiscal deficit.¹³⁰ These factors created both internal and external pressure on the Zimbabwean Government to adopt reforms. Internally, the economic crisis slowed economic growth resulting in a stagnant economy that lagged in job creation and precipitated poverty.¹³¹ Investment control and other policies created barriers for the small indigenous entrepreneurs who became discontent with government policies and advocated for change.¹³² Externally the perennial budgetary deficit

¹²⁵ Brett (2005)(note 9 above) 96. The Government's general expenditure tripled from 32.5% of the country's GDP in 1979 to amount to 44.6% in 1989. See Nziramasanga and Lee (2002)(note 38 above)56 .

¹²⁶ ESAP (1992) 1 pars.50 and 51. Market forces determinations essentially describe an economic phenomenon in which the prices of goods and service on a given market are determined by supply and demand. The economic concept of 'the law' of supply and demand states that where the demand of a particular good or service is higher and such is not met by its supply, the price thereof increases. Similarly, an increase in the supply that is not matched by the demand will see a drop in prices. See generally on this concept,

¹²⁷ ESAP (1992) 12 para.53. See also Brett (2005)(note 7 above) 99.

¹²⁸ See note 102 above.

¹²⁹ Nziramasanga and Lee (2002) (note 36 above) 56; Robertson (1992) (note 32) 106; Kovacic (1992-93)(note 23 above) 257 (between 1980 and 1990, national expenditure as a percentage of GDP rose from 33% to 48%). ESAP also recognised this perennial budgetary deficit syndrome hence the proposals of measures aimed at curtailing government's activities that contributed to the same. See ESAP (1992) generally par. 19 'Fiscal and Monetary Policies' and particularly pars. 20 which provides for measures aimed at reducing central government deficit and para. 22 aimed at cutting net recurrent expenditure.

¹³⁰ Robertson (1992)(note 38 above) 106.

¹³¹ Brett(2005) (note 7 above) 98.

¹³² Kovacic (1992-93)(note 23 above) 258; Brett (2005)(note 7 above) 99.

led multilateral financing intuitions and the donor community to call for economic reforms as conditions for continued assistance.¹³³

ESAP thus was aimed at addressing these problems through adoption of such reforms as trade liberalisation, domestic deregulation, financial sector and monetary policy reforms, fiscal policy and tax reforms, labour market reforms and public enterprise reforms.¹³⁴ This part will thus focus on trade liberalisation, domestic deregulation, labour market reforms and the reform of public enterprise as they impact on competition issues.¹³⁵

2.4.2.1 Trade liberalisation

Trade regulation has been a hallmark of the Zimbabwean economic policy for a long time.¹³⁶ Prior to ESAP, the trade environment was characterised by restrictive import licensing systems, discretionary foreign exchange allocation and administered exchange rates.¹³⁷ Trade liberalisation within the context of ESAP took the form of import licensing reforms, reforming the foreign exchange allocation system as well as investment approval system.

What influence did these trade liberalisation measures have on competition issues? ESAP's trade liberalisation dimension substantially eliminated entry barriers associated with shortage of foreign currency by dismantling foreign exchange controls and removing import licensing

¹³³ Brett (2005)(note 7 above) 89 (shortages of credit as a result of sustained fiscal deficit); Kovacic (1992-93)(note 23 above) 257 (external donors insisted on growth-oriented structural reforms as a condition for providing financial support).

¹³⁴ ESAP (1992) 3; *Study of Monopolies and Competition Policy* (1992) 8. See also Kovacic (1992-93)(note 23 above) 253.

¹³⁵ The creation and strengthening of public enterprises that had acted as monopolies in most cases lessen competition. Price controls, investment controls and labour market regulation all combine to create entry barriers that impact negatively on the degree of competition.

¹³⁶ See Davis, Rattso and Torvik (1998)(note 17 above) 305 and 306. The authors noted that regulation of trade was adopted as part of the post-UDI strategy of import substituting industrialisation to control imports and the measures were maintained after independence in an import rationalisation policy to control foreign exchange situation.

¹³⁷ See Bautista RM, Lofgren H and Thomas M 'Does Trade Liberalisation Enhance Income Growth and Equity in Zimbabwe? The Role of Complementary Policies' (1998) *International Food Policy Research Institution, TMD Discussion Paper No. 32*. A paper presented at Zimbabwean Conference on Macroeconomics Policy, Management and Performance since Independence, University of Zimbabwe, Harare (19-21 August 1998).

requirements.¹³⁸ However, opening up of the domestic market under trade liberalisation exposed the market to unfair trade practices such as dumping.¹³⁹ It is submitted that in order to benefit from free trade without incurring the wrath of unfair trade practices, the need for a regulatory framework was realised. Probably this explains the presence of unfair trade provisions within the current competition legislation in Zimbabwe.¹⁴⁰

2.4.2.2 Domestic deregulation

One feature of the Zimbabwean economy upon independence was that it was highly regulated in as much as it was relatively developed. It has been shown that this trend which was inherited from the colonial regime was retained pursuant to the Government's Socialist ideology whereby it participated in the economic activities of the country. ESAP sought to dismantle some of the domestic regulatory measures such as price controls and investment approvals that had combined to erect barriers to entry and that lowered investment.¹⁴¹

The repeal of certain provisions of the Control of Goods Act was a notable development towards domestic deregulation.¹⁴² However, the existing structure of the economy characterised by monopolies and oligopolies meant that removing price controls would potentially subject consumers to some unscrupulous business practices associated with abuse of market power and dominance. These practices such as price manipulation necessitated a regulatory mechanism to monitor activities and behaviour of market players hence the call for

¹³⁸ See General Agreement on Trade and Tariff (GATT) *Trade Policy Review: Zimbabwe - Staff Country Report 97/59* (1995).

¹³⁹ See note 49 above for more on dumping and its competitive implications.

¹⁴⁰ Part IVB of the Competition Act of 1996.

¹⁴¹ ESAP (1992) 10 par.46 acknowledged the need to deregulate domestic economic activities in order to give effect to the goals of trade liberalisation that were key to attract foreign investments.

¹⁴² Statutory Instrument (S.I) 153B of 1989 repealed certain provisions of the Control of Goods Act of 1989 notable those relating to price control of items such as cigarettes, and pipe tobacco, wines, spirits, safety glass, and motor vehicle batteries and the reclassification of a number of goods from a category of strict controls to that of which the Government announced fixed maximum prices and these included agricultural products such as food or cash crops, livestock and fish; building materials other than cement; food additives; mineral raw materials; motor vehicles and stock feeds. See *Study of Monopolies and Competition Policy* (1992) 49.

the establishment of an anti-monopolies authority within the ESAP framework.¹⁴³ The reintroduction of price control functions of the CTC is testimony to this development.¹⁴⁴

2.4.2.3 Labour market reforms

Upon independence the Zimbabwean Government introduced a number of measures to regulate the labour market in a bid to limit the influence of big businesses on the economy.¹⁴⁵ The introduction of a mandatory minimum wage was seen as essential in protecting workers from business exploitation. Dismissal of employees was subjected to Government approval which was seldom granted.¹⁴⁶ These measures were deemed to have contributed to the low levels of unemployment as they created operating risks for business hence contributed to entry barriers in the economy.¹⁴⁷

ESAP sought to address the problem of unemployment and its social consequences.¹⁴⁸ Having noted the negative effects of its labour market control measures,¹⁴⁹ the Government

¹⁴³ CTC *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 14 and 18.

¹⁴⁴ See section 5(1) (h) of the Competition Act of 1996 inserted by section 5 (h) of the Competition Amendment Act 29 of 2001. However, the legislature's wisdom to reintroduce price controls especially as a function of the competition authority is questionable. It raises two main questions: (i) is it not a step backwards from the gains made towards a market based economy? Is it an admission that the market based economy policy has failed? (ii) Is it a function of a competition authority to control prices? One can argue in relation to the first issue that the market is not necessarily a perfect platform for self-regulation as assumed by market-based economic principles such as the 'law' of supply and demand. Market participants are seldom pro-competitive as they take whatever opportunity they get to engage in anti-competitive practices so as to enhance their profits. This coupled with the glaring cases of unilateral and unjustified price increases, justified the introduction of price controls. However, in relation to the second issue, it is argued that even if there is a need to introduce price control measures, surely conferring such a function upon the competition authority in its current state is not advisable. The authority is currently nearly incapacitated by a number of factors chiefly high staff turnover due to poor remuneration. These naturally impacts upon its effectiveness as a regulatory authority. Thus to then add an additional function which is not competition in nature is just ill- advised.

¹⁴⁵ Kububa (2006)(note 28 above)1.

¹⁴⁶ Kovacic (1992-93) (note 23 above) 256.

¹⁴⁷ Ibid.

¹⁴⁸ ESAP (1992) 3 para. 13 provided as an aim of ESAP 'to improve the living conditions especially for the poorest groups.' Para. 16 give effect to the 'Social Dimension of Adjustment' and para. 72 provided that the reforms would take measures that would 'avoid unnecessary adverse social consequences.'

introduced a series of legislative and administrative measures to reform labour issues relating to dismissal of employees,¹⁵⁰ mechanisms for quick retrenchment¹⁵¹ and abolished mandatory minimum wages.¹⁵² It can be said that the labour reforms introduced as part of ESAP significantly eliminated entry barriers that were associated with labour regulations. However, the desire to protect labour interests did not only end with the reforms but manifested in the current legislation where employment issues are factored into merger regulation.¹⁵³

2.4.2.4 Reform of public enterprises

Creation and strengthening of public enterprises were seen as a significant contributor to the economic decline of the country during the first decade of independence. This is so given the budgetary burden placed on the state by these utilities through subsidisation and sustenance.¹⁵⁴

Public enterprises enjoyed monopolies in the economy through either express statutory provisions or administrative practices such as licensing requirements.¹⁵⁵ Heavy subsidisation of public enterprises and the privileges they enjoyed created entry barriers and encouraged inefficient methods of production.¹⁵⁶ The reform of public enterprises under ESAP was designed to address, *inter alia*, the problem of state expenditure and effective resource allocation.¹⁵⁷ This commonly takes the form of commercialisation or privatisation of public

¹⁴⁹ See Ministry of Finance *Budget Statement Paper 16* (1990).

¹⁵⁰ Statutory Instrument SI 379/1990 Labour Regulations (Employment Code of Conduct) of 1990 facilitated the issue of firing and hiring of individual employees on inter alia, misconduct.

¹⁵¹ Statutory Instrument SI 404/1990 labour Relations (Retrenchment) Regulations of 1990 allowed retrenchment for operational reasons. See *Stanbic Bank Zimbabwe Ltd. v Charamba* (43/05) [2006] ZWSC 69.

¹⁵² Gwisai...

¹⁵³ Section 3(1)(b) of the Competition Act of 1996 provides that the Act does not apply to legitimate activities of organised labour aimed at protecting the interests and rights of their members as recognised, provided and protected under the country's labour and employment laws.

¹⁵⁴ See generally notes 36 and 119 above.

¹⁵⁵ Kovacic (1992-93) (note 23 above) 256 (protection from actual and potential competitors entails that incumbents and existing monopolies lost the desire to compete and hence be efficient). See also note 72 above.

¹⁵⁶ See notes 70 and 74 above.

¹⁵⁷ ESAP (1992) 5 par 23. Proposed the phasing out of public enterprises as a way of reducing the government's budgetary burden. Par. 25. Provided for the elimination of large budgetary burden of these entities and turning them into more efficient concerns. The public entities were to compete on the market without enjoying any

enterprises.¹⁵⁸ Commercialisation entails turning public utilities into profit making business ventures whereas privatisation involves the selling of parts or the whole of the entities to private players.¹⁵⁹

However the existing economic structure characterised by monopolies presented competition challenges to public enterprises reforms. Firstly, privatisation would mean replacing a Government controlled monopoly with a private monopoly. This scenario potentially exposes consumers to anti-competitive behaviour associated with private monopolies.¹⁶⁰ Secondly, commercialisation in an economy where the majority were and remains poor meant that incumbent big businesses would be able to acquire commercialised assets hence fermenting monopolies and oligopolies. Thus it is submitted that the options that were available to the Government when contemplating public enterprises reforms largely maintained the *status quo*. This realisation necessitated the need for a regulatory and enforcement mechanism to guide this aspect of ESAP.

2.4.2.5 ESAP and the development of a competition system: some general observations

The adoption of ESAP in 1991 as part of comprehensive market based economic reforms significantly influenced the formulation and adoption of a formal competition system in Zimbabwe. It is submitted that the liberalisation of trade created a regulatory vacuum in as far as regulating the behaviour of market players in a free market economy was concerned. Domestic deregulation also exposed consumers to manipulative behaviour by businesses who

special treatment from the State or being afforded any advantages that were not dictated by economic principles. See ESAP (1992) 6. Par.30 outlined measures aimed at reforming public enterprises including commercialisation and partial privatisation.

¹⁵⁸ Ibid.

¹⁵⁹ Commercialisation describes a situation where an entity, particularly public enterprises whose business was mainly the provision of goods and services without regards to profit making, is turned into an efficient commercial entity that is self-sustaining and where necessary, profit making in the same mould as a private concern. Privatisation refers to turning a public entity into a private business entity through disposing of the entire concern (wholly privatisation) or part thereof (partial privatisation) to other investors besides the government.

¹⁶⁰ See 2.3.1 above.

took advantage of the absence of price control measures to charge unjustified prices.¹⁶¹ ESAP also advocated for the deregulation of the labour market - a situation that was meant to curtail Government's active control of the labour market.¹⁶² It is this desire to protect the interests of the workers that resulted in the statutory exclusion of, *inter alia*, legitimate activities of employees' organisations from the application of the current statute.¹⁶³

It is submitted that perhaps the most significant influence of ESAP on the origins and development of a competition regime in Zimbabwe was its public enterprise reform dimension. It is further submitted that alternatives available to the Government in order to implement these reforms to a larger extent reproduced the problem of monopolies albeit in another form. The desire to achieve the benefits associated with economic reforms coupled with the natural hatred of private monopolies contributed to the exploration of ways to regulate monopolies in Zimbabwe as part of the broader scheme of economic reform.

The need to incorporate a regulatory dimension to ESAP was emphasised after the realisation that market forces alone cannot be relied upon to address the ills of the market as businesses on their own are not inherently pro-competitive.¹⁶⁴ The prime object of business is to make profit even if this means engaging in anti-competitive behaviour.¹⁶⁵ It is submitted that business' tendency to engage in such behaviour and practices as collusive dealings for

¹⁶¹ See Kububa 'Zimbabwe' in UNCTAD *Review of Recent Experiences in the Formulation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia and Zimbabwe* (2005) (UNCTAD/DITC/CLP/2005/2) 303(price control reintroduced due to a sudden spate of increases in basic commodities in Zimbabwe in 2000 which the Government felt as being unwarranted and politically motivated given their co-incidence with general elections).

¹⁶² See 2.4.2.3 above.

¹⁶³ See note 153 above.

¹⁶⁴ *Study of Monopolies and Competition Policy* (1992) 40. See also Lewis D 'South African Competition Law: Origins, Content, and Impact' in Dhall V (ed.,) *Competition Law Today; Concepts, Issues and the Law in Practice* (2007) 340-363, 351 who eloquently described the situation by stating that 'while many business people would conceive that competitive markets and the competition authorities are necessary to secure them a pre-condition for a thriving economy, most would steadfastly resist their incursion into their own backyard,'

¹⁶⁵ See Fox and Sullivan (1987)(note 74 above) 971. Companies act primarily to increase their profits by obtaining market power, reducing costs or providing a better product for consumers. It follows that if such profits can be achieved through obtaining market power alone and abusing it, then companies might act anti-competitively. See also Bork R *The Antitrust Paradox: A Policy at War with itself* (1978) 90-133 (companies always act to increase profits).

instance, are motivated by the desire to achieve maximum profits. Thus in an unregulated environment business behaviour cannot be relied upon to maintain a perfect operating environment.¹⁶⁶ This slope side of a liberal economy also explains why even economies with open markets had adopted regulatory mechanisms.¹⁶⁷

In most developing economies going through transformation from centrally economic planned systems to market-based economy, competition law and policy is often considered as an integral part of such a transformation process.¹⁶⁸ An effective competition system provides a regulatory and enforcement impetus required to deal with the challenges that the economic reforms might present.¹⁶⁹ ESAP thus heightened the need for a regulatory and enforcement mechanism which an effective competition system was willing to provide. The adoption of a formal competition system in Zimbabwe was necessitated by the desire to obtain benefits from the market-based economic reforms without subjecting the very market to undesirable effects associated with business behaviour and practices. The question however arose as to what dimension the required competition system had to take, that is, what conduct was it going to regulate, what principles was it going to follow and who was going to perform its enforcement and regulation?

The above questions led to the establishment of an Inter-Ministerial Committee under the chair of the Ministry of Industry and Commerce.¹⁷⁰ The Committee's mandate was to

¹⁶⁶ *Study of Monopolies and Competition Policy* (1992) 65.

¹⁶⁷ *Ibid.* It was noted that even countries with free market economies such as Germany, US, Britain and Canada, with even more open and market based economies than Zimbabwe and also boasting much lower levels of industrial concentration, have some of the stringent and complex set of competition regulation. Added to this list is South Africa which has a relatively free market based economy than Zimbabwe albeit a thorough merger regulatory regime.

¹⁶⁸ Kovacic (1992-93)(note 23 above) 253 and Kovacic (1997-98) (note 46 above) 403.

¹⁶⁹ Singh and Dhumale (1999)(note 1 above) 8.

¹⁷⁰ Kububa (2005)(note 20 above) 281. The Inter-Ministerial Committee on the Monopolies Commission (herein after referred to as the Committee). The other members of the Committee were representatives from the then Ministry of Finance and Economic Development (at the time of writing, this ministry has since split into the Ministry of Finance and the Ministry of Economic Planning and Development), the then Department of Customs and Exercise (this department which was established under the Customs and Excise Act [Chapter 23:02] of 1955 and was succeeded by the Zimbabwe Revenue Authority in September 2001 under the Revenue Authority Act [Chapter 23:11] (Act No.17 of 1999), the Zimbabwe Investment Centre, a statutory institution

spearhead the process of establishing an anti-monopolies authority to perform the enforcement and regulatory functions required for an effective economic reform programme.¹⁷¹ This in earnest laid the foundation for the formulation of a competition regime in Zimbabwe. The Committee confirmed the need for a regulatory and enforcement framework to monitor market competitiveness and monopolies within the broader economic reforms, particularly the liberal aspects thereof that had the potential to create an uncompetitive market structure.¹⁷²

The United States Aid for International Development (USAID)¹⁷³ provided the Committee with technical and financial support leading to the commissioning of a comprehensive study on monopolies and competition policy by a team of foreign competition experts and local economists.¹⁷⁴ This study was conducted under the banner of Implementing Policy Change

created by the Zimbabwe Investment Centre Act [Chapter 24:16] of 1992 whose functions are provided as, *inter alia*, the promotion and co-ordination of investment, and lastly the Reserve Bank of Zimbabwe which is the country's central bank established by the Reserve Bank Act [Chapter 22:15] (Act No. 5 of 1999).

¹⁷¹ Kububa (2005)(note 20 above) 281.

¹⁷² Ibid.

¹⁷³ The United States Agency for International Development is a United States Government agency that provides international economic and humanitarian assistance. See generally on USAID <http://www.usaid.gov/>. (Accessed 30 August 2011).

¹⁷⁴ Kububa (2005)(note 20 above) 383. The team (herein referred to as the IPC Study Team) was led by Mr. Antony Davis, a competition specialist; Dr. Clive Gray, Restrictive Business Practices specialist from Harvard Institute for International Development; Dr. David Gordon, a political economist; Professor William E. Kovacic, a legal and judicial specialist from George Mason University School of Law and Dr. Eugene West, a business economist and consultant. The two local economic experts were Mr. David Hatendi from the Merchant Bank of Central Africa, Zimbabwe and Mr. Andrew Chataika also from Merchant Bank of Central Africa, Zimbabwe. The strong presence was international experts on the study team makes an interesting reading as one is easily tempted to conclude that they just imported Western antitrust techniques into Zimbabwe. However, the fact that the report only provided recommendations that were not necessarily binding meant that the final drafters of the penultimate legislation were able to disregard some aspects that were recommended by the study team. One of the members of the team Professor Kovacic later wrote that it was wrong to assume that techniques that have worked in developed economies can work in third world countries like Zimbabwe and hence the need to avoid what he termed 'off-the shelf remedies derived solely from experienced in industrialised Western countries.' See Kovacic (2005)(note 23 above) 250, 259 and 261. See further Langenfield J and Blitzer MW 'Is Competition Policy the Last Thing Central and Eastern Europe Need?' (1991) 6 *American University Journal of International Law and Policy* 347.

(IPC).¹⁷⁵ The following part will discuss the main findings and recommendations of the IPC Study with a view of assessing how these influenced the current competition system in Zimbabwe.

2.5 The IPC Study and the development of a competition system in Zimbabwe

2.5.1 The IPC Study

Between January and March of 1992, the IPC Study Team embarked upon a project to study the monopolies and competition situation in Zimbabwe. They then produced a report which was submitted to the Government. This report in many ways forms the basis upon which the current competition and merger regulatory framework in Zimbabwe is based. This part will discuss the IPC Study, particularly its findings and recommendations, in order to highlight the contributions and influence thereof on the current merger regulatory regime.

The main aim of the study was to explore the state of monopolies and competition in Zimbabwe with the objective of identifying some areas of concern and to draw from experiences of other jurisdictions as well as to provide and suggest appropriate recommendations on the suitable competition policy for Zimbabwe within the context of ESAP.¹⁷⁶ Given that the study in many respects influenced the dimension of the current competition system, one would ask whether the latter is relevant in dealing with issues emanating from a changed operating environment. An attempt to answer this question requires an understanding of salient features of the current system in respect to the recommendations of the study. This aspect forms the bulk of the remainder of this chapter.

The study revealed significant and ‘startling’ findings on the degree of competition within the Zimbabwean economy.¹⁷⁷ ‘Significant’ in that the findings assisted in the formulation of an

¹⁷⁵ *Study of Monopolies and Competition Policy* (1992).

¹⁷⁶ The objectives of the study which are contained in part 1.4 of the Study titled ‘Objectives and Conduct of the Study’ can be summarised as to ; (a) ‘Assess and analyse the industrial concentration, restrictive business practices (RBPs) and regulation in Zimbabwe and the impact of ESAP on RBPs and their regulation.(b)Identify and analyse worldwide experiences with regulating RBPs, especially within the context of simultaneously introducing structural adjustment programmes, so as to draw implications for Zimbabwe.(c) Recommend policy actions and institutional, legislative and procedural options to regulate market power and RBPs in Zimbabwe.’

¹⁷⁷ Kububa (2009)(note 27 above) 3.

appropriate competition system. ‘Startling’ given that they highlighted the glaring competition challenges that were facing the country.

2.5.2 IPC Study’s main findings

The main findings of the IPC Study that influenced the dimension of the competition system required for the Zimbabwean economy pertains to the degree of competition within the economy, which is determined by the level of industrial concentration within a given sub-sector of the economy as well as the existence of entry barriers on the market.¹⁷⁸ The study used the manufacturing sector because it was a strategic component of ESAP given its linkages with other sectors¹⁷⁹ as well as the unavailability of data on non-manufacturing sectors.¹⁸⁰

2.5.2.1 Degree of concentration in the manufacturing sector

At the time of the study the manufacturing sector accounted for approximately a third of the country’s Gross Domestic Product (GDP).¹⁸¹ This sector was highly diversified¹⁸² comprising of sub-sectors that produced a variety of goods.¹⁸³ The state played a visible role in the sector

¹⁷⁸ See generally Cramer DL and Heuser WL ‘Variations in the Definitions of the Degree of Competition’ (1960) 19(4) *The American Journal of Economics and Sociology* 383-397.

¹⁷⁹ See Sichone O ‘Zimbabwe’s Economic Policies, 1980-2002’ (2003)(X)(2) *DPMN Bulletin*, <http://www.dpmf.org/images/zimbabwe-economic-policy-sichone.html>, (accessed 25 April 2012). By 1989 the sector was estimated to have provided sixty-six percentage points of the agricultural sectors’ intermediate inputs as well as forty-seven percentage points of the mining sector’s inputs.

¹⁸⁰ *Study of Monopolies and Competition* (1992) 28-29. The IPC Study relied upon primary data supplied by the Central Statistics Office (CSO) based on the 1989/90 Census of Production on the inputs and outputs of 1,045 enterprises distinguishing 57 branches of manufacturing.

¹⁸¹ See Sichone (2003)(note 179 above). A country’s GDP is a numeric value of the total finished goods and services produced in it within a specific time period and is a gauge of its economic healthy.

¹⁸² *Study of Monopolies and Competition Policy* (1992) 27. At the time of the study, the manufacturing sector accounted for between 6 500 and 7 000 products.

¹⁸³ These included foodstuffs; drinks and tobacco, textiles and ginning; clothing and footwear; wood and furniture; paper and printing; chemicals and petroleum products; non-metallic mineral products; metals and products; and transport and equipment.

through either holding significant investment interest shares in production entities or owning and controlling these entities.¹⁸⁴

Protectionist policies adopted pre-and post independence created monopolies and oligopolies within the manufacturing sector.¹⁸⁵ Between 1980 and 1985 a single producer accounted for about 52 percentage points of all goods manufactured in Zimbabwe whereas two producers or less accounted for about 70 percentage points of all manufactured goods and three or less producers were found to have produced about 80 percentage points of all manufactured goods.¹⁸⁶ This pattern was still prevalent at the time of the study.

The IPC Study team used the traditional structural measures of market concentration, the four-firm-concentration ratio (CR4)¹⁸⁷ and the Herfindahl-Hirschman Index (HHI)¹⁸⁸ to

¹⁸⁴ *Study of Monopolies and Competition Policy* (1992) 27.

¹⁸⁵ Ibid.

¹⁸⁶ *Study of Monopolies and Competition Policy* (1992) 29-33. See also in this regard the United Nations Industrial Development Organisation (UNIDO) *Study of the Manufacturing Sector in Zimbabwe* (1985) (herein after referred to as UNIDO Study 1985); World Bank *Zimbabwe: An Industrial Sector Memorandum* (1987) and Government of Zimbabwe *Report of the Commission of Inquiry into Incomes, Prices and Conditions of Services* (1981) presented by the Commission of Inquiry into Incomes, Prices and Conditions of Services chaired by R.C Riddle.

¹⁸⁷ A concentration ratio in economic terms is a measure of the sum output produced in an industry by a given number of firms in the industry (the leading firms). The four-firm concentration ratio (CR4) is one of the common concentration ratios which are the proportion of output originating from the four largest enterprises. It is a more generalised method of estimating the level of concentration in a given industrial sector and as such rarely used by competition authorities. See generally Hirschman M *Fundamentals of Managerial Economics* (2008) 529.

¹⁸⁸ The Herfindahl Index also known as the Herfindahl-Hirschman Index (HHI) was named after two prominent economists Herfindahl, O.C and Hirschman, A.O. The HHI is a measure of the size of firms in relation to the industry and indicates the level of competition among them. It is defined as 'the sum of the squares of the market shares of the 50 largest firms (or summed over all the firms if there are fewer than 50) with the industry where the market shares are expressed as fractions.' The result produced is proportional to the average market share, weighted by market shares and such it ranges from 0 to 1.0 moving from a huge number of very small firms to a single monopolistic producer. An increase in the HHI index generally indicates a decrease in competition and an increase of market power, whereas a decrease indicates an increase in competition and a decrease in market power. See Hirschman AO 'The Paternity of an Index' (1964) 54(5) *The American Economic Review* 761; US Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines*

analyse the degree of concentration within the manufacturing sector and hence determine the levels of competition therein.

Using the four-firm digit industrial level basing on the International Standard Industrial Classification of All Economic Activities (ISIC),¹⁸⁹ the study showed that forty-five of the fifty-seven industrial sectors, constituting almost eighty percentage points of all the sectors, had concentration ratios equal to or in excess of seventy-five percentage points.¹⁹⁰ This indicated a highly concentrated industry characterised by an oligopoly.¹⁹¹ Furthermore, high concentration ratios were found to exist in twelve industrial sectors, which were above a fifth of all the sectors.¹⁹² This indicated that there were four firms or less in the entire industry.¹⁹³ Only seven sectors were found to have concentration ratios below fifty percentage points.¹⁹⁴ The study therefore concluded that, basing on the CR4 analysis, the manufacturing sector in Zimbabwe was highly concentrated.¹⁹⁵

The high degree of concentration was also confirmed by employing the more precise and preferred HHI-index. Forty-six of the fifty-seven industrial sectors showed indices above 1800.¹⁹⁶ This level is considered as an indication of a highly concentrated industry that is potentially anti-competitive.¹⁹⁷ Five industrial sectors had index values of 10 000 exhibiting pure monopolies.¹⁹⁸

2.5.2.2 Degree of concentration in the non-manufacturing sector

(2010) para.5.3.(issued on 08/19/2010) and US Department of Justice ‘The Herfindahl-Hirschman Index’ available at <http://www.justice.gov/atr/public/testimony/hhi.htm>., (accessed 1 September 2011).

¹⁸⁹ The ISIC is a United Nations code for classifying economic data. See United Nations Statistics Division, <http://unstats.un.org/unsd/cr/registry/regast.asp?CI=27>, accessed 21 February 2013.

¹⁹⁰ *Study of Monopolies and Competition Policy* (1992) 30-31 and Exhibit 3-1.

¹⁹¹ See note 188 above.

¹⁹² Ibid, 32 and Exhibit 3-2.

¹⁹³ See note 187 above.

¹⁹⁴ Ibid, 33 and Exhibit 3-3.

¹⁹⁵ Ibid,5.

¹⁹⁶ Ibid.

¹⁹⁷ See note 188 above on HHI. An HHI index of 0 denotes pure competition whereas an index of 10.000 indicates a pure monopoly. Industries with indices above 1,800 are generally an indication of a high concentration levels and potentially uncompetitive.

¹⁹⁸ Ibid.

This sector comprises of mainly the financial and transport sectors. The study relied mainly on qualitative data¹⁹⁹ to make a finding that the financial sector was also highly concentrated with a CR4 ratio of one for all sub-sectors save for a single unnamed commercial bank.²⁰⁰

The transport sector was comprised of urban public transport, rural passenger transport services and the road haulage transport.²⁰¹ The urban public transport sub-sector was dominated by the state-run Zimbabwe United Passenger Company (ZUPCO).²⁰² This meant there was no competition. A number of bus operators dominated the rural transport services thereby competing effectively to some extent.²⁰³ The study noted that the road haulage sub-sector which was comprised of many local and foreign-owned small, medium and large operators was competitive regardless of a number of regulations and licensing requirements.²⁰⁴

As indicated, both the CR4 ratios and HHI analysis revealed that the manufacturing sector in Zimbabwe was highly concentrated.²⁰⁵ Further analysis of qualitative data on non-manufacturing sectors also revealed this pattern in the financial and transport sectors. This confirmed the existence of monopolies and oligopolies within the Zimbabwean economy. The Study accordingly indicated that:

¹⁹⁹ Qualitative data denotes any captured research information that is not numerical in nature.

²⁰⁰ *Study of Monopolies and Competition Policy* (1992) 37. At the time of the study the financial sector was made up of the central bank (The Reserve Bank of Zimbabwe (RBZ)), 3 discount houses, 4 merchant banks, 5 commercial banks, 4 building societies, 5 finance houses, insurance companies, pension houses, 1 development bank and the Post Office Savings Bank (POSB). See generally on the sector, Moyo T 'Financial Sector Liberalisation and the Poor: A Critical Appraisal' (2011) *Southern Africa Microfinance and Enterprise Capacity Enhancement Facility* (SAMCAF) 2. A presentation at the SAPRI-Zimbabwe Initiative Poverty Reduction Forum, Harare. available At http://www.saprin.org/zimbabwe/research/zim_fin_sect.pdf. (Accessed 26 August 2011).

²⁰¹ Ibid.

²⁰² The urban public transport sector has since transformed with private operated commuter omnibus dominating and ZUPCO almost extinct following years of unsustainable financial crisis at the utility.

²⁰³ *Study of Monopolies and Competition Policy* (1992) 37.

²⁰⁴ Ibid.

²⁰⁵ These methods unfortunately failed to account for other sources of industrial concentration such as concentration of ownership and control emanating from cross-directorship and direct equity holding.

While the contribution of a high degree of industrial concentration and a high barrier of entry does not automatically lead to the abuse of market power by monopolists and oligopolists, the scope for exercising such power exists. There is some evidence and good reason to believe that RBPs are extensive in Zimbabwe.²⁰⁶

This practical observation was very crucial in the formulation of underlying principles of an effective competition system. The extent to which this is reflected in the current system will be assessed in later parts of this chapter, suffice to state here that the history of monopolies in the Zimbabwean economy and the ridicule and contempt they attracted from a pro-Socialist administration potentially influenced the attention this issue might have received in the current statute thereby putting to the fore the question as to what extent competition principles can be free of political influence.²⁰⁷

2.5.2.3 Barriers to entry

The existence of entry barriers on the Zimbabwean economy was one of the significant findings made by the IPC Study. These barriers were largely a product of various policy measures that were adopted both pre- and post independence to regulate economic activities. Entry barriers in competition terms refers to any hindrance or impediment to easy market entry by new entrants that can either be a result of administrative measures, practices and behaviour of incumbent participants or the structure of the market.²⁰⁸ The following sections will discuss these forms of entry barriers as they relate to the Zimbabwean situation.

²⁰⁶ *Study of Monopolies and Competition Policy* (1992) 41.

²⁰⁷ See generally, Mehta PS and Evenett SJ (eds.,) (2009) (note 5 above) 27 (government determines both budgets of and senior appointments to regulatory authorities making it difficult to have an absolutely independent competition regulatory authority); Hamner (2001-2002) (note 43 above) 389 appears to suggest that another source of political meddling into the affairs of regulatory authority is the effects of the ever growing global free trade movement. In an increasing global market where domestic firms are becoming increasingly threatened by foreign competition, political pressure have tended to influence policy makers to responded to such threats, founded or otherwise. This will result in the adoption and application of protectionist analysis methods to the likely effect of cross-border transactions. See also Summers LH 'Competition Law in the New Economy' 69 (2001) *Antitrust Law Journal* 353, 357 (that whereas protection of consumers in an open market is a concern to competition authorities, this consideration not the one that put pressure upon them but rather from vested political interest).

²⁰⁸ See note 74 above.

(a) Government erected barriers

This category comprises of the combined effects of various policy measures implemented with the aim of regulating economic activities. These included price control mechanisms, labour market regulations and foreign exchange allocation.²⁰⁹ These measures created a business risk that ‘crowded out’ new entrants.²¹⁰

The creation and strengthening of public enterprises that enjoyed statutory and administrative protection also acted as a barrier to entry. This is particularly true in respect of administrative practices such as licensing requirements that kept out private firms from participating in such sectors as the telecommunications and broadcasting sector.²¹¹ Government subsidisation of public enterprises also created an entry barrier for private firms who, even if they could clear the administrative hurdle, could still not compete profitably in such an environment.

(b) Industrial structure

The Zimbabwean economy was dominated by a few monopolies and oligopolies who had survived from the post-UDI era.²¹² The manufacturing sector was highly concentrated with few industries accounting for the entire number of products produced in Zimbabwe.²¹³ It was easy for these few producers to create supply networks among the incumbents that would limit the distribution and supply of raw materials through economies of scale and scope and influence consumer choices through product differentiation and brand loyalty, a combination of which kept new entrants out of the market.²¹⁴

(c) Business behaviour and practice

²⁰⁹ See Brett (2005)(note 7 above) 95.

²¹⁰ Ibid, 98.

²¹¹ See note 72 above.

²¹² Examples of these big monopolies included the Anglo-American Corporation (mining), Delta Corporation (beverages) and British American Tobacco (tobacco and cigarettes manufacturing).

²¹³ Kububa (2009)(note 28 above) 3.

²¹⁴ See *Study of Monopolies and Competition Policy* (1992) 40.

The prime business of business is to make profit.²¹⁵ It is in the nature of business to engage in whatever practices that ensures maximisation of their profit margins. Business behaviour is therefore seldom pro-competitive and given an opportunity and the operating environment permitting, they would rather prefer being alone and reaping monopoly profits by preventing entry into the market.²¹⁶ However, the mere fact that a business engages in exclusionary practices such as aggressive competition through technological innovation that enhances its production efficiency is not anti-competitive even if it means that other competitors are frozen out of the market.²¹⁷ The aim of competition policy is not to protect individual market players but the competitive system.²¹⁸ Accordingly, business behaviour can only be referred to as amounting to entry barriers should it involve such practices as predation where a firm uses its market power to avail certain products or services at a price far below the competitive market prices to such an extent that smaller firms cannot match that price.²¹⁹ This predatory practice erects entry barriers and hence is a concern for competition policy.

The Study's findings confirmed the presence of monopolies and oligopolies on the Zimbabwean economy. The study then concluded that the high levels of industrial concentration resulting from mostly government policy measures erected entry barriers to the economy.²²⁰ It is submitted that the combined effects of the government policies created an uncompetitive structure that promoted restrictive business practices and other anti-competitive behaviour. The study team recommended the formulation of an effective

²¹⁵ See Bork (1978)(note 165 above) 90-133 (companies always act to achieve an increase in profit even if such profits are achieved through anti-competitive means). See also Friedman M 'The Social Responsibility of Business is to Increase its Profits' (1970) *The New York Times Magazine* (13 September , 1970)

²¹⁶ *Study of Monopolies and Competition Policy* (1992) 41.

²¹⁷ *Ibid.*

²¹⁸ Hamner (2001-2002) (note 43 above) 389.

²¹⁹ Section 8 of the First Schedule to the Competition Act of 1998 defines predatory pricing as 'the selling at very low prices or at below production costs as a deliberate strategy of driving competitors off the market.' It is believed that dominant firms acting individually or in collusion with others (cartelisation) can agree to engage in predatory behaviour. Although they might record loses, these loses can be easily covered by other goods. However, the long term effect of such pricing is that smaller firms might be forced to either reduce their prices below production costs. Since there are not able to maintain such unprofitable pricing, they eventually fold and exit the relevant market.

²²⁰ *Study of Monopolies and Competition Policy* (1992) 41.

competition policy to deal with the competition concerns within the context of economic structural program.²²¹ The following part will focus on these recommendations.

2.5.3 The IPC Study Recommendations

The high levels of industrial concentration and entry barriers on the economy dominated by monopolies and oligopolies substantially lessened the degree of competition in Zimbabwe. Although ESAP was designed as market-based liberal reforms to address problems associated with a centrally planned economic system, it was realised that market reforms alone could not eliminate these problems especially those relating to competition issues. The lack of regulatory and enforcement mechanisms within the reform framework necessitated the need for such mechanisms. This part will discuss the study's recommendation relating to the required competition system in Zimbabwe. The main focus will be on the elements that were mooted as crucial to the formulation of such a system and how the latter influenced the current philosophies underlying the competition regime in Zimbabwe and influences merger regulation.

In order to understand the study's recommendations on the dimensions of the competition system required in Zimbabwe, one need to understand why the need for competition law and policy after all? This question as it relates to Zimbabwe will be briefly addressed below.

2.5.3.1 The need for a competition regime in Zimbabwe

The discussion above had shown that the idea of a formal competition regime in Zimbabwe was mooted as an integral part of the then ongoing economic reforms. This was common to many transitional economies that formerly followed the Soviet-style central economic model.²²² However, the question is whether economic reforms alone motivated the need for a competition system in Zimbabwe?

The role played by liberal economic reforms in highlighting the need for a formal competition system in Zimbabwe is undisputed. Significantly as in many developing

²²¹ Ibid, 89.

²²² See generally, Kovacic (1997-98)(note 46 above); Hamner (2001-2002)(note 43 above) 398 and Singh and Dhumale(1999)(note 1 above) 9.

countries, competition policy presented a window of opportunity for the government to adopt liberal market reforms that promised to bring some relief to a rather stagnant economy.²²³

However, whether or not the introduction of a formal competition system in Zimbabwe was motivated primarily by the need to relieve the economy of stagnation is debatable. Government's early measures aimed at regulating economic activities in the country were nothing more than a pre-occupation with the desire to curtail the influence of private big business monopoly. Although the price control system was maintained to ensure that the poor majority could access and afford basic commodities, these measures were also aimed at reducing the influence that big businesses exerted on the economy.²²⁴ Similarly, labour market regulations through mandatory minimum wages were designed not only to ensure equity in income distribution but also to curtail the profits that business were reaping through increasing production costs in form of labour.²²⁵ The same can be said of foreign exchange controls and allocations that doubled both as means to preserve scarce foreign exchange and limiting the ability of the majority foreign owned big business to repatriate huge profits.²²⁶ Considering that ESAP contained components designed to deal with these control aspects, that is, introduction of market-based liberal reforms that discouraged price controls, labour market regulations and foreign exchange controls, one tends to ask what then was next for the government in its bid to control monopolies?

Whereas regulating monopolistic practices is a noble idea,²²⁷ however, where this is done not only for the purpose of encouraging competition and economic activity, but for the promotion of another ideological agenda it might impact on basic principles of a competition system.²²⁸ The system may end up being designed intentionally to promote other goals that the

²²³ Kovacic (1992-93) (note 23 above) 253.

²²⁴ See generally Brett (2005)(note 7 above) 93.

²²⁵ See 2.3.4 above.

²²⁶ See generally Moyo (2011) (note 200 above).

²²⁷ See notes 83 and 84 above.

²²⁸ See for example Singh and Dhumale (2009)(note 1 above) 29 who stressed that where competition is adopted as part of structural adjustment programmes as the case in most developing economies, this might put pressure on the competition system as it would be expected to address other issues such as poverty reduction.

Government might have been forced to abandon during the reform process to the detriment of economic efficiency.²²⁹

The argument that competition systems that evolved as part of reform programmes are largely designed to advance vested corporate and bureaucratic interests is debatable.²³⁰ Whereas it might be true that these interests potentially influence the design of such systems, to say that they motivated the adoption of competition systems in developing countries is an over-generalised proposition. The extent to which this applies in the Zimbabwean situation can only be ascertained if one looks at the current competition system against the background of its origins. It is true that the current system originated as an integral part of a broader economic reform process. However, the desire exhibited by the government to regulate monopolies might have acted against the promotion of their interests. Whether this is reflected in the current system can only be determined after considering the influence of the background of the current system and this will be done in later parts of this chapter.

It has been argued that competition regimes have been adopted to achieve ‘economic democracy’.²³¹ This views the role of a competition system as being to promote economic participation through dismantling of entry barriers. It partly explains the determination shown in regulating the dominant market power by monopolies that give them the ability to *inter alia*, restrict market entry and participation of smaller firms.

The choice of a competition system as the provider of regulatory and enforcement mechanisms within a market-based reform process is somewhat of an interesting one. This raises the old question as to what role competition law plays in an economy. The Chicago Scholars advanced a non-interventionist approach where in a free market economy the State plays no role in market regulation.²³² For them competition is a concern of the market, so too

²²⁹ Singh and Dhumale (1999) (note 1 above) 7.

²³⁰ Ibid, 24.

²³¹ See generally Gerber D *Law and Competition in Twentieth Century Europe* (2001); OECD and World Bank (1999) *A framework for the Design and Implementation of Competition Law and Policy* (1999); Singh and Dhumale (2009)(note 1 above) 24. Kovacic (1992-93)(note 23 above) 258; Brett (2005)(note 7 above) 96, Everest-Phillips (2009)(note 5 above) 50 and *Study of Monopolies and Competition Policy* (1992) 66.

²³² The group of economic scholar who have Chicago University training, commonly referred to as the Chicago scholars or Chicagoans, insist mainly that legal regulations have no place in markets. They argue that any inefficiencies in the market can be better be punished by the market itself and not by legal rules. Their

is macro-economics and as such they viewed competition as economics.²³³ However, it can be argued that the fact that markets on their own are not perfect as participants are not necessarily pro-competition justifies the adoption of interventionist measures to safeguard potential and actual market failures.²³⁴ This probably explains why even liberal economies have strong regulatory mechanisms.²³⁵ The adoption of a competition system in Zimbabwe was therefore in line with this realisation hence a fundamental requirement to provide the regulatory and enforcement dimension to the economic reform programme.

The adoption of a competition regime was viewed as an opportunity for the Zimbabwean Government to deal with a number of challenges that the regime was facing.²³⁶ The protectionist policies inhibited economic growth²³⁷ and contributed to the slow growth of employment opportunities and increased poverty levels.²³⁸ Economic entry barriers resulting from administrative and other measures also ‘crowded out’ investment leading to shortages of foreign currency.²³⁹ Restrictive policies such as foreign currency allocation also contributed to the discrimination of small indigenous businesses.²⁴⁰ Price controls and foreign exchange controls and inefficient and over-subsidised public utilities contributed to create an unstable

contention is based on the fact that an inefficient market participant can be forced out of the same by efficient ones who will be able to command a substantial market share due to their quality products that will also be available at lower prices. See generally Bork (1978)(note 165 above) and particularly, Easterbrook FH ‘The Limits of Antitrust’ (1984) 63 *Texas Law Review* 24-25, 29; Easterbrook FH ‘Workable Antitrust Policy’ (1986) 84 *Michigan Law Review* 1696, 1700-1. For a generally critique of this approach, see Fox and Sullivan (1987) (note 74 above) 956.

²³³ The Chicagoans view the exclusive objective of antitrust as being efficiency. To them, law is equated to economics and efficiency to justice. See Bork (1978)(note 165 above) 90-106 (an exclusive goal of all law with the exception of constitutional law is efficiency); Posner R *The Economics of Justice*(1981) 13-115 (for a discussion of the relationship between efficiency and justice).

²³⁴ Lewis(2007) (note 164 above) 350 (competition law intervenes to preserve and promote competition, a seemingly abstract cause as opposed to environmental regulation or criminal law which are more defined causes).

²³⁵ See note 167 above.

²³⁶ Kovacic (1992-93)(note 23 above) 253-4.

²³⁷ Brett (2005)(note 7 above) 98.

²³⁸ Fallon and Lucas (1993) (note 103 above) 54.

²³⁹ *Study of Monopolies and Competition Policy* (1992) 39; Brett (2005)(note 9 above) 98.

²⁴⁰ Brett (2005)(note 7 above) 98; Kovacic (1992-93) (note 23 above) 258.

macro-economic environment.²⁴¹ This environment, characterised by an unstable macro-economy, unemployment, poverty and lack of business opportunities, created a source of discontentment that would manifest in political opposition to the regime.²⁴² Thus the adoption of a competition system was seen as an opportunity to diffuse this political tension.²⁴³

Assuming that the adoption of a competition system in Zimbabwe was meant to ease both the economic–social and political pressures that the country was facing, the extent to which these aspects were considered in designing the current system is interesting. The crucial question to be asked in this regard is what conduct, practice or behaviour needed to be regulated and controlled, that is, what substantive rules needed to be put in place and how was it going to be regulated and controlled, in other words, the procedural and institutional aspects to regulate and control the identified conduct. These aspects will be explored below under the IPC Study recommendations. The focus will be on mainly the recommendation dimension that the envisaged competition policy should adopt, namely, the legal and institutional elements thereof.

2.5.3.2 The dimensions of competition policy

The *Study of Monopolies and Competition Policy* (1992) concluded that the uncompetitive market structure prevailing in most of the economic sectors was largely a result of the presence of monopolies and oligopolies that combined with various government policy measures to erect entry barriers and ferment industrial concentration.²⁴⁴ The study then recommended a competition policy with legal rules and institutions designed to promote competition by regulating and controlling certain practices that impeded on the country's economic competitiveness and general economic growth.

(a) The legal elements of the competition system

An effective competition policy requires legal rules that define what conduct needs to be regulated as well as the procedures required to regulate and control the same. Additionally,

²⁴¹ Brett (2005) (note 7 above) 97.

²⁴² Kovacic (1992-93)(note 23 above) 258; Brett (2005)(note 7 above) 98,99.

²⁴³ Ibid.

²⁴⁴ *Study of Monopolies and Competition Policy* (1992) 65.

legal rules are necessary to establish, constitute and empower the various institutions tasked with administering the competition system. In designing this critical element of a competition system there is a need to identify the actual competition concerns encountered and possibilities of those that might occur in the future.

The immediate competition concerns were identified as emanating from monopolistic and oligopolistic positions enjoyed by both private and public entities. These erected entry barriers and potentially engaged in anti-competitive restrictive practices. There was a need to design legal rules that would regulate and control these practices. However, an important observation was made that the mere existence of monopolies and oligopolies do not necessarily render them harmful to competition and the economy.²⁴⁵ This is because of the fact that there are some economic benefits that can be derived from them through economies of scale and scope.²⁴⁶ The purpose of legal rules thus is to determine which conduct amounts to anti-competitive practices and which conduct is merely a beneficial business practice.²⁴⁷ Business conduct that amounts to anti-competitive practices is those that are likely to result in the substantial lessening or prevention of competition.²⁴⁸

Most jurisdictions adopt either the *per se* approach where the mere existence of certain conduct renders them automatically prohibited without any need to assess whether or not they are anti-competitive²⁴⁹ or a rule of reason approach which dictates that a transaction cannot be automatically prohibited without any assessment for it might be able to result in beneficial gains that can offset any anti-competitive effects thereof.²⁵⁰ These approaches enable the adjudicating authority to determine which conduct to automatically prohibit for being neither competition neutral nor pro-competition and which ones to further assess to determine

²⁴⁵ See note 206 above.

²⁴⁶ Economies of scale and scope denote situations whereby both quality and quantity products are produced in an efficient manner that cut production and distribution costs.

²⁴⁷ *Study of Monopolies and Competition Policy* (1992) 65.

²⁴⁸ Competition is deemed to have been substantially lessened or prevented if as a result of a certain business conduct, the actual or potential levels of competition on a given market is either materially reduced or the chances of future competition are seriously jeopardised.

²⁴⁹ See *Addyston Pipe & Steel Co. v. U.S.*, 175 U.S. 211 (1898).

²⁵⁰ See *Standard Oil Co of New Jersey v US* 221 US 1 (1911) and also Bork RH 'The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (Part 1)' (1965) 74 *Yale Law Journal* 775.

whether or not to allow them given that they might be beneficial to the economy or provide other benefits.²⁵¹

The study recommended that the legal rules must be applied to all economic activities regardless of who is involved.²⁵² Monopolistic and oligopolistic situations arose from several sources such as business combinations or other arrangements. In order to effectively deal with the negative competition effects of monopolies, there was a need to regulate these situations as well, hence the legal rules were required to address the same. The recommendation that the legal rules be applied to statutory and other public enterprises was important given the role played by government in the creation of an uncompetitive environment.²⁵³

The study's identification of monopolies and oligopolies as central to the economy's competition concerns had a number of both practical and theoretical implications. Practically it encouraged the adoption of a tailor-made legal framework that sought to address the actual problems faced by Zimbabwe rather than simply importing concepts from other jurisdictions in the name of establishing a competition system.²⁵⁴ This was reflected by the recommendation that there was a need to firstly adopt a simple set of fewer rules and then add on to them as time goes by.²⁵⁵ This approach is commendable given that it enabled the newly established system to utilise its available resources thereby addressing the common problem of resource constraints associated with developing countries.²⁵⁶

²⁵¹ *Study of Monopolies and Competition Policy* (1992) 65.

²⁵² *Ibid*, 89.

²⁵³ See 2.3.2.5 above.

²⁵⁴ See Kovacic (1992-93)(note 23 above) 261.

²⁵⁵ *Study of Monopolies and Competition Policy* (1992) 66. This incremental approach is commendable as it take into account the ability of the country to enforce any given set of regulations given its available resources and expertise. See also Fox EM 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways' (2000) 75 *New York University Law Review* 1781, 1783 ('as the economic conditions evolves, so too evolves the antitrust enforcement system'); Fox and Sullivan (1987)(note 74 above) 366 ('by adopting cautiously to change on case-by-case basis') and Kovacic (1997-98)(note 46 above) 404.

²⁵⁶ Zogbhi V 'Strategic Priorities of Competition and Regulatory Agencies in Developing Countries' in Mehta and Evenett (eds.) (2009)(note 5 above) 89-209, 89 and 96. See also OECD 'Challenges and Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition'

A competition system takes a long period to mature. Adopting fewer rules that address immediate competition issues provides an opportunity to add on to these rules in the event that the operating environment changes. This will enable the system to adopt more rules as it becomes mature with time and acquires experience in dealing with complex matters. This approach takes into account the undeniable fact that competition is and will never be static and there is a need to design a system that is dynamic.²⁵⁷ However, the salient question is what constitutes a dynamic competition system? Does it refer to its ability to respond to the changing environment without necessarily adapting it to another legislative process or is it its ability to accommodate legislative amendments to cater for the changing environment?

Jenny and Calvino noted that the European system is designed in such a manner that there is no need to refocus it in the face of the current economic crisis.²⁵⁸ The fact that the Zimbabwean competition statute underwent legislative amendments three years into its operation²⁵⁹ might suggest that it did not meet the European style degree of flexibility. These amendments were a response to the need to address other government concerns that were left

(2004) Contribution from Fair Trading Commission of Jamaica, Session 11 *OECD Global Forum on Competition* (2004).

²⁵⁷ See Fox and Sullivan (1987)(note 74 above) 936. These esteemed writer acknowledged the dynamic nature of competition when they stated that ‘ by adapting cautiously to change on a case-by-case basis to new or ascendant insights, to new situations, and to new forms and pressures of competition, antitrust law will be better equipped to deal with the problems that will confront it.’ Ewing KP Jnr ‘Integration: Perspectives and Competition’ (2001) 69 *Antitrust Law Journal* 349 also noted the dynamic nature of antitrust law in stating that ‘indeed the competitiveness process itself has changed as this country has moved from a largely agrarian society through the “transportation/expansion” society into “knowledge” and ‘electronic global commerce” world of the 21st century.’ See also Fox (2000) (note 255 above) 1783 (as the economic environment evolves, so too the regulatory environment).

²⁵⁸ Jenny F ‘Foreword’ in Kokkoris I and Olivares-Caminal R *Antitrust amidst Financial Crises* (2010); Calvino N ‘Brussels: Part of the Problem or Part of the Cure?’ *EU Competition and Public Law Report, Brussels focus* (2009). Available at

http://abreuadrogados.com/xms/files/05_Comunicacao/Artigos_na_Impreusa/Iberia_Lawyer_Artigo-MMP_fEB.2009.PDF.

(accessed 23 October 2010). Nadia Calvino is the Deputy Director General of the Directorate General Competition of the EU.

²⁵⁹ By way of the Competition Amendment Act of 2001.

out in the principal legislation. They included provisions relating to price controls where the competition authority was further tasked to perform the price controlling duties.²⁶⁰

An important aspect in designing legal rules is to ensure their appropriateness to the system they are meant to apply to. Such rules must be credible in that they must not only proscribe certain conduct as being anti-competitive or establish and constitute the required institutions but they must also not be empty legal provisions.²⁶¹ This observation further emphasises the importance of creating an acceptable competition system with the legal element necessary to establish and constitute credible institutions to enforce and administer the substantive aspects of the competition system. The IPC Study discussed a number of institutional options that Zimbabwe's proposed competition system could adopt. These options will be briefly explored below.

(b) The regulatory institutional options

In designing a competition system, there is a need to consider the suitability of the institutions that would be tasked to perform its regulatory and enforcement functions. In recommending the appropriate institutions, that is, those capable of dealing with the identified competition concerns,²⁶² the study took into account a number of factors. The main factor was the credibility of the institutions in performing its various tasks which is largely a function of its independence.²⁶³ Other factors included the resources available and the identified competition concerns. These factors will be addressed as and when necessary below insofar as they apply to the institutional option being discussed.

(i) Full implementation of ESAP without adjusting the legal system

This approach proposed that there was no need to enact new legislation to regulate the identified competition concerns. It assumed that a fully implemented ESAP would address

²⁶⁰ See note 144 above.

²⁶¹ Kovacic (1997-98) (note 46 above) 404 (effective legal rules must not only be to establish regulatory authorities but also to provide for substantive law. However, these laws 'must not be erratically applied or amount to empty legal reforms.') See also Zogbhi (2009) (note 256 above) 103.

²⁶² *Study of Monopolies and Competition Policy* (1992) 71.

²⁶³ Mehta and Evenett (2009) (note 5 above) 27.

the identified competition concerns without requiring any new institutions.²⁶⁴ This ‘do-nothing’ proposition placed market forces as corrective remedies for any anti-competitive market harm through encouraging market efficiency and innovation²⁶⁵ as well as contributing towards the dismantling of government erected entry barriers.²⁶⁶

The full implementation of ESAP could have potentially given the Zimbabwean economy a much needed competitive stimulus.²⁶⁷ However, the effectiveness and successes of such an approach depended much on the political willingness and commitment of not only the present but also future governments to implement any present or future economic reforms including those pertaining to enhancing market competition.²⁶⁸ Furthermore, markets on their own are not perfect for their participants are not automatically pro-competition and as such cannot be entrusted to promote competition.²⁶⁹ This observation explains why even economies with liberal trade policies have strict regulatory mechanisms.²⁷⁰ Thus measures to liberalise trade and domestic deregulation does not totally deter business from engaging in anti-competitive practices such as collusive behaviour that enhance their profits²⁷¹ and as such reliance on market forces to promote competition was deemed not to be the appropriate model for Zimbabwe.

²⁶⁴ *Study of Monopolies and Competition Policy* (1992) 73, 75.

²⁶⁵ *Ibid.* This approach followed the Chicagoans theory that in a free market environment there is no room for government intervention on the market since market forces alone are capable of regulating the conduct of market participants. This approach boarder more or less on the concept that if the market promotes efficiency, then inefficient entities will be gradually driven out of the market. This is because the more efficient entities will be able to produce not only quality but also quantity at a reasonably lower price. This is not matched by inefficient ones hence they will not lose customers and market shares leading to their exit.

²⁶⁶ *Study of Monopolies and Competition Policy* (1992) 75.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ See generally, Raja RG and Zingales L ‘The Road to Prosperity: Saving Capitalism from Capitalists’ (2003) 14 (7.9) *Transition Newsletter*, World Bank, available at <http://siteresources.worldbank.org/INTTRANSITION/Newsletter/20561627/JulAugSep03.pdf>, (accessed 21 February 2013). ; Gal M ‘The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries’ in *UNCTAD Competition, Competitiveness and Development* (2004).

²⁷⁰ *Study of Monopolies and Competition Policy* (1992) 75. See also note 156 above.

²⁷¹ *Ibid.* It was admitted that ESAP might have the potential to reduce the frequency and seriousness of RBPs but still market reforms on their own could not be relied upon to ensure that the problem would be eliminated in the foreseeable future.

(ii) *An exclusive private enforcement system provided by new competition rules*

This model required minimal public participation in the operation of the new competition system with government's participation limited to the enactment of new competition rules.²⁷²

These rules would simply proscribe certain anti-competitive business practices and provide a private enforcement right to affected private parties such as consumers, business rivals and suppliers.²⁷³

The private enforcement model involved the participation of interested parties with immediate knowledge of harmful anti-competitive practices.²⁷⁴ This approach lessens the resource burden associated with newly formed entities in developing economies as private litigants would be expected to finance their suits.²⁷⁵

However, this model is not without its shortcomings. Primarily, it is dependent on the effectiveness of the existing legal system. In a system where legal costs are prohibitive, private parties have to engage in a cost-benefit analysis before contemplating pursuing competition violations.²⁷⁶ An attempt to lessen the litigator's financial burden might

²⁷² *Study of Monopolies and Competition Policy* (1992)

²⁷³ *Ibid.* This model was based on the US system that allows for private suits. However, the US system is not exclusively for private parties that are affected as the public enforcement provisions still obtain.

²⁷⁴ *Study of Monopolies and Competition Policy* (1992) 75. This gives the system an added advantage in that the public enforcement authorities are relieved of a considerable financial and resource burden. The private parties also add a great deal of expertise needed towards the jurisprudential development of the regulatory system.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.* The then existing legal practice in Zimbabwe also worked to the disadvantage of this model. Practices such as limiting damages recovery to actual loss incurred, prohibition of contingent fee arrangement between litigants and legal practitioners and levelling of costs against an unsuccessful party all acted as disincentives to a private party who might have contemplated instituting action against a financially powerful entity. The current statute regulating class actions in Zimbabwe, the Class Actions Act [Chapter 8:17](Act No.10 of 1999) provides that a class action can only be brought if the prospective litigants can prove that they have a clear legal and material interest in the matter requiring protection. In other words, a party who wish to be permitted in joinder proceedings must demonstrate that he/she have a clearly defined legal interest therein. These procedural pre-requisites impose a rather daunting obligation on small parties who might wish to bring a joint competition violation claim.

encourage the proliferation of baseless and vexatious commercial claims that would potentially overburden the legal system.²⁷⁷

A private enforcement right can be a component of a hybrid system with a public non-enforcing competition authority that would perform industrial analysis and competition advocacy roles.²⁷⁸ The private action component would thus act as a counter-measure to the potential corruption or inaction of public enforcement officials.²⁷⁹

(iii) Public enforcement through the Attorney General's Office

The office of the Attorney General (AG) is the Zimbabwean government's principal law office.²⁸⁰ It provides legal advice to the state as well as prosecutes crimes.²⁸¹ This option envisages the enactment of new competition laws with the enforcement functions thereof entrusted exclusively to the AG's office.²⁸² The model required the creation of a specialised competition enforcement division within the AG's office given that the office provides general legal services.²⁸³

²⁷⁷ *Study of Monopolies and Competition Policy* (1992) 76. The study team observed that prosecuting frail or baseless claims as a strategic misuse of the legal system were not an alien practice in most commercial suits. These suits end up fermenting further competition problems as they could be used to impede entry or otherwise raise the costs of rivals for reasons that are not even related to efficiency.

²⁷⁸ *Study of Monopolies and Competition Policy* (1992) 76.

²⁷⁹ *Ibid.* The issue of corrupt public enforcement officials was a reality given the levels of remuneration that such officials might be getting compared to what a party to the proceedings might be willing to offer as a bribe.

²⁸⁰ The Attorney General's Office headed by the Attorney General is established in terms of section 76 of the Constitution of Zimbabwe 1980 as a department within the Ministry of Justice and Legal Affairs with further sub-departments in Legal Advice, Legal Drafting, Civil Division and Criminal Division. The functions of the AG's office as spelt out in the empowering provisions of the Constitution and reiterated in the Office's Mission Statement are to ; 'To ensure the provision of sound legal services to the State, in an efficient and professional manner, and to secure the proper and effective functioning of the criminal justice system.' See http://www.justice.gov.zim/index.php?option=comcontent&view=article&id=57%3Attorney_generals_office&catid=35%3Adepartments&Itemid=55 (Accessed 05 September 2011). See also Madhuku L *An Introduction to the Zimbabwean Law* (2010) 48.

²⁸¹ *Ibid.*

²⁸² *Study of Monopolies and Competition Policy* (1992) 77.

²⁸³ *Ibid.*

This model was premised on the US antitrust enforcement model where the Antitrust Division of the Justice Department performs some enforcement function though the system provides for a private right of action.²⁸⁴ This approach that advocates importation and adoption of Western enforcement concepts have had a fair share of criticism in recent years.²⁸⁵ Opponents of this approach point to the difference in the enforcement environments of the developed and developing systems as not suitable for a ‘one-size-fits-all’ approach.²⁸⁶ Other critical factors that militate against the importation and adoption of Western standards include the inadequate enforcement resources of developing countries; the lack of expertise and experience in competition enforcement and generally the role that competition policy is expected to play in the economy.²⁸⁷

However, there are some commentators who maintain that even if all the factors that distinguish developing countries from their developed counterparts are taken into account, certain fundamental principles of competition regulation must not be sacrificed on the basis of such distinctions.²⁸⁸ This argument is based on two main premises:

(a) competition law even if it is to encompass other goal, must primarily seek to protect the competition process.²⁸⁹ This means that regardless of the enforcement models developing countries might adopt, they must be in line with this universal goal;

(b) developing countries cannot, in the name of coming up with models that represent their status, forego the principles developed in established jurisdictions. To do so would not only impact negatively upon the effectiveness of their enforcement systems but also isolate them

²⁸⁴ US DoJ’s Antitrust Division was established in 1933 to enforce antitrust violations. See The United States Department of Justice Antitrust Division, <http://www.justice.gov/atr/about/division-history.html>, (accessed 10 February 2013).

²⁸⁵ See generally, Kovacic (1992-93)(note 23 above) 261.

²⁸⁶ Ibid.

²⁸⁷ See Zogbhi (2009)(note256 above) 90, 102; Kovacic (1997-98)(note 46 above) 409, 410.

²⁸⁸ See generally Fox EM ‘Economic, Development, Poverty and Antitrust: The Other Path’ (2007) 13 *Southwestern Journal of Law and Trade in the Americas* 211.

²⁸⁹ Wish R *Competition Law* 6th ed (2009) 1(rules of competition law are intended to protect the competition process in order to maximize consumer welfare); Hamner (2001-2002)(note 43 above) 389; Zogbhi(2009)(note 256 above) 89 (the main objective is preserving and promotion of competition as a means of ensuring the efficient allocation of resources in an economy); *Study of Monopolies and Competition Policy* (1992) 68.

from much needed co-operation.²⁹⁰ Accordingly, they need to find ways of aligning their enforcement mechanisms with those of the established regimes in order to find common grounds for advancing common interests such as cross-border merger regulation and curtailed enforcement.²⁹¹

The proposed model was to utilise the already available resources of the AG's office²⁹² and was regarded as an alternative to the exclusive private enforcement model given that the AG's office was an already established entity with better resources.²⁹³

The effectiveness of this model depended on the effectiveness of the resident office, in this case the AG's office. A fundamental factor in designing a competition system is to ensure its credibility, that is, its acceptance to the stakeholders.²⁹⁴ One way of ensuring this is by ensuring that the institutions tasked with enforcing and implementing the system is independent.²⁹⁵ Independence of the competition authority in this instance refers to the ability to make decisions without the influence of interest groups.²⁹⁶ This entails that the

²⁹⁰ See Fox(2007)(note 288 above) 214.Fox also suggested that developing countries need not to radically depart from their developed counterparts because the principles underlying competition regulation have been established and are well articulated to such an extent that trying to reinvent them is not only difficult but also costly. She further noted that 'though developing countries might want to explore a path more sympathetic to their context, not to discount or run contrary to that which rely on matters and critical to economic welfare.' See also on the development of universal norms, Delrahim M 'The Long and Winding Road: Convergence in the Application of Antitrust to intellectual Property' (2005) 13 *George Mason Law Review* 259. (Remarks at George Mason Law Review Symposium, October 6, 2004).

²⁹¹ Ibid.

²⁹² *Study of Monopolies and Competition Policy* (1992) 77.

²⁹³ However, a counter argument to this was that the Office as a department within a government ministry was not spared from personnel constraints as a high staff turnover was and is still prevalent especially among the middle to junior level professionals. See *Study of Monopolies and Competition Policy* (1992) 77. See further Saller K *The Judicial Institution in Zimbabwe* (2004) 87.

²⁹⁴ See Lewis (2007) (note 1164 above) 351.

²⁹⁵ See Mehta and Evenett (2009)(note 5 above) 27.

²⁹⁶ Oliviera G, Machado EL and Novaes LM 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' in Mehta and Evenett (ed.,) (2009)(note 5 above) 285-326.

authority must be independent from government influence and stakeholders and make decisions without fear of these groups.²⁹⁷

In this context, much depended on the independence of the AG's office. It is unfortunate that the office had attracted a fair share of criticism in this regard. The AG's office had been seen as susceptible to influence by political interests²⁹⁸ and its financial resources are subject to state allocation.²⁹⁹ In addition, the office's effectiveness is hampered by perennial high staff turnovers³⁰⁰ thereby rendering it unsuitable for properly performing the functions of a competition authority. This is because any expertise that might have been developed in competition enforcement will be easily lost the moment the personnel who acquired that expertise leave office.

(iv) *Creation of a Competition Commission within an existing government ministry*

The model called for the enactment of a new competition statute that would establish a competition commission within an existing ministry to enforce its provisions.³⁰¹ Thus the commission would have performed a public enforcement function either through binding recommendations, or adjudicating cases relating to competition violations having been

²⁹⁷ Pederson L and Sorensen E 'Transfer and Transformation in Process of Europeanisation' *EGPA 2004 Annual Conference* (2004) 8.

²⁹⁸ It is submitted that the fact that the Attorney General is a political (executive) appointment makes it difficult for the office holder to perform his/her duties free of the influences of the appointing authority. However, what is expected is that at least the office be safeguarded from such influences through legislative measures that ensures and guarantees its independence. At the time of writing, there appears to be no evidence that such independence existed. One would have expected the new Constitution of Zimbabwe Amendment Act 20 of 2013 that was signed into law by the Zimbabwean President on 22 May 2013 will improve situation. However, Part 5 of Chapter 5 of the new constitution reiterates that the Attorney-General is the principal government legal advisor who is appointed by the President (s114(1) and the same authority can remove him/her from such a position (s115). The draft provision thus does nothing to dispel the fears that the office of the Attorney-General will be free of political influence. See for a discussion of the political influence on the Attorney-General, Saller (2004)(note 292 above) 87.

²⁹⁹ Saller (2004) (note 292 above) 86.

³⁰⁰ Ibid, 87.

³⁰¹ *Study of Monopolies and Competition Policy* (1992) 79.

proscribed by the new rules.³⁰² The existing ministry's broader objectives had to accommodate the competition policy objectives of the new authority.³⁰³

However, this model can be criticised because it subordinates the competition authority to the host ministry's other objectives and functions.³⁰⁴ This deprives the competition authority of much needed visibility necessary for an independent effective authority.³⁰⁵

(v) *Creating an independent Competition Commission*

The model called for the enactment of new competition laws that would establish a competition commission as an autonomous government institution charged with the public enforcement functions of the system.³⁰⁶ This approach theoretically guarantees the independence of the competition authority from possible government influence.³⁰⁷ It is accepted that the independence of a competition authority is a pre-requisite for any effective competition system. However, a number of factors make this goal difficult to attain for competition agencies in developing countries.

An independent competition authority must be able to select cases for prosecution without fear of reprisal from interest groups and to make decisions accordingly.³⁰⁸ An effective competition system must, *inter alia*, empower the authority to perform some form of advocacy role. This entails putting in place measures targeted at government policies that

³⁰² *Study of Monopolies and Competition Policy* (1992) 79.

³⁰³ *Ibid.* This would ensure that the risks of conflicting interests between the commission and the host ministry were avoided in as much as possible.

³⁰⁴ *Ibid.* This point can be illustrated by using the preferred Ministry of Trade and Commerce (now Ministry of Trade and Industry) whose other visible functions pertain to trade issues. Although competition and trade are related, regulation of trade may include measures that are prejudicial to the promotion of competition. For example, a country may decide to limit imports so as to promote domestic products whose producers might not necessarily be efficient and hence not competitive. Furthermore, should a country through this ministry, promote free trade, this does not necessarily mean that competition will be enhanced as market liberalisation and deregulation may not solve competition problems such as RBPs.

³⁰⁵ *Study of Monopolies and Competition Policy* (1992) 79.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.* An independent competition commission was regarded as less prone to manipulation by existing agencies thereby increasing its prestige and acceptability to the economic actors in the country.

³⁰⁸ Pedersen and Sorensen (2004)(note 297 above) 8; *Study of Monopolies and Competition Policy* (1992) 79.

lessen competition so as to sustain a competitive environment.³⁰⁹ Given that this role targets the government through *inter alia*, reduction of entry barriers, it can only be performed effectively by an authority that is independent of the government. In this regard, the study recommended the establishment of an entirely independent entity to perform pro-advocacy functions outside of any existing entity.³¹⁰

(c) Protection of non-competition factors

The Study also noted that the Zimbabwean situation required more than an exclusively economic approach to competition matters.³¹¹ This observation was premised mainly on the basis that ESAP, which informed their mandate, also encompasses non-economic issues.³¹² Accordingly, such issues as consumer protection and protection of disadvantaged groups received attention.³¹³

(i) Consumer Protection

Consumer protection is a common objective of most competition systems.³¹⁴ Although it is becoming more acceptable that the competition policy should seek to protect the competition system for the benefit of consumers,³¹⁵ the issue is how to set-up the enforcement institutions

³⁰⁹ Competition advocacy refers to any activities, regulatory policies, public awareness campaigns aimed at reducing entry barriers especially those perpetrated by the government in a bid to ‘create a level playing field and stimulate competition.’ See *Study on Monopolies and Competition Policy* (1992) 81.

³¹⁰ *Study of Monopolies and Competition Policy* (1992) 81.

³¹¹ *Ibid*, 82.

³¹² See ESAP par.16 ‘Social Dimension of Adjustment’ and par.729 adoption of measures which would not cause unnecessary adverse social consequences.

³¹³ See *Study of Monopolies and Competition Policy* (1992) 82 and 83.

³¹⁴ *Ibid*, 82.

³¹⁵ An unregulated market is prone to abuse by powerful and dominant entities through engaging in anti-competitive practices notable price increases, output restriction and preferential distribution as well as conditional (tying) selling. All these practices are to the detriment of the consumers hence the need to protect the competitiveness of the market through competition regulation. See further on competition regulation for benefit of consumers, Wish (2009)(note 289 above) 1; *Study of Monopolies and Competition Policy* (1992) 82 (competition policy have as one of its ‘ main objective, the goal of providing consumers with the best possible array of product choices, that is, to increase the range and quality of products offered at ‘reasonable’ or lowest prices’); Everest-Phillips (2009)(note 5 above) 47; Thorelli H *The Federal Antitrust Policy: Origination of an Antitrust Tradition* (1954) 166-70, 171 n20, 180-86 (broader objectives of antitrust is ultimately to protect

to conduct such a task within the competition system? Are competition enforcement authorities the ideal institutions for the protection of consumer interests? Should they be protected through competition institutions or through entities created outside the competition system?

After considering the practices from different jurisdictions, the study recommended that creation of a consumer protection entity was a priority for Zimbabwe.³¹⁶ This was because the existing mechanisms and institutions responsible for such a function were limited in operational effectiveness. There was no widespread effective enforcement of statutes and common law legal principles regulating deceptive marketing practices and controlling advertising content, among other things.³¹⁷ The Consumer Council of Zimbabwe (CCZ), which is the watchdog for consumer matters, is limited to urban areas only thus barely visible.³¹⁸

(ii) Disadvantaged groups

consumer welfare by regulating exploitative conduct); Hamner (2001-2002) (note 41 above) 402-3 (‘primary purpose of antitrust is to maximize the economic welfare of consumers by inter alai, eliminating barriers to market entrance and eliminating the abuse of market dominance by cartel, behaviour and monopolistic strategies’) and Fox EM ‘Towards World Antitrust and Market Access’ (1997) 91 *American Journal of International Law* 1. However, there are some who argue that consumer protection is not the objective of competition law. Proponents of this school either are influenced by Chicago economic thinking in which the enhancement of economic efficiency becomes the primary and exclusive aim of competition law. See Hamner (2001-2002)(note 43 above) 390 (ultimate goal of competition law is efficiency not competition) and competition is not the end but the means to an end (the end being efficiency). See also Bork (1978)(note 165) 15-16; Easterbrook(1984) (note 235 above) 13. It is submitted that competition law cannot have one goal as its exclusive aim. Accordingly, consumer welfare can still be of the main important goals of competition law. See Monti G *EC Competition Law* (2007)2.

³¹⁶ *Study of Monopolies and Competition Policy* (1992) 82.

³¹⁷ Although sections 2 ‘misleading advertisement’ and 3 ‘ false bargaining’ in the First Schedule ‘Unfair Business Practices’ are proscribed as unlawful restrictive practices by the Competition Act protection in Zimbabwe still remains a grey area. There is no comprehensive piece of legislation that deal with consumer protection. Other statutes that regulate certain aspects of consumer protection includes,

³¹⁸ *Study of Monopolies and Competition Policy* (1992) 82.Consumer Council of Zimbabwe. See IPC Study, 82.

One of the most important targets of the government upon independence was to provide equal opportunities to its entire population in the social and economic spheres.³¹⁹ Economically, this particularly entailed that the previously disadvantaged and marginalised black entrepreneurs were to be afforded equal opportunities to participate and compete in the country's economy.³²⁰ This was to be achieved through, *inter alia*, dismantling the entry barriers, reducing RBPs and discouraging any business practice deemed discriminatory.³²¹

It may however be asked whether the competition system, as much as it could probably have achieved this aim, was or is the best forum to address these issues. This calls for a re-examination of the aim of a competition system. As much as this subject is debatable, it has increasingly become acceptable that a competition system should aim to protect the process of competition and not individual competitors such as special groups.³²² However, it is also not uncommon to see some non-competition issues being included in competition statutes of most developing countries.³²³ South Africa is one of the countries that explicitly included non-competition public interest considerations in its competition statute.³²⁴ It is submitted that the issue is not whether or not these issues must be included in competition legislation but rather whether their inclusion will have an impact on the effectiveness of the competition system in question. This issue will be fully explored in latter parts of the study dealing with the regulation of mergers and acquisitions in Zimbabwe and also in South Africa where the impact of public interest on merger review will be assessed. Suffice to state here that although competition legislation is economic statutes,³²⁵ they cannot ignore the fact that there are other considerations, though non-economic, that require their attention. This is equally true of the enforcement institutions established under them, as eloquently stated by Lewis:

³¹⁹ CTC *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 53 above) 15.

³²⁰ *Study of Monopolies and Competition Policy* (1992) 83.

³²¹ *Ibid.*

³²² *Study of Monopolies and Competition Policy* (1992) 68; Hamner (2001-2002) (note 43 above) 389; Wish (2009) (note 289 above) 1; Fox (1997) (note 315 above) 1.

³²³ See Chetty V 'The Place of Public Interest in South Africa's Competition Legislation : Some Implications for International Antitrust Convergence' *American Bar Association Section of Antitrust Law 53rd Meeting*, Washington D.C. March 30-April 1, 2005) 4.

³²⁴ See section 12 A (3) of the South African Competition Act 89 of 1998.

³²⁵ Lewis (2007) (note 164 above) 358.

[A]competition statute that simply ignores the impact of its decisions on employment or securing a greater spread of black economic ownership would consign itself and the authorities that it creates to the scrap heap.³²⁶

In considering whether there should be institutions to enforce non-competition issues such as concerns relating to disadvantaged groups, the study team, again drawing from experiences elsewhere,³²⁷ recommended that special treatment of such interest groups as smaller black entrepreneurs could be served better outside the competition system.³²⁸

2.5.4 The implications of the IPC Study: Post-IPC Study and the evolution of a competition regime

The IPC Study made important findings regarding the degree of competition within the Zimbabwean economy which was largely a function of the level of industrial concentration and entry barriers. The study concluded that monopolies and oligopolies that existed on the market were hugely responsible for the lack of competition in the economy through erecting entry barriers and engaging in anti-competitive practices. These findings and conclusions laid the basis for the exploration of an appropriate competition system that would address the competition concerns associated with the existing market structure.

A desire to address these concerns led to the next important development towards the formulation of a competition regime in Zimbabwe, that is, the formulation of the legal rules to provide the regulatory and enforcement dimensions to the economic reforms. This section will briefly discuss the events and processes leading to the adoption of the current Competition Act in 1996 that became effective in 1998.

2.5.4.1 The Competition Council Committee of Zimbabwe

The IPC Study Team presented its final report to the Inter-Ministerial Committee on Monopolies Commission in September 1992. This committee, following the IPC Study recommendations, established an independent Competition Council Committee of

³²⁶ Lewis (2007)(note 164 above) 360.

³²⁷ It particularly made reference to the UK and Sweden.

³²⁸ *Study of Monopolies and Competition Policy* (1992) 84.

Zimbabwe.³²⁹ The establishment of the Competition Council Committee to make a follow up, select and implement the IPC Study recommendations were a giant step towards the formulation of a competition regime in Zimbabwe.³³⁰ The Competition Council Committee recommended to Cabinet the establishment of a Monopolies Commission and a legislative framework to constitute and empower the entity. Cabinet's approval of these recommendations was followed by a series of steps that resulted in the drafting of the underlying principles of the proposed legislation and the draft legislation.

2.5.4.2 Towards the establishment of a Monopolies Commission: the guiding principles

In October 1992 the then Minister of Industry and Commerce presented a Memorandum to Cabinet Committee on Development on the 'Establishment of a Monopolies Commission.'³³¹ The Memorandum recommended the adoption of the IPC Study and its findings and confirmed a number of significant observations made in the study. These included the need for a formal regulatory and enforcement framework to complement the economic reforms advocated by ESAP. The Memorandum also emphasised the need to promote competition within the economy of Zimbabwe and within the context of ESAP, a competitive and efficient market desirable for the attainment of the government's socio-economic goals such as the enhancement of consumer welfare, creation of employment and expansion of the entrepreneurial base.³³² These factors probably explain the broad-based objectives of the current competition law and policy in Zimbabwe.

The Memorandum reflected the influence of the IPC Study on the formulation of a competition system. This policy document outlined the underlying principles of the proposed

³²⁹ Kububa (2005)(note 20 above) 285. The independent Competition Council Committee of Zimbabwe (herein the Competition Council Committee). This committee was led by a Parliamentarian and comprised of experts from Zimtrade ,a private-public sector joint venture organisation whose purpose is to promote national trade and development; Zimconsult, a local research and consultant organisation and the Consumer Council of Zimbabwe, a consumer watchdog organisation, Air Zimbabwe, the national airline, with observers from USAID and the Freidrich-Naumann Foundation.

³³⁰ Ibid.

³³¹ The writer's attempts to locate the said Memo was fruitless hence reliance will be made as an exception to the secondary source being the competition authority studies.

³³² Kovacic (1992-93)(note 23 above) 258; Brett (2005)(note 7 above) 99.

competition system. Accordingly, the desired policy was regarded as one that would aid the government in the implementation of the economic reform policies and regulation of business conduct; provide for the regulation of mergers and acquisitions thereby altering the existing uncompetitive market structure where necessary;³³³ facilitate new market entries; promote industrial innovation and enhance exports and advance policies aimed at promoting consumer welfare.

These principles were aimed at addressing both the social and economic challenges that were targeted by ESAP thereby fortifying the claim that the adoption of a competition system was complementary to the on-going economic reform process.³³⁴ This was motivated by the need to achieve both the economic and social development objectives of ESAP that could not be achieved through pure economic reforms.³³⁵

Crucially the Memorandum reaffirmed the accepted position that the purpose of the competition policy must be to protect the competition system and not individual competitors.³³⁶ This was meant to ensure that the contemplated competition policy conforms to the established principles of competition law and policy.³³⁷ Protecting the competition process was critical in that it would ensure a level playing field by reducing entry barriers as well as shielding the system from vested interests. This was so given the fact that the existing Zimbabwean market structure was dominated by monopolies and oligopolies that contributed to the erecting of entry barriers thereby creating an uncompetitive economic environment.

The policy document stressed the need to ‘reduce’ rather than ‘eliminate’ entry barriers.³³⁸ One can say this was a more realistic target given the extent to which entry barriers hampered

³³³ Unregulated monopolists do have the potential and propensity to abusive their market power on one hand whereas business combinations resulting from mergers and acquisitions can also have a negative impact on the market structure by, *inter alia*, acquisitions on a monopoly and potentially abuse the same. See generally Goldberg AH ‘Merger Control’ in Dhall (eds.) (2007) (note 164 above) 93-107, 93-94; Zogbhi (2009)(note 256 above) 128; Signh and Dhumale (1999)(note 1 above) 4.

³³⁴ See note 2.5.3.1 above.

³³⁵ *Study of Monopolies and Competition Policy* (1992) 40.

³³⁶ Kububa (2009)(note 28 above) 9-10.

³³⁷ *Ibid.*

³³⁸ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 18.

economic development. Although entry barriers are anti-competitive, an ambitious agenda to eliminate them might as well contribute to the ineffectiveness of the whole system as more resources might end up being channelled towards that goal as well as enacting legislation with provisions that might turn out to be unenforceable.³³⁹ Thus targeting entry barriers in order to reduce them was a noble approach that allows for an adjustment of the system as more experience and development becomes available. However, achievement of the optimal goals of any system depend on the actual implementation thereof. The assessment of the effectiveness of the Zimbabwean competition system in dealing with entry barriers is however beyond the scope of this study and as such no attempt will be made in that regard.

Another important aspect highlighted in the policy document was the need to ensure the independence of the competition system from vested interests of both private and public nature.³⁴⁰ In this context vested interests included big corporate businesses that saw a regulatory system as an unnecessary impediment to their rent-seeking and political forces who considered it as a stumbling block to certain policy goals.³⁴¹ Thus the need for an independent competition system was crucial in ensuring the credibility of the system and hence its acceptance to stakeholders as being fair and impartial.³⁴²

Lastly, and most importantly, the Memorandum stressed a need to design a competition policy in such a way that it is not static.³⁴³ Monopolies and oligopolies were identified as the chief contributors to an uncompetitive environment in Zimbabwe. This entails that the focus of the envisaged competition system was to address this problem. However, given the role of the state in contributing to this situation, it may be asked whether such proposals would have had an effect on the state's position? Furthermore, it may also be asked whether the pre-occupation with monopoly control can potentially result in other similar concerns being

³³⁹ Kovacic(1997-98)(note 46 above) 404.

³⁴⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 18.

³⁴¹ Vested interests generally denote private or private considerations that are so entrenched to such an extent that they become accepted as normal. In the context of competition, these can refer to monopolies of economic and political power to influence competition processes. See Everest-Phillips (2009)(note 5 above) 43.

³⁴² See generally Oliviera G, Machado EL and Novaes LM (2009)(note 296 above).

³⁴³ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 54 above) 18.

overlooked. It is submitted that the answer to these questions lies in the degree of flexibility of the proposed system.

A flexible system would adjust to accommodate a changing operating environment. This entails that as the economy develops one would envisage a stage where the state's desire to control and influence big business that was so entrenched during the early years of independence, wanes. This would mean that the need to control only private monopolies would diminish gradually.

Another possible source of dynamism is the drive towards privatisation. ESAP encompassed programmes for the liberalisation of state enterprises through either privatisation or commercialisation.³⁴⁴ Given that some of these enterprises are natural monopolies,³⁴⁵ even removing them from government's direct control and ownership did not automatically guarantee that they would become pro-competitive. Anti-competitive practices would still persist hence the need for a forward-looking system that would be able to capture and address these situations.³⁴⁶

The Memorandum provided the underlying principles for the regulatory and enforcement framework. Its recommendations were adopted by the Cabinet and the legislative process was set in motion, with regard to the preliminary consultation and drafting processes.

2.5.4.3 The preliminary legislative phase

After adopting the policy recommendations on the guiding principles of the regulatory framework, study trips were made to several jurisdictions with functional competition systems.³⁴⁷ These included a visit to the USA's Federal Trade Commission (FTC) and the Anti-Trust Division of the US Department of Justice;³⁴⁸ the Monopolies and Mergers

³⁴⁴ ESAP (1992) 5 and 6 par.30.

³⁴⁵ *Study of Monopolies and Competition Policy* (1992) 65. Natural monopolies are those entities that can be the only ones who can survive in a given industry or market. It is economic to have them in such an industry or market rather than having a lot of entities. This is particularly true of public service utilities such as telecommunications, road maintenance, water treatment and energy generation and distribution.

³⁴⁶ *Study of Monopolies and Competition Policy* (1992) 65; Singh and Dhumale (1999)(note 1 above) 8.

³⁴⁷ Kububa (2006)(note 28 above) 1.

³⁴⁸ These two institutions consist the federal antitrust authority in the USA.

Commission and the Office of Free Trade in the United Kingdom;³⁴⁹ to the then Competition Board of South Africa,³⁵⁰ and Kenya and Zambia were also consulted in the process.³⁵¹

The then Ministry of Industry and Commerce spearheaded the legislative process by preparing preliminary draft principles with the assistance of two seconded US antitrust law experts from the US Federal Trade Commission and an academic.³⁵² These draft principles were presented to the AG's Legal Drafting Division for further consideration culminating in a preliminary draft entitled the *Monopolies and Merger Commission Bill*.³⁵³ This section will briefly highlight the significant events of the legislative phase with the purpose of assessing how the proposed legislation was influenced by the underlying philosophies that developed as a result of the broader-economic reform process. As such the focus will be on the proposed underlying principles of the draft legislation.

2.5.4.4 The underlying principles of the draft legislation

In July 1993 the Ministry of Industry and Commerce submitted the draft underlying principles of the proposed legislation to the AG's Office for legal drafting.³⁵⁴ These

³⁴⁹ Following the coming into force of the new Competition Act of 1998, the Competition Commission was created to replace the Monopolies and Merger Commission on 1 April 1999 and this new institution together with the Office of Free Trade makes up the UK's competition authorities.

³⁵⁰ The Competition Board was the competition authority in South Africa before 1998 when the authority was vested with the Competition Commission, the Competition Tribunal and the Competition Appeals Court in terms of the Competition Act 89 of 1998. These three institutions collectively constitute the South African competition authority.

³⁵¹ Kububa (2006)(note 27 above) 1. Kenya and Zambia were consulted probably because they have by then, functional competition systems and also because they were share common economic development levels with Zimbabwe and hence were a relevant choice as to how the competition enforcement in developing countries operates.

³⁵² (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 18.

³⁵³ *Monopolies and Merger Commission Bill*.

³⁵⁴ Kububa (2005)(note 20 above) 286. The Attorney General's Office headed by the Attorney General is established in terms of section 76 of the Constitution of Zimbabwe as a department within the Ministry of Justice and Legal Affairs with further sub-departments in Legal Advice, Legal Drafting, Civil Division and Criminal Division. See http://www.justice.gov.zim/index.php?option=com-content&view=article&id=57%3Attorney_generals_office&catid=35%3Adepartments&Itemid=55,(accessed 20

principles were mainly a confirmation of the earlier Cabinet approved Memorandum and sought to realign the proposed legislation with fundamental standards adopted by established jurisdictions. The latter point was buttressed by the presence of two seconded US antitrust law experts.

The most significant principles related to the structure and functions of the preferred competition authority. The preliminary draft had referred to the competition authority as the *Monopolies and Merger Commission*. However, it was recommended that the authority be referred to as the ‘Competition Commission.’³⁵⁵ It was emphasised that the authority be an independent and autonomous entity despite it being funded by the Government.³⁵⁶ It makes interesting reading to suggest that the authority could escape the influence of the Government. Whether this was simply going to be a case of ‘he who pays the piper plays the tune’ could only be determined by observing the entity in action. It is submitted that the extent to which the Government contributed towards the sustenance of the authority had a bearing on the amount of influence Government might exert. In a case where the authority solely depends on Governmental funding its financial independence might be compromised. However, where the Competition Commission was to rely on the greater part on funding from other revenue sources, then its degree of financial independence would be enhanced.³⁵⁷

The proposed legislation was supposed to guarantee this independence and autonomy through, *inter alia*, limiting the Minister’s powers and influence on the Competition Commission that was apparent from the draft legislation that made too many references to the Minister. Similarly, it was preferred that the members of the authority be Presidential

September 2011.). Due to the unavailability of the primary source and this writer’s failure to locate the same, reliance will be placed on the secondary source for purposes of this discussion.

³⁵⁵ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

³⁵⁶ *Ibid*, 18.

³⁵⁷ However, both exclusive government funding and external funding have their implications on the independence of the regulatory authority. Whereas government can exert influence through providing funding, the same can be equally true of external funders. By external funders here is meant largely private funding. Private funding can result in the regulatory authority losing its independence through similar influences such as the protection of vested interests. An ideal situation would be to have the regulatory institution been funded partly from the government and from its own initiatives such as fees from merger notification and competition violation penalties with private players providing technical support in form of training.

appointees selected from a broad representation of the society to accommodate various and diverse stakeholders.³⁵⁸ In exercising this power, the President was to be guided by the principle that the competition authority was to remain independent and uncompromised as much as possible so as to enable it to advance the primary aim of the competition system which is to protect the competition process.³⁵⁹ However plausible the idea of a representative authority might appear, the manner in which it is appointed might raise issues regarding the safeguarding of its independence. Even if the President were to appoint from a recommended list, this does not completely free the process from political influence.³⁶⁰

It was also highlighted that the envisaged competition authority was to be an autonomous entity independent of any existing ministry.³⁶¹ The idea of seconding officials from the parent ministry was rejected in favour of an authority with its own staff establishment dedicated to perform exclusively its competition mandate.³⁶²

It was recommended that the new entity consisted of clearly demarcated structures to perform investigative and adjudication functions.³⁶³ The investigative division of the entity was to provide evidence required for the adjudication process without influencing the decision-making functions of the adjudication division. This was meant to enhance impartiality of the system.³⁶⁴ Although it was noted that these crucial functions could only be performed by separate divisions, the idea of a US styled institution with the AG's Office conducting

³⁵⁸ Kububa (2005)(note 20 above) 287.

³⁵⁹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

³⁶⁰ Mehta and Evenett (2009)(note 5 above) 27. It is accepted that there are very few if no competition authorities that can claim to be totally independent from political influences. The fact that the members of such authorities have to be appointed by a process that involves political powers makes it to imagine them being totally independent. What is crucial is that the political involvement ends with the appointment and effective legislation measures put in place to ensure that the regulatory authorities enjoys a considerable degree of independence from political influences.

³⁶¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 18.

³⁶² Kububa 'Zimbabwe' (2005)(note 161 above) 287.

³⁶³ Kububa (2009)(note 28 above) 5.

³⁶⁴ Ibid.

investigations relating to competition violations and assigning staff to the competition authority, was rejected.³⁶⁵

The preliminary draft proposed the establishment of the office of a Director of Fair Trading.³⁶⁶ This practice also evidenced the influence of foreign practices as this office was influenced by the UK competition structure.³⁶⁷ The proposed functions of the Director of Fair Trading were limited to performing some administrative, financial and supporting duties for the Competition Commission and excluded any investigations of unfair trade practices as opposed to the position in terms of the UK statute.³⁶⁸ Accordingly, the Memorandum considered the title of the envisaged competition authority inappropriate given that it did not have any role in ensuring fair trading.³⁶⁹

The preliminary draft envisaged a procedure where the decisions of the Competition Commission were appealable to the Administrative Court as the immediate appellate forum.³⁷⁰ This was probably in recognition of the fact that the Competition Commission was an administrative body and as such keeping in line with existing practice that its decisions were appealable to the Administrative Court.³⁷¹ However, the Memorandum recommended the establishment of an internal administrative structure within the Competition Commission before the Commissioners as the initial forum for appeals.³⁷² One can argue that this proposal was risky in that the chances that the very Commissioners who might have decided against a

³⁶⁵ Kububa (2005)(note 20 above) 287. In the US, the Antitrust Department of the Department of Justice together with the Federal Trade Commission make up the federal antitrust agencies. It is the FTC who can conduct investigations with the DOJ having the prosecutorial authorities.

³⁶⁶ CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

³⁶⁷ Ibid. The UK office of Director General of Fair Trading was established by section 1 of the Fair Trading Act of 1977 and has since being replaced by the Office of Fair Trading under section 1(1) of the Enterprises Act of 2002.

³⁶⁸ Ibid. Kububa 'Zimbabwe' (2005)(note 161 above) 287.

³⁶⁹ Kububa (2005) (note 20 above) 287.

³⁷⁰ Ibid.

³⁷¹ The Administrative Court is established in terms of the Administrative Court Act [*Chapter 7:01*] (Act No.39 of 1979) as a specialized court whose jurisdiction is bestowed by other statutes such as the Competition Act. See Feltoe G *A Guide to the Administrative and Local Government Law in Zimbabwean* 4th ed (2006) 25.

³⁷² Kububa (2005)(note 20 above) 287.

litigant found themselves having to deal with the merits of their own decision potentially compromised the integrity of the whole process. This arrangement defeats the whole essence of an appeal where the litigant sought recourse from a different forum on the basis of the previous forum's decision either being wrong or unreasonable.³⁷³

On the substantive aspects, it was noted that the proposed list of conduct that amounted to unfair trade practices was limited hence the recommendation that the schedule for practices deemed as unfair trading practices be expanded to include any form of agreements aimed at market restriction and price discrimination, price fixing and or output restriction, collusive dealings including predatory pricing, resale price maintenance, conditional selling and exclusive supplying.³⁷⁴

The revised principles were resubmitted to the AG' Office for legal drafting with a recommendation that the draft should take into account the recommendations made.³⁷⁵ The revised draft legislation was published for comments after a consultative phase involving stakeholders.³⁷⁶ The consultative phase involved public seminars organised to entice the views of the various stakeholders on the proposed draft legislation.³⁷⁷

Given that the proposed legislation was to apply to all economic activities having an effect in Zimbabwe, this was potentially going to impact on divergent interest groups hence their interest in the process. The small indigenous business groups represented by the Indigenous Business Development Centre (IBDC)³⁷⁸ seized this opportunity to try and advance their cause. So too were manufacturers represented by the Confederation of Zimbabwe Industries

³⁷³ See Madhuku (2010) (note 280 above) 113.

³⁷⁴ Kububa 'Zimbabwe' (2005)(note 151 above) 287.

³⁷⁵ Ibid.

³⁷⁶ The consultative comments and consultative stage is not necessarily a requirement for the legal validity in Zimbabwe but simply a practice that have been observed in law marking process. See Madhuku (2010) (note 280 above) 50.

³⁷⁷ Kububa 'Zimbabwe' (2005)(note 161 above) 287.

³⁷⁸ The Indigenous Business Development Corporation (IBDC) is a black business empowerment organisation established in 1990 with the aim of championing the broadening of indigenous participation in the business economic life of Zimbabwe. See Raftopolous and Mlambo (2009)(note 8 above) 191. See also IBDC *Proceedings of the IBDC/Friedrich-Naumann Seminar on Competition and Economic Development in Zimbabwe* (1992), Bulawayo Sun Hotel, Bulawayo (22-24 June 1992).

(CZI)³⁷⁹ as well as employees and workers' representatives through the Zimbabwe Congress of Trade Unions (ZCTU).³⁸⁰ The impact of these consultations on the legislative process will be discussed below.

2.5.4.5 The consultative stage

The consultative stage of the formulation of the competition legislation was characterised by the desire to advance various often divergent interests in the competition system. These were notably by the big businesses and not surprisingly the public sector. Monopolies, especially in the beer manufacturing and cigarette manufacturing industries, were not prepared to let go their privileged positions.³⁸¹ These big businesses vigorously opposed the idea of establishing a competition authority in Zimbabwe arguing that there was no need for such given the small size of the economy.³⁸² However, this somewhat baseless argument³⁸³ was largely motivated by the desire to hang on to and enjoy their long established and unrestricted monopolies on the respective markets.³⁸⁴ The economic benefits accruing from a competitive environment are well documented thus it is submitted that for one to have argued in favour of the prevailing uncompetitive environment was simply motivated by personal gains.

³⁷⁹ CTC *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19. The Confederation of Zimbabwean Industries (CZI) was established in 1923 as an independent organisation representing and serving the interests of its members in several matters affecting their viability and competitiveness. See <http://www.czi.co.zw>, (accessed 10 April 2013).

³⁸⁰ The Zimbabwe Congress of Trade Unions (ZCTU) is the largest and most popular member based labour movement in Zimbabwe. See <http://www.zctu.co.zw>. (accessed 10 April 2013).

³⁸¹ The National Breweries owned by the multinational Delta Corporations under its beverages division enjoyed monopoly in the beer manufacturing industry whereas the British American Tobacco (BAT) did the same in the tobacco processing and cigarette manufacturing industry.

³⁸² (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

³⁸³ See Limpile GK 'Mergers and Acquisitions Investigative Tools: A Synopsis from a Developing Country Perspective' (2005) *Zambia Competition Commission* (2005) 2. Paper Presented at the *Training Workshop on Mergers and Acquisitions Evaluation Skills for Competition Authority Officials*, Hai Phong, Vietnam, (13-14 August, 2005).

³⁸⁴ See Mehta and Evenett (2009) (note 5 above) 24 (the 'very implementation of efficiency enhancing and pro-competitive market regulations may erode supra natural (rents) and therefore the capacity of certain vested interests to influence political leader.')

The CZI made some very significant comments on the proposed draft legislation. It applauded the proposed legislation as being founded on sound economic principles and welcomed the idea of competition within the economy.³⁸⁵ However, it took a swipe at the proposed objectives of the legislation as stated in its preamble and short title as being aimed at addressing too many conflicting issues that might potentially compromise its noble idea of a competition statute.³⁸⁶

The CZI also criticised the proposed pre-merger notification procedure as being unnecessary given the existence of criminal penalties in the statute to deal with any proscribed competition violations.³⁸⁷ The pre-merger notification is a safeguard against the implementation of uncompetitive mergers that, once implemented, might in some cases be difficult to identify and even more difficult to unscramble.³⁸⁸ It is submitted that although criminal penalties can be used as a deterrent to competition violations,³⁸⁹ their effectiveness in ensuring compliance with competition rules is still questionable and as such they cannot be relied upon to ensure compliance with. The effectiveness of criminal sanctions is diminished by the fact that unlike preventative measures, they might not be of any use where parties implement an anti-competitive merger and cause harm to competition. In this case harm might already have been done even if the perpetrators are punished. The authority further needs to go through the rigorous process of investigating and preventing the competition harm resulting from the transaction given that mergers are not per se prohibited.³⁹⁰ This can put a strain on the available resources burdening the infant institution.

³⁸⁵ Kububa 'Zimbabwe' (2005) (note 161 above) 290.

³⁸⁶ Ibid.

³⁸⁷ Ibid, 292.

³⁸⁸ See generally, Hamner (2001-2002)(note 43 above) 392; Goldberg (2007)(note 333 above) 96 (pre-merger notification 'lessens the administrative burden of competition authorities and also enables them to identify and focus upon the mergers which are most likely to be of concern).

³⁸⁹ See Gallo JC, Dau-Schmidt KG, Craycraft JL and Parker CJ 'Criminal Penalties Under The Sherman Act: A Study of Law and Economics' (1994) 16 *Research in Law and Economics* 25; Smith WJ and Formby JP 'Cartels and Antitrust: The Role of Fines in Deterring Violations at the Margin' (2001), available at <http://www.weber.edu/wsuiimages/AcademicAffairs/ProvostItems/cartels.pdf>, (accessed 24 May 2013).

³⁹⁰ Goldberg (2007)(note 333 above) 59.

The Bill also provided that the Competition Commission might publish notice of its intention to investigate certain transactions deemed as contrary to the provisions of the statute.³⁹¹ The CZI criticised these proposed provisions as being unwarranted since they would subject business to unnecessary public scrutiny, ridicule and even product boycott.³⁹² However, in sharp contrast, the ZCTU welcomed this proposal as a necessary mechanism that would enable the public and interested parties to participate in competition issues through making comments and objecting to transactions they deem harmful to competition.³⁹³

The CZI also welcomed provisions relating to the settlement of competition cases with the competition authority as an alternative to criminal penalties.³⁹⁴ Although these provisions are essential in, *inter alia*, providing revenue for the authority and speeding up the process, questions can be raised regarding their effectiveness. It is submitted that big business can simply engage in harmful transactions and settle any disputes arising from alleged competition violations where the cost of settling is less than the benefits that might accrue from the anti-competitive transaction.

Although the participation of interest groups in the legislative process was very important, clearly most of their contributions were motivated by the desire to protect their vested interests. The CZI for instance, by opposing the pre-merger procedure as well as applauding the settlement procedure, appears to have exhibited the desire to promote the interests of its members. The ZCTU also advocated for the exclusion of activities from trade unions and other employee representative organisation from the purview of the proposed statute.³⁹⁵ Other notable attempts to hijack the competition process for vested interests was exhibited by the opposition by public enterprises to have the proposed legislation apply to them as well as the

³⁹¹ Clause 3(a) of the *Competition Bill* of 1995. This clause provided that ‘it shall not be necessary for the Commission to publish a notice of its intention to embark upon the investigation upon notification of a proposed merger. However, Part (iv) of the *Memorandum to the Competition Bill of 1995* (‘*the Memorandum*’) provided that ‘before embarking on an investigation, the Commission will have to give public notice of its intention to do so.’

³⁹² Kububa ‘Zimbabwe’ (2005)(note 161 above) 292.

³⁹³ *Ibid*, 291.

³⁹⁴ *Ibid*, 292.

³⁹⁵ *Ibid*,290.

opposition by indigenous small businesses to have express provisions aimed at promoting indigenous oriented programmes.³⁹⁶

The final draft of the proposed legislation bore the brunt of these divergent interests. Notable changes were the dropping of the ‘Competition and Monopolies Commission’ in favour of a more generalised ‘Competition Commission.’³⁹⁷ Activities of trade unions were also expressly excluded from the application of the proposed legislation.³⁹⁸ The principle that all economic activities having an effect on the Zimbabwean economy was subject to the application of the proposed law was modified to exempt certain statutory bodies that were expressly regulated under other statutes from certain provisions relating to criminal penalties.³⁹⁹ Perhaps the most telling compromise was the omission of the pre-merger provisions.⁴⁰⁰ These compromises were regarded as essential as they enabled the draft legislation to pass through the political filter in parliament that was influenced by intense lobbying from big business.⁴⁰¹ It is submitted that although the compromises might have impacted negatively upon the effectiveness of the proposed legislation, they were necessary in ensuring that the law saw the light of the day. In any event, it was contemplated that the legislation could still be subjected to further legislative processes to address some of the concerns that might have arisen as a result of the compromises. This is exactly what happened as in 2001- only three years after the Act become operational it was subjected to a further legislative process.⁴⁰² The Competition Amendment Act of 2001 addressed such

³⁹⁶ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

³⁹⁷The Long title to the *Bill* which pronounced the objectives of the proposed statute provided for the establishment of the Industry and Trade Competition Commission. See also clause (i) of the *Memorandum to the Bill*.

³⁹⁸ Clause 3 of the *Bill* did not include an exemption on the activities of organised labour from the application from the proposed legislation.

³⁹⁹ Clause 3(1) of the *Bill*.

⁴⁰⁰ The *Bill* did not provide for pre-merger notifications. The same provisions were also omitted from the final statute and only inserted as an amendment in 2001. See 12 of the Competition Amendment Act of 2001 inserting Part IV into the Competition Act of 1996.

⁴⁰¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19.

⁴⁰² The principal Act which became effective in 1998 was amended by the Competition Amendment Act 29 of 2001.

issues as merger regulation and relevantly introduced pre-merger notification requirements that have been omitted from the principal statute.⁴⁰³

The compromises made during the consultative process were regarded as necessary evils that ensured that the proposed legislation sailed through the legislative processes given, *inter alia*, the amount of opposition that it was facing as well as the intense lobbying that characterised its passage. The legislation was passed by Parliament in 1996 and finally came into operation on 9 February 1998 after it was assented to by the President in the *Government Gazette* on 6 February 1998.⁴⁰⁴ The following part will give an overview of the main elements of the Competition Act. The aim thereof is not to provide a comprehensive analysis of the competition legislation but rather give a general understanding thereof so as to assess the impact of the environment in which it originated on the current underlying principles.

2.6 The current regulatory framework: The Competition Act of 1996

2.6.1 Introduction

The Competition Act of 1996 became effective in 1998 and was amended in 2001.⁴⁰⁵ As the case in many other competition statutes, the Competition Act provides for the regulation of business conduct that impacts upon the competitive structure of the market. It provides for the regulation of horizontal and vertical anti-competitive agreements,⁴⁰⁶ abuse of dominant position or monopolisation⁴⁰⁷ and anti-competitive mergers and acquisitions.⁴⁰⁸ Additionally,

⁴⁰³ See note 360 above. The Amendment Act also substituted the statutory definition of a merger. The current definition in section 2(1) is a product of this process.

⁴⁰⁴ The Competition Act [Chapter 14:28] (Act No.7 of 1996) .The *Statutory Instrument SI 21A* of 1998 (Date of Commencement: Competition Act, 1996) appeared in the *Supplementary Government Gazette Extraordinary* of 6 February 1998 fixing the 9th day of February 1998 as the day of commencement. See also See Batham B ‘Competition Regimes in the World- a Civil Society Report: Zimbabwe’ in Mehta P (eds.,) *Competition Regimes in the World –A Civil Society Report* (2005) 306,307.

⁴⁰⁵ Ibid. The Act was amended by the Competition Amendment Act 29 of 2001.

⁴⁰⁶ Section 2(1) defines restrictive practices, section 5(1)(c) provides for the regulation of restrictive practices through investigating , discouraging and preventing them as a function of the Commission.

⁴⁰⁷ Section 5(1)(d) provides as a function of the Commission to investigate monopoly situations and prevention thereof where they are contrary to public interests.

the Act provides for and establishes and constitutes a regulatory and enforcement authority in the form of the Competition and Tariff Commission (CTC).⁴⁰⁹

The purpose of this section is neither to provide an exhaustive overview of the statute nor a critical analysis thereof but rather to present a general assessment of the influence of the historical factors surrounding the origins and development of a competition system in Zimbabwe on the current statute, particularly on merger regulation. As such focus will be on the following questions:

- (a) To what extent did the pre-occupation with monopoly situations influence the current merger regulation provisions?
- (b) What influence did Government's policy measures aimed at advancing economic reforms have on the current merger regulatory framework? In other words, what is the influence of public interest considerations on the merger regulatory framework?

In order to explore the above issues, it is essential that salient features of the legislation be highlighted. Again, no attempt will be made to give a critical analysis of the same. A general presentation will be given of such issues as the scope of application of the statute and particular attention will be given to the regulation and control of monopoly situations, reduction of entry barriers and promotion of non-competition matters. This will be followed up with an overview of the regulation of corporate mergers and acquisitions and how this regulation has been influenced by the factors determining the origins and development of the competition system in general.

2.6.2 The main elements of the Competition Act

2.6.2.1 Aims of the Act

⁴⁰⁸ Section 2(1) defines a merger. Section 5(1) provides as a function of the Commission 'to study trends towards increased economic concentration.' Section 28 provides for matters relating to inter alia, merger investigations by the Commission.

⁴⁰⁹ The Competition and Tariff Commission of Zimbabwe (CTC) (herein after the Commission) was established in 2001 by section 4 of the Amendment Act to replace the merged old Industry and Trade Commission and the Tariff Commission. See Batham (2005)(note 404 above) 306,307.

The Long Title lays the basis upon which the main elements of the statute are founded. These being, the substantive provisions relating to the competition violations, the procedures for implementing and enforcing the statute as well as the institutional framework for achieving the same.

The Act's broader aims are presented in its Long Title as:

To promote and maintain competition in the economy of Zimbabwe; to establish a Competition and Tariff Commission and to provide for its functions;⁴¹⁰ to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair trade practices; and, to provide for matters connected with or incidental to the foregoing.⁴¹¹

The promotion and maintenance of competition in the Zimbabwean economy was identified as a central element for the achievement of the economic reforms. It is thus not surprising that such a goal is the cornerstone of the current competition system. By providing for the 'prevention and control of restrictive practices, regulation of mergers, prevention and control of monopoly situations and prohibition of unfair trade practices,' the Act aims at promoting and maintaining competition thus this objective became a central theme thereof.

As indicated, entry barriers were identified by the IPC Study as one of the major contributors to an uncompetitive economy.⁴¹² Promotion of competition in this context can be taken to mean putting in place measures that ensures the participation of as many competitors in the economy of Zimbabwe as possible. Maintaining competition in the Zimbabwean economy can thus be taken to mean putting in place measures that ensures that anti-competitive practices are put in check. However, having many competitors in the economy does not necessarily translate into having a competitive economy.⁴¹³ There is a possibility that these many competitors might not be competitive either by virtue of them being economically

⁴¹⁰ This is as amended by Section 4 of the Amendment Act 2001 which deleted the Industry and Trade Competition Commission and replaced it with the Competition and Tariff Commission.

⁴¹¹ The Long Title to the Competition Act 1996 as amended by section 4 of the Competition Amendment Act of 2001.

⁴¹² *Study of Monopolies and Competition Policy* (1992) 39-41.

⁴¹³ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 16, 18.

weak or by them engaging in anti-competitive practises themselves. In this regard, it is submitted that it is rather useful if the Act aims at achieving a minimum degree of competition rather than mere competition. A minimum degree of competition is achieved through the promotion and maintenance of effective competition in the economy.⁴¹⁴ Even though expressing the central objective of the Act as being to promote and maintain effective competition within the economy does not guarantee the achievement of competition in the economy, it is submitted that it will provide the adjudicating institutions with guiding concepts especially in assessing the extent to which a given transaction may lessen or reduce competition.

The Act states that the statute aim to ‘provide for matters connected with or incidental to the foregoing.’⁴¹⁵ This open-ended provision ensures that the Act is not limited to specifically stated matters alone but it addresses any other matters that might arise that have a bearing on its stated aims. This provision is plausible given the dynamic nature of business transactions that might not categorically fit within the provided list. However, such a ‘capture all’ provision ensures that any perceived anti-competitive transactions are subjected to the provisions of the legislation on the one hand but on the other hand the stipulation might be a dilemma for businesses who might find their bona fide transactions being subjected to statutory scrutiny.

2.6.2.2 Application of the Act

Section 3 demarcates the scope of application of the statute. It provides that the statute shall apply ‘to all economic activities within or having an effect within the Republic of Zimbabwe’⁴¹⁶ subject to stated exemptions.⁴¹⁷ The phrase ‘economic activities’ is not defined in the Act. However, if this provision is to be interpreted within the broader scheme of the Act, then it is submitted that any activity that involves the production and distribution of

⁴¹⁴ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 54 above) 16, 18.

⁴¹⁵ Long title to the Competition Act.

⁴¹⁶ Section 3(1) of the Competition Act 1996 as amended by section 3 (a) of the Competition Amendment Act of 2001.

⁴¹⁷ Section 3(1)(a) (i)-(v), and (b) provides for a list of exemptions that limit the application of the Act.

goods and services qualifies as ‘economic activities.’⁴¹⁸ The application of the Act to such economic activities is qualified by them having ‘an effect within the Republic of Zimbabwe.’⁴¹⁹ This wording suggests that the Act shall apply even if the transaction is concluded outside Zimbabwe as long as it has any effect on the Zimbabwean market.⁴²⁰ This presents practical challenges to the enforcement of such arrangements with extraterritorial effects.⁴²¹ These challenges relate primarily to whether the CTC has the means and powers to enforce its orders beyond the borders of Zimbabwe. In other words, the question turns on whether national legislation can have any application beyond the legislating country’s jurisdiction?

It is submitted that guidance on this issue can be gleaned from the South African Competition Tribunal’s position that the legislation can apply beyond its borders as long as the transaction or conduct in question have effects within the country.⁴²² However, this position was disputed in the legal opinion in *Ex parte: Caledonia Holdings (Africa) Limited*⁴²³ Whereas the basis for suggesting that the statute applies beyond the country’s boundaries lies in the effects-

⁴¹⁸ The definition of ‘restrictive practice’ provided in section 2 includes an element of ‘restricting production or distribution of any commodity or service.’ See also section 3 (2) providing that the Act shall bind the State in as far as it is involved in the manufacturing, that is production, and distribution of commodities.

⁴¹⁹ Section 3(1).

⁴²⁰ See however on the discussion of similar provisions within the South African Competition Act of 1998, *Competition Commission and Botswana Ash (Pty) and Another v American Natural Soda Ash Corporation and Another*, 49/CR/Apr00 and 87/CR/Sep00 (*‘the Ansac cases.’*). For a detailed discussion of the *Ansac cases*, see Moodaliyar K Competition policy in the SADC: a South African perspective’ in Drexler et al (eds.,) (2012)(note 6 above)66-85,78.

⁴²¹ Ibid.

⁴²² Ibid. This finding was premised on the application of the ‘effects test’ which is also applied in the US. See *United States v Aluminum Co. of America* 148 F.2d.416,444(2d Cir. 1945); *Hartford Fire Insurance Co. Petitioners v. California and Others and Merret Underwriting Agency Management Limited and Others*, 113. S.Ct. 2891 (1993). Cf. *Timeberlane Lumber Co. Bank of America* 549 F.2d 597 (9th Cir.1976). See also Hamner (2001-2002)(note 43 above) 391 (‘given the global nature of industry today, it is difficult to conceive of a wholly foreign act that could not be extended to meet the effects test, even if only in a remote way.’) See generally on extraterritorial jurisdictions, Griffin JP ‘Extraterritoriality in US and EU Antitrust Enforcement’ 67 (1999) *Antitrust Law Journal* 159.

⁴²³ *Ex parte: Caledonia (Africa) Limited In re: Blanket Mine (1983)(Private) Limited and Competition and Tariff Commission* (2006). (Opinion of de Bourbon AP (SC) of 9 December 2006 (unreported, on file with the writer).

based doctrine, the basis for rejecting such a formulation lies mainly in the enforcement of the orders of a domestic tribunal. In the legal opinion in *Ex parte Caledonia*, it was contended that a transaction between parties who were neither residents of Zimbabwe nor was the transaction concluded in the country constituted no basis for conferring jurisdiction on the Act.⁴²⁴ The argument was that the order of a domestic tribunal cannot be enforced beyond its borders.⁴²⁵ However, it is argued that what is important is that the Act regulates as many transactions as possible hence reference to the effects of such transactions. If any transaction has any effects on the domestic economy surely to deny the Act application solely on the basis of enforcement of orders would be doing injustice to the desire to have an effective statute. Accordingly, it is submitted that the wording of the provision is broad enough to confer extraterritorial jurisdiction upon it.⁴²⁶

The Act provides a closed list of exemptions to its scope of application.⁴²⁷ It does not apply to certain intellectual property rights to the extent they are not used for purposes of enhancing or maintaining prices or restrictive practices.⁴²⁸ Legitimate activities of trade unions or other employees' representatives aimed at protecting their member's rights are also exempted.⁴²⁹ Crucially, the Act applies to the State's economic activities but exempts the State from those

⁴²⁴ *Ex parte Caledonia* (note 423 above) 4.

⁴²⁵ *Ibid.* This argument was remised on precedence that a domestic court does not have jurisdiction on non-residents, See also *Siemens Ltd v Offshore Marine Engineering Ltd* 1993(3) SA 913 (A) 928 ('... here the plaintiff and the defendant are both foreign peregrine (*extranei, uitlanders*) both a recognized *ratio jurisdictionis* as wee as arrest of the defendant or attachment of his property are essential to found jurisdiction.')

⁴²⁶ See also on the effects based doctrine, note 422 above

⁴²⁷ Section 3 (1) (a) (i)-(v) and (b).

⁴²⁸ Section 3(1) (a) Exempts rights acquired from a list of statutory provisions namely, the Plant Breeders Rights Act [Chapter 18: 16], the Copyright Act [Chapter 26:01], the Industrial Designs Act [Chapter 26:02], the Patents Act [Chapter 26:03], the Trade Marks Act [Chapter 26:04].

⁴²⁹ Section 3(1)(b) of the Competition Act, 1996. The activities of trade unions and other employees' organisations that are considered as legitimate are those that enable the former to protect the interest of their members. These include negotiations and entering into agreements that are allowed under labour laws (the Labour Relations Act [Chapter 28:01]). The purpose of this exemption is to allow employees' representatives to protect their members' interest without being caught on the wrong side of competition rules given that the competition system broadly take into account employment issues especially in merger review.

provisions relating to criminal liabilities.⁴³⁰ The Act also provides that any other statutory regulatory authority shall apply to the Competition Commission for final authorisation before allowing any proposed sectoral merger.⁴³¹

Two exceptions are worth mentioning here. These are those relating to organised labour and State activities. It has been shown that the early measures implemented to regulate economic activities included the regulation of the labour market.⁴³² These measures were aimed partly at protecting the interests of employees and partly at curtailing the ability of private big business to make huge profits through exploitative means. Similarly, the exclusion of legitimate activities of organised labour from the scope of the Act can also be described as being aimed primarily at ensuring that employment interests are protected. It can thus be said that even if these interests do not fall within the traditional competition concerns, they found their way into the Act hence exhibiting the influence of historical events on the current statute.

The second relevant factor with historical connotations is the partial exemption of State activities from the purview of the statute. The State had traditionally participated in economic activities through public utilities and parastatals. It was found that these entities contributed to an uncompetitive economic structure through monopolistic practices.⁴³³ One would have expected that the new statute would apply to all State activities. The Act indeed applies to all economic activities of the State thus meeting this expectation.

2.6.2.3 The prevention and control of monopoly situation

⁴³⁰ Section 3(2). The Act imposes criminal sanctions on certain violations of competition rules such as 'entering into, engaging or otherwise giving effect to a restrictive practice which is an unfair business practice.' These practices are specified in the First Schedule as misleading advertisements (s2 of the First Schedule); false bargaining(section3); distribution of commodities or services above advertised price (s4); undue refusal to distribute commodities or services (s5); bid-rigging (s6); collusive arrangements between competitors (s7); predatory pricing (s8); resale price maintenance (s9) and exclusive dealing (s10). See also section 42 (3) which criminalise unfair trade practices.

⁴³¹ Section 3(3).

⁴³² See 2.3.2.4 above.

⁴³³ *Study of Monopolies and Competition Policy* (1992) 38.

Monopoly situation is dealt with in a number of provisions of the Act. The Act defines monopoly situation ‘as a situation in which a single person exercises, or two or more persons with a substantial economic connection exercises, substantive market control over any commodity or service.’⁴³⁴ The Competition Commission is empowered to investigate any monopoly situation that it reasonably believed to have come into existence⁴³⁵ with the view to determine whether it is contrary to public interest⁴³⁶ and hence make suitable orders including ordering its termination.⁴³⁷

The guiding principle behind prohibiting monopoly situations is that monopolies have the capability and means to lessen or prevent competition through abusing their dominant positions to engage in restrictive practices.⁴³⁸ The Act simply treats monopoly situations from a public interest perspective without actually providing for criteria to determine how competition is deemed as having being substantially lessened or prevented in such cases.⁴³⁹ It is submitted that the provisions create a wrong impression that all monopoly situations are harmful to competition and as such must be prohibited on competition grounds but can be allowed on public interest grounds.

The question here is whether the Act demonstrates a pre-occupation with monopolies? In creating of a Ministry of State in the President’s Office responsible for State Enterprises, Anti-Monopolies and Anti-Corruption and a National Incomes and Prices Commission meant to monitor prices, a clear demonstration was made of the need to control and regulate monopolies. This however provides a challenge to the control and prevention of monopoly situation in Zimbabwe. This Ministry is directly under the President’s Office and the National Incomes and Prices Commission was created to perform the other function thereof.⁴⁴⁰ The

⁴³⁴ Section 2.

⁴³⁵ Section 28 (1)(d).

⁴³⁶ Section 32(1) provides that a monopoly is contrary to public interest if it lessens effective competition, does not promote consumer interests. Section 32(5) provides for situations where a monopoly is deemed not be contrary to public interest in it enhance efficiency, is necessary and required for the parties’ economic activities and prohibit it would be detrimental to consumer interests as they would be denied benefits associated with it.

⁴³⁷ Section 31(2)(b).

⁴³⁸ See notes 83, 84 and 85 above.

⁴³⁹ Kububa (2005)(note 20 above) 354.

⁴⁴⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 19. The National Incomes and Prices Commission was established by the National

prevention of monopolies situation is a duplication of the Competition and Tariff Commission's function although the latter is under the Ministry of Trade and Industry. It is therefore not clear how these functions can be performed by different ministries with different missions. It is submitted that the creation of the Anti-Monopolies department within the President's Office reflects the determination to control monopolies in the economy as was exhibited throughout the country's economic history.

Monopoly situation can arise from business combinations that result in the market being dominated by a few firms or even a single firm.⁴⁴¹ The most common illustration is that of mergers and acquisitions. The Act confirms this by providing that a merger is regarded as contrary to public interest if it actually or potentially results in a monopoly situation which will be contrary to public interest.⁴⁴² As such the regulation of mergers and acquisitions is important in addressing the competition problems associated with monopolies. It may however be asked to what extent did the pre-occupation with monopolies influence the current philosophies underlying merger regulation in Zimbabwe?

It has been shown that throughout the development of competition law in Zimbabwe, monopoly control featured prominently.⁴⁴³ It is thus not surprising that the same scenario is visibly reproduced in the current merger regulatory system. Determining whether a merger creates a monopoly situation that is contrary to public interest is central to the current merger regulation provisions.⁴⁴⁴

2.6.2.4 Regulation of Mergers and Acquisitions

Provisions relating to the regulation of mergers and acquisitions are another important feature of the Act. Section 2 defines a merger as:

Incomes and Prices Commission Act [*Chapter 14:32*] and its mandate as expressed in the Act's long title is to develop 'pricing models for goods and services produced in the country with the view to balancing the viability of the producers and welfare of the people of Zimbabwe.'

⁴⁴¹ See section 2 of the Competition Act on the definition of a monopoly situation.

⁴⁴² Section 32(4) (b).

⁴⁴³ See 2.5.2 above.

⁴⁴⁴ Section 32(4) (b).

‘[T]he direct or indirect establishment acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor supplier, customer or other person [...]’,⁴⁴⁵

Any transaction where a controlling interest is either acquired or established through a scheme involving the purchase or lease of shares or assets of or the combination of a party who is a competitor, supplier, customer or any other person is regarded as a merger.⁴⁴⁶ The Act further provides that all mergers that fall within a prescribed threshold calculated on the basis of the merging parties’ combined annual turnover or assets in Zimbabwe must be notified to the Commission.⁴⁴⁷ Such a notification regarding a ‘notifiable merger’⁴⁴⁸ must be done within a prescribed period of either the ‘conclusion of the merger agreement between the merging parties’⁴⁴⁹ or the acquisition of a controlling interest by any of the merging

⁴⁴⁵ Section 2(1). The definition of a merger was one of the significant amendments made to the principal Competition Act by the Amendment Act in 2001. This definition was substituted by section 2 of the Amendment Act 29 of 2001.

⁴⁴⁶ Section 2(1) (a)-(c).

⁴⁴⁷ Section 34(2) of Part IVA defines a ‘notifiable merger’ as being a transaction whose value is equal to or exceeds the prescribes threshold. This threshold is calculated as the combined annual turnover or assets in Zimbabwe of merging parties equalling or exceeding US\$1 200 000 (the US dollar is the official currency in Zimbabwe along with the South African Rand following the disuse of the local Zimbabwe dollar). See section 2 of the Competition (Notifiable Merger Thresholds)(Amendment) Regulation No. 2 of 2011 published in Statutory Instrument SI 110/2011.

⁴⁴⁸ Section 34(2) defines a notifiable merger as ‘a merger or proposed merger with a value at or above the threshold prescribed’ in the Act.

⁴⁴⁹ Section 34(2)(a) and (b) read with section 2(1) A merger must be notified within 30 days of either (a) the conclusion of the merger agreement or (b) acquisition of a controlling interest by ether of the parties in the whole or part of the business of the target entity.

parties.⁴⁵⁰ Upon receiving such notification, the Commission must then make a determination as to whether or not to approve such a merger.⁴⁵¹

In examining a proposed merger the Commission determines whether or not the merger is compatible with public interest.⁴⁵² A merger is deemed to be “public interest incompatible” if it is likely to substantially lessen or prevent competition in Zimbabwe or any substantial part of the country⁴⁵³ or results in the creation of a monopoly situation that is contrary to public interest.⁴⁵⁴ The standard for merger assessment raises two main issues that are of relevance in identifying the influence of the historical development of the competition system on the current merger regulatory framework. These are (a) the role of the control of monopoly situations on merger regulation and (b) the influence of a broader-policy consideration manifesting in public interests considerations in merger regulation.

The role of the control of monopoly on merger regulation has already been discussed above and will not be repeated here.⁴⁵⁵ This leaves the issue of public interest. The concept of public interest consideration in merger regulation largely denotes the inclusion of broader policy objectives in merger control. The concept is central to merger regulation in Zimbabwe as evidenced by the frequency with which the statute makes reference thereto.⁴⁵⁶ Section 32 provides that when making an order as to whether or not a merger must be approved, the

⁴⁵⁰ Section 34(2)(b). Section 2 defines a controlling interest as any interest which entitles the holder thereof to exercise control or influence, be it directly or indirectly, over the whole or part of the business of another. See generally on the concept of acquisition of control in merger regulation, *Distillers Corp. (South Africa) Ltd and Stellenbosch Winery Group Limited v Blumer (SA) (Proprietary) Ltd and Seagram Africa (Proprietary) Ltd* 08/CAC/May01, and the European Commission’s decision in Case No. IV/M.890 *Blokker/Tots ‘R’ Us* L316/1, L316/3 par. 13 (control for purposes of merger regulation refers to the ‘possibility of exercising decisive influence on a firm, in particular by ownership or otherwise.’)

⁴⁵¹ Section 34A read with section 5 of Statutory Instrument 270/2002 (Determination of Notification) provides that the Commission have to make a determination ‘as soon as practicable.’ In regard to an application for authorisation of a transaction, section 4 (2)(a) and (b) of Competition (Authorisation of Mergers) Regulations 1999 published in Statutory Instrument 295/1999 provides that the Commission have to make a determination within 90 days.

⁴⁵² Section 32 (4).

⁴⁵³ Section 32(4)(a).

⁴⁵⁴ Section 32 (4)(b).

⁴⁵⁵ See note 444 above and the accompanying text.

⁴⁵⁶ See section 32.

CTC must determine whether or not such a merger is contrary to public interest.⁴⁵⁷ Section 32 (4) further provides that a merger is contrary to public interest if it is likely to either substantially lessen or prevent competition in the economy or results in the creation of a monopoly situation that is contrary to public interest.⁴⁵⁸ The Act provides a list of factors that the CTC must assess, where necessary, to determine whether or not a merger is likely to substantially lessen or prevent competition. These are:

- (a) the actual and potential level of import competition in the relevant market;
- (b) the ease of entry into the market, including tariff and regulatory barriers;
- (c) the level, trends of concentration and history of collusion in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the merged parties having market power;
- (f) the dynamic characteristics of the market including growth, innovation and product differentiation;
- (g) the nature and extent of vertical integration into the market;
- (h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
- (i) whether the merger will result in the removal of efficient competition.⁴⁵⁹

However, it is submitted that a closer look at these factors shows that they are nothing less than the traditional economic considerations in merger regulation.⁴⁶⁰ This is despite the fact that they are presented here as factors that must be assessed in the broader assessment of the public interest compatibility of a given merger. This has led some to conclude that the public interest concept in Zimbabwean merger regulation is largely undefined.⁴⁶¹ Regardless of this observation, it suffices to note here that the inclusion of the public interest concept in merger regulation is largely a product of the historical development of the country's competition

⁴⁵⁷ Section 32(4).

⁴⁵⁸ Section 34(4)(b).

⁴⁵⁹ Section 32 (4a)(a)-(i).

⁴⁶⁰ See Lewis (2007)(note 164 above) 358.

⁴⁶¹ United Nations Conference on Trade and Development (UNCTAD) 'Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia and Zimbabwe' (2012) *UNCTAD DICT/CLP2012/1*, 184.

system. If public interest is to be taken to mean the inclusion of non-competition considerations in merger regulation, then one could easily think of the consideration of such factors as affording equal opportunities for economic participation, creation and protection of employment, enhancement of the ability of domestic firms to effectively compete on regional and international markets, generation of foreign exchange and consumer welfare protection.⁴⁶²

2.6.2.5 Prevention and control of restrictive practices

The Act also provides for the control of restrictive practices. Restrictive practices are widely defined to capture most transactions or activities that might directly or indirectly significantly impact upon the degree of competition.⁴⁶³ Any transaction, practice or operation that actually or potentially results in any of the identified effects is deemed as a restrictive practice.⁴⁶⁴

Restrictive practices are not automatically prohibited. This means, as is the case with mergers, that they have to be assessed in order to determine whether or not they can be allowed. In other words, the authorities employ a rule of reason approach in which they engage in a balancing exercise to determine whether the practice in question is likely to or actually impedes the degree of competition and if so, whether there are any benefits.⁴⁶⁵ A restrictive practice is also assessed for public interest compatibility.⁴⁶⁶ A practice is not automatically contrary to public interest if it results in any of the following:

⁴⁶² See section 12A (3) of the South African Competition Act of 1998 which provides a clear public interest concept.

⁴⁶³ Section 2(1).

⁴⁶⁴ Section 2(1) (i)-(vii) provides a list of situations that are should the transaction, practice or operation actually or likely affect, the former is deemed to be a restrictive practice. This list includes the restricting production or distribution, limiting productive facilities, price manipulation, preventing the use of economic productive means, impeding the development of technology in production, creating any entry barriers, retarding market expansion and any practice that limit product availability.

⁴⁶⁵ See Section 32(1) read with section 32(2) providing for factors that the Commission would consider when making orders. See generally on the rule of reason ,Batham (2005) (note 365 above) 308, CTC, 20.

⁴⁶⁶ Section 32(2).

- (a) maintenance and promotion of effective competition between parties involved in any economic activity in Zimbabwe;⁴⁶⁷
- (b) prices that promote the interests of consumers and other users of the product;⁴⁶⁸
- (c) promote competition by reducing costs, enhancing production and technology as well as facilitating market entry.⁴⁶⁹

However, some restrictive practices are outright considered anti-competitive and prohibited as such. This means that they are declared as being unlawful trade practices without any need to assess whether or not they might give rise to any substantial benefits including pro-competitive gains.⁴⁷⁰ Restrictive practices that are specified under the First Schedule of the Act constitutes ‘unfair business practices’ and are regarded as *per se* prohibited.⁴⁷¹ These include misleading advertising, false bargains, charging prices above advertised ones, undue refusal to distribute goods or services, bid rigging, collusive dealings, predatory pricing, resale price maintenance and exclusive dealing.⁴⁷²

2.6.2.6 Institutional provisions

The IPC Study recommended the establishment of an effective competition regulatory authority.⁴⁷³ The legislature obliged by establishing the CTC as the competition authority.⁴⁷⁴

⁴⁶⁷ Section 31(1)(a).

⁴⁶⁸ Section 31(1)(b).

⁴⁶⁹ Section 31 (1) (c).

⁴⁷⁰ Section 32 (3) states that; ‘A restrictive practice that is an unlawful trade practice is deemed [...] to be absolutely contrary to the public interest.’ This approach is generally termed as the *per se* approach in competition law. See generally *Study of Monopolies and Competition Policy* (1992) 73; Batham (2005)(note 404 above) 308 and (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 20.

⁴⁷¹ Section 2 (1) defines an ‘unfair business practice’ as ‘a restrictive practice or conduct specified in the First Schedule’. Section 42 (1) further makes reference to the First Schedule for conduct amounting to ‘unfair business practices’.

⁴⁷² See First Schedule (Sections 2 and 42).

⁴⁷³ *Study of Monopolies and Competition Policy* (1992) 57, 65.

⁴⁷⁴ See Long title and section 4. The Competition and Tariff Commission (CTC) was established following the merging of the then Competition Commission and the Tariff Commission and the defunct Industry and Trade

The Act also provides that decisions of the CTC can be appealed to the Administrative Court⁴⁷⁵ by implication incorporating the said court into the institutional arrangement for competition enforcement.

(a) *The Competition and Tariff Commission*

The CTC comprises of the Board of Commissioners who are members of the Commission and are referred to in the Act as the Commission itself⁴⁷⁶ and the Directorate as the administrative arm of the Commission.⁴⁷⁷

The Act provides for the functions of the Commission as being to encourage and promote competition, reduction of entry barriers, investigating and prevention of restrictive practice and monopoly situations that are contrary to public interest and to fulfill an advisory role to the Minister.⁴⁷⁸ However, there is no express reference to the function of the Commission regarding merger regulation which regulation is stated as one of the aims of the Act. It is submitted that this function can be inferred from the investigative role of the Commission in respect of monopoly situations that are contrary to public interest.⁴⁷⁹ In assessing whether or not a merger is contrary to public interest, one of the criteria provided is to determine whether or not such a merger will result in a monopoly situation.⁴⁸⁰ These functions largely confirm the objectives of the Act and the competition system.⁴⁸¹

As the adjudicative authority, the Commission can make such orders as are necessary to advance the objective of the Act.⁴⁸² The standard employed in making such orders is largely the public interest concept. This again demonstrates the influence of the historical

Competition Commission. Section 4 of the Competition Amendment Act of 2001 deleted the Industry and Trade Completion Commission and inserted the Competition and Tariff Commission.

⁴⁷⁵ Section 40.

⁴⁷⁶ Section 6 of the Competition Act.

⁴⁷⁷ Section 17 of the Competition Act.

⁴⁷⁸ Section 5 of the Competition Act.

⁴⁷⁹ Section 5(1)(d).

⁴⁸⁰ Section 32(4) (b).

⁴⁸¹ See Batham (2005)(note 404 above) 307.

⁴⁸² Section 31.

development of the system on the current philosophies. Any decision of the Commission is subjected to an appeal by the Administrative Court.⁴⁸³

(b) *The Administrative Court*

The Act provides for a right to appeal Commission decisions to the Administrative Court.⁴⁸⁴ The Administrative Court is a specialised institution established by the Administrative Court Act ⁴⁸⁵ whose jurisdiction depends on conferment by the specific statute.⁴⁸⁶ The Administrative Court acts as a court of appeal for decisions of administrative tribunals such as the Competition Commission.⁴⁸⁷

Although the Administrative Court is incorporated into the competition enforcement institutional arrangement, the right of appeal against a decision of the CTC to the Administrative Court subjects competition proceedings to rules and procedures of the Administrative Court.⁴⁸⁸ Although provision is made for the Administrative Court to be specially constituted for purposes of hearing competition appeals,⁴⁸⁹ it is submitted that the Act subjects competition litigants to any shortfalls within the court's practices.

It is submitted that the size of the economy and number of cases that the Commission handles to a larger extent justifies the prevailing appeal process. In larger economies such as South Africa, this arrangement might be unsuitable given the number of cases that are handled by competition authorities. The need to have an independent institution as the appellate body also justifies the use of the Administrative Court for that purpose. However, there is a need to tailor-make the procedure so that it is more accommodating to competition matters.⁴⁹⁰

⁴⁸³ Section 40 (1).

⁴⁸⁴ Section 40 of Part VI.

⁴⁸⁵ Administrative Court Act of 1979.

⁴⁸⁶ Feltoe (2006)(note 371 above) 25.

⁴⁸⁷ Ibid.

⁴⁸⁸ Section 40(2).

⁴⁸⁹ Section 41.

⁴⁹⁰ For instance, the Administrative Court practice does not provide for urgent applications. This means that any matter as treated as normal. In merger proceedings, there are some matters that must be dispensed with as a matter of urgency.

It is evident that the current institutional arrangement is a hybrid of the options explored by the IPC Study.⁴⁹¹ The current authority houses both investigative and adjudicative functions in a single institution.⁴⁹² It is submitted that the CTC does not have the powers to prosecute competition violations or make legally binding decisions. It relies on the State prosecutorial machinery to prosecute violations as well as the mainstream legal system to enforce its orders.⁴⁹³ It is submitted that this arrangement subjects the competition system to the risks associated with any shortcomings that might be in either the judicial or prosecutorial systems. The effectiveness of the current institutions in merger regulation will be discussed in detail in the next chapter. Suffice to state at this stage that they are mainly a hybrid of the IPC Study recommendations since they draw from a number of options mooted in the study, notably the creation of a new law that establishes an independent regulatory institution⁴⁹⁴ and reliance on the AG's office for prosecutorial functions.⁴⁹⁵

2.6.2.7 Other matters regulated by the Competition Act

The Act, besides dealing with restrictive practices and mergers, also contains provisions relating to consumer protection including exploitative pricing of goods and services.⁴⁹⁶ These consumer protection provisions are scattered all over the Act.⁴⁹⁷ Most of the practices categorised as 'unfair business practices' under the First Schedule relates directly to consumer welfare.⁴⁹⁸ These are: misleading advertising, false bargains, distributing

⁴⁹¹ See *Study of Monopolies and Competition Policy* (1992) 7 par. 6.2.

⁴⁹² Mhamhare (2012)(note 6 above) 58.

⁴⁹³ See for instance section 33 of the Competition Act on the enforcement of orders.

⁴⁹⁴ *Study of Monopolies and Competition Policy* (1992) 79.

⁴⁹⁵ *Ibid*, 77.

⁴⁹⁶ Batham (2005)(note 404) 308.

⁴⁹⁷ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 21.

⁴⁹⁸ The First Schedule (Sections 2 and 42) list nine practices as Unfair Business Practices that are out rightly prohibited. These are; misleading advertising, false bargaining, distribution of commodities or services above advertised price, undue refusal to distribute commodities or services, bid-rigging, collusive arrangements between competitors, predatory pricing, resale price maintenance and exclusive dealing.

commodities or services above advertised prices, resale price maintenance and exclusive dealing.⁴⁹⁹

The Commission is also mandated to perform a monitoring function relating to prices, costs and profits as might be directed by the Minister of Industry and Commerce.⁵⁰⁰ In order to give effect to this function, the Commission can investigate restrictive practices with the view to discourage them.⁵⁰¹ The definition of restrictive practises is wide enough to cover any business practice or trading methods that has the potential to ‘enhance or maintain the price of any commodity or service.’⁵⁰² The Act also defines ‘unfair business practices’ as entailing ‘a restrictive business practice or conduct specified in the First Schedule.’⁵⁰³ This Schedule provides various forms of price manipulation as unfair business practices that amounts to restrictive practices.⁵⁰⁴ These scenarios where price manipulations amounts to restrictive practices, partly justify the Commission’s involvement in pricing matters.⁵⁰⁵

2.7 Conclusion

Zimbabwe is one of many developing countries that embraced the idea of market-based economic reforms as a vehicle for promoting national and economic development. The adoption of ESAP in 1992 was necessitated by the need to address a range of socio-economic challenges that had plagued the country during its first decade of independence. These challenges were hugely the result of poor economic performance characterised by a stagnant economy, lack of investment, shortage of foreign exchange, lack of business opportunities for

⁴⁹⁹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 21.

⁵⁰⁰ Section 5(1) (h).

⁵⁰¹ Section 5 (1) (c).

⁵⁰² Section 2(1) (b) (iii).

⁵⁰³ Section 2(1).

⁵⁰⁴ Examples of such practices are undue refusal or failure to distribute any commodity to another party. This amounts to an unfair business practice as the refusing party attaches conditions that results in prices that are above the normal distribution margin for them to distribute. Similarly, collusive dealings involving distributors of a similar product or service results in them agreeing to distribute such at a particular price or range of price, a practice which amounts to price manipulation. See (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 53 above) 22.

⁵⁰⁵ Section 28 of the Competition Act on price orders.

the small indigenous entrepreneurs, persistent budget deficit, unemployment and poverty. The economic problems were blamed on the government's protectionist policy measures that combined to crowd out investment and derail economic growth through price controls, labour market regulations, foreign exchange controls and unsustainable government expenditure through subsidising and maintaining inefficient public enterprises.

Besides negatively impacting on the country's economic performance, government measures raised a number of competition concerns. Public enterprises aggravated the already anti-competitive monopoly situation. These public enterprises enjoyed privileged market positions through either express statutory provisions or protective administrative policies such as licensing. In addition, they were heavily subsidised. The public enterprise concern was militated by such measures as labour market regulation and foreign exchange controls to erect entry barriers for new market entrants. The result was an economy characterised by monopolies and oligopolies. The major sectors of the economy were characterised by high levels of industrial concentration and the existence of entry barriers as was confirmed by the *Study of Monopolies and Competition Policy*.⁵⁰⁶ This resulted in an uncompetitive economic environment.⁵⁰⁷

ESAP encompassed some important competition enhancement measures. These included trade liberalisation, domestic deregulation and reform of parastatals. However, as ESAP was merely a market-based economic reform programme, its ability to regulate the unbecoming behaviour of market participants was also questionable. It was this realisation that even market based reforms cannot guarantee a competitive market that prompted the need for a regulatory mechanism.

A formal competition system was considered as capable of providing this dimension as it would also enable the country's domestic industries to compete at the regional and international markets and benefit from the growing movement towards free market trade. A formal competition regime was also regarded as one way of promoting economic democracy⁵⁰⁸ through dismantling of entry barriers and encouraging economic participation of especially small indigenous businesses that were becoming agitated by the exclusionary

⁵⁰⁶ See 2.5.2 above.

⁵⁰⁷ See 2.3.2.5 above.

⁵⁰⁸ See Mehta and Evenett (2009) (note 5 above) 25.

government policies.⁵⁰⁹ Competition policy was also considered as a remedy to cure social ills such as unemployment and poverty.⁵¹⁰ These considerations put pressure on the competition system.

The enactment of the Competition Act in 1996 ushered in the era of formal competition regulation in Zimbabwe. This Act was influenced by the underlying philosophies developed during the economic reform period. The main objective of the Act is to encourage and maintain competition within the economy of Zimbabwe.⁵¹¹ This is supported by a number of provisions aimed at tackling anti-competitive practices such as the regulation and control of anti-competitive agreements, the regulation of mergers, the prevention and control of monopoly situations and the prohibition of unfair business practices.

Monopoly situations were identified as central to the country's competition concerns.⁵¹² The current statute seek to, *inter alia*, prevent and regulate monopoly situation, regulate mergers and prevent restrictive business practices. The Competition and Tariff Commission established as the authority responsible for the enforcement and administration of the competition system is empowered to investigate monopoly situations, mergers and restrictive practices and make appropriate orders if they are contrary to public interest. However, reference to public interest in the Act is more of an assessment of the effects of a given concern on the degree of competition and consumer welfare than public interest in its ordinary sense. Although the alleviation of the effects of monopoly situations was central in the formulation of the competition system, the Act unfortunately does not clarify the criteria for assessing the impact of monopoly situation on the degree of competition from a public interest perspective given that preference to public interest is central to the competition system.⁵¹³

The Act also provides for the regulation of mergers. As the case with monopoly situation, merger regulation is scattered throughout the Act. Section 2 provides definitions and makes reference to 'controlling interest.' It provides a definition of controlling interest without

⁵⁰⁹ Kovacic (1992-93)(note 23 above) 258; Brett (2005)(note 7 above) 98 and 99.

⁵¹⁰ See 2.2 above.

⁵¹¹ The Long Title to the Competition Act of 1996.

⁵¹² *Study of Monopolies and Competition Policy* (1992) 41.

⁵¹³ Kububa (2009)(note 28 above) 19; Kububa 'Zimbabwe' (2005)(note 161 above) 354-357.

illustrating circumstances under which control can be established or acquired. Section 32 provides that for purposes of making a determination, the CTC must consider the public interest compatibility of the merger. A merger is regarded as contrary to public interest if it materially lessens the degree of competition or results in a monopoly situation. The latter part confirms the central role of prevention of monopoly situation as it originated from the pre-occupation with the economic power of big businesses in the country's economy. Again the ambiguities/ shortfalls in provisions relating to a monopoly situation can be transferred to the current mergers regulation.

The Act also confirms a number of principles that featured during its evolution. The need for an independent competition authority is confirmed in the Act. However practical aspects relating to funding and administration subject the authority to external influence. The Act further confirms the principle that the role of competition policy is to protect the competition process for the benefit of the consumers. This is evident in the central theme in the Act which is to encourage and maintain competition through the regulation, control and prevention of competition inhibiting practices and behaviours such as mergers, monopolisation and restrictive practices.

Although the Act strives to conform to settled principles of competition regulation, subsequent developments exhibit the influence that the philosophies underlying the origins thereof continue to exert on its development. The broader objectives that influenced the competition system are also deeply reflected in the Competition Commission's assessment and determination of mergers where non-competition factors are considered. Whether these factors impact on the assessment of mergers during a changed operation environment is the concern of this study and will be explored in detail in subsequent chapters. Suffice to state here that the reference to public interest in the merger provisions of the Act had a huge bearing on how transactions involving firms in financial difficulties are treated.

Chapter 3: The regulation of corporate mergers and acquisitions in Zimbabwe

Getting the balance between a prohibition and permission right is important as an overly restrictive approach to merger control can prevent beneficial mergers proceeding, entrench existing inefficient market structures, and limit incentives for new investment: whilst an overly permissible approach to merger control can entrench monopoly elements.¹

3.1 Introduction

The importance of merger regulation within the broader context of competition law cannot be underestimated. Merger regulation is at the core of competition law in almost all major competition regimes² and as such Zimbabwe is no exception. In Zimbabwe, the Competition Act³ states that its aim is to promote and maintain competition within the country's economy through *inter alia*, regulation of mergers and acquisitions and control of monopoly situations.⁴ Merger regulation is also crucial to the control of monopoly situations as a transaction that gives rise to a monopoly situation that is contrary to public interest is assessed under merger regulation provisions.⁵ Furthermore, merger regulation functions constitute probably the most important

¹ Goldberg AH 'Merger Control' in Dhall V (eds.) *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007) 93- 107, 94.

² Fox EA 'Economic Development, Poverty and Antitrust: The Other Path' (2007) 13 *South-western Journal of and Trade in the Americas* 211, 223 (SA competition policy is 'merger policy.') and Lewis D 'The Competition Act 1998-Merger Regulation,' (1999) 2. Speech delivered by the then Chairperson of the South African Competition Tribunal David Lewis to the *ICM Mergers and Acquisition Conference* (24 November 1999), available at <http://www.comtrib.co.za/assets/Uploads/Speeches/lewis9.pdf>, (accessed 30 October 2010). See further Chapters 6 on EU merger control and 7 on the US.

³ Competition Act [Chapter 14:28] (Act No. 7 of 1996). This legislation, which becomes effective in 1998, was further amended by the Competition Act 29 of 2001. The Amendment Act notably substituted the definition of mergers in section 2(1), introduced pre-merger notification provisions into Part IV and replaced the old Industry and Trade Competition Commission with the Competition and Tariff Commission (CTC) in section 4. For purpose of this Chapter, reference to the 'Act' shall mean the Competition Act of 1996 as amended unless specified otherwise.

⁴ Long title to the Act.

⁵ Section 5(1)(d) provides as one of the function of the CTC as 'to study trends towards increased economic concentration, with a view to investigation of monopoly situations and the prevention of such situations, where they

mandate of the competition authority and not surprisingly, merger cases not only constitute a significant workload but are also a major contributor to the competition authority's resource base.⁶

Corporate mergers and acquisitions⁷ are recognised as a normal economic phenomenon in any economy.⁸ They are, *inter alia*, the most recognised and utilised strategy for implementing corporate restructuring transactions⁹ and a means for effecting business expansion.¹⁰ Corporate

are contrary to public interest.' Section 32 (4)(b) provides that the Commission shall regard a merger as contrary to public interest if it 'has or is likely to result in a monopoly situation which is or will be contrary to the public interest.'

⁶ See Kububa AJ 'Zimbabwe' in *UNCTAD Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries : Thailand, LAO, Zambia, Zimbabwe* (2005) UNCTAD/DITC/CLP/2005/2, 277-365, 277(between 1999 and 2005, of the 200 competition cases handled by the CTC, restrictive and unfair trade practices combined constituted 60% and mergers and acquisitions constituted 40% of the total); Between 2006 and 2011, mergers cases totalled to 416 compared to 358 restrictive business practices cases. See also Kububa AJ 'Overview of Competition Law and Policy in Zimbabwe' Paper presented at 3rd Annual Competition Commission , Competition Tribunal and Mandela Institute Conference on Competition Law , Economics and Policy in South Africa , Pretoria (3-4 September 2009)30. Available at <http://www.compcom.co.za/assets/Uploads/events/10-yera-review/paralle-la/Alex-KububaCompetition-Policy-Law-in-Zimbabwe.doc>, (accessed 20 September 2010). Between 2010 and 2012, notification fees amounted to about US\$79 0838 with the only other internal income being Investment (US\$92 683) and Sundry income (US\$1 760). See UNCTAD 'Voluntary Review of Competition Law and Policy: Zimbabwe Overview' (2012) *UNCTAD/DITC/CLP/2012/1* ('UNCTAD 2012 Overview') 13.

⁷ As the case elsewhere in this study, the terms corporate mergers and acquisitions will be used herein interchangeably and loosely to denote any situation where two or more entities combines their businesses by direct or indirect means. Section 2(1) of the Act does not distinguish between mergers and acquisitions for it only provides a definition of a merger which also covers the amalgamation of business through acquisitions. See also similar approach in section 12(1) (a) and (b) of the South African Competition Act 89 of 1998.

⁸ Dhall V (eds.,) *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007) 15.

⁹ Corporate restructuring can be in its ordinary sense entails an exercise whereby a company undergoes structure legal, ownership and operational reorganization for the purpose of enhancing profitability and better management meet present needs. This might involve the selling of sectors or units of the company, reducing the workforce or debt restructuring where the company fails to generate enough cash flows to meet its debt obligations and other liabilities. See Gaughan PA *Mergers, Acquisitions and Corporate Restructuring* (4ed) (2007). See also DePamphilis D *Mergers, Acquisitions, and other restructuring activities: An Integrated Approach to Process, Tools, Cases and*

mergers are recognised as an effective means of generating efficiencies and achieving some public interest benefits through generation of economies of scale and scope.¹¹ Economies of scale occur when the average long term production cost decreases due to synergies in production and economies of scope occur where the combined output of a single entity is greater than that that which could be achieved by two different entities with each producing a single product.¹² Economies of scale and scope thus generate efficiencies that result in the production of both quality and quantity products at lower costs that are transferred to the customers and consumers - a public benefit. Mergers are also a key element in the advancement of a country's national policy objectives such as the generation of foreign exchange, enhancing the competitiveness of domestic industries on the regional and international markets and general economic development that in turn create employment and improve welfare of citizens.

However, business combinations impact upon the concentration of, and ability to use, market power as a result of which the competitive structure of the market can be altered.¹³ Market power is a general description of a business' ability to act without any restraint from either actual or potential competitors in both the pricing and distribution aspects of the market.¹⁴ Goldberg outlines two instances in which corporate mergers impact upon market power and concentration. These are (a) through the reduction of the number of market participants, more particularly, the elimination of effective competitors, and (b) the acquisition or strengthening of the merged entity's market share.¹⁵

Solutions (2001) 5. For purposes of this research the term 'corporate restructuring' will be used to refer to any activity undertaken by the company to fully or partially reorganise its business operations and shall not be limited to a particular form.

¹⁰ Dhall (2007) (note 8 above) 15.

¹¹ Goldberg (2007) (note 1 above) 94. See also generally DePamphilis (2001)(note 9 above) 18.

¹² De Pamphilis (2001)(note 9 above) 18.

¹³ Goldberg (2007)(note 1 above) 93.; Kokkoris I & Katana. K 'Critical Analysis of the ECMR Reform' in Lionos I & Kokkoris I (eds.,) *The Reform of EC Competition Law: New Challenges* (2010) 437.

¹⁴ Goldberg (2007)(note 1 above) 93.

¹⁵ *Ibid.*

It is primarily this acquisition or strengthening of a dominant market position in the market that attracts the attention of competition authorities and hence merger regulation.¹⁶ However, it must also be pointed out that the mere acquisition or strengthening of a dominant market position is not anti-competitive.¹⁷ What is of concern to regulatory authorities is the potential in the merged entity to abuse its new founded dominant position.¹⁸ A merged entity is able to abuse its acquired dominant position or the elimination of an effective market participant can result in the remaining firms coordinating their activities leading to various anti-competitive effects such as price fixing and increases, output restriction, diminished innovation,¹⁹ increased entry barriers through expansion and raising of rival's business costs and costs of entry.²⁰ These issues materially alter the competitive structure of the market hence requiring intervention in the form of merger regulation.

The involvement of competition law and merger regulation in corporate transactions implemented through mergers is to address the above market failures.²¹ Accordingly, the law's primary concern is, or should be, to regulate the anti-competitive effects of corporate business transactions and not unduly hamper beneficial corporate transactions.²² This task involves a difficult balancing exercise which becomes even more difficult during harsh business operating

¹⁶ Goldberg (2007)(note 1 above) 93.

¹⁷ See note 18 below.

¹⁸ See for instance in *Acquisition of Shashi Private Hospitals by Premier Services Medical Investments CTC/M&A/Feb2005* where the CTC conditionally approved a vertical merger between a health care provider and a dominant health insurance concern despite the fact that merger was likely to further strengthen the dominant position of the acquiring firm. The rationale for the conditional approval was that the CTC was not concerned with the strengthening of the dominant position per se but its potential abuse hence the imposition of conditions to deter any such abuses.

¹⁹ Monopolies are accused of lacking the zeal to innovate in order to boost their market shares for they already have such. See Posner RA *Economic Analysis of Law* (8th ed) (2011) 361.

²⁰ Goldberg (2007)(note 1 above) 94.

²¹ See note 256 below and accompanying text.

²² See for instance *International Shoe Co. v FTC.* 280 U.S 291, 298 and 302,50 S.Ct.89, 74 L Ed.431 (1930) where the US Supreme Court noted that acquisition of a corporation whose business is facing grave probability of failure will not violate antitrust laws but rather serve to promote an array of public interest benefits such as those of the stockholders and the general community in which it operates.

environments occasioned by economic crisis. It is only an effective and well prepared regulatory regime that is able to effectively dispense of this daunting task.²³

Realising that corporate mergers can both generate significant benefits and pose a serious threat to the competitive structure of the market and by so doing undo the benefits associated with competition such as lower prices, the need for an effective merger regulatory framework became paramount in Zimbabwe. It is submitted that an effective merger regulatory framework refers to one that is able to meet the immediate regulatory demands of the market and adapt to any changes in the business operating environment that might necessitate, if necessary, application of different principles and adoption of other approaches. Above all, an effective system should be able to prohibit anti-competitive mergers and allow those that are beneficial.²⁴

This Chapter will explore these aspects within the context of general merger regulation in Zimbabwe. Competition law and merger regulation in Zimbabwe is principally enshrined in the Competition Act.²⁵ The Act aims at promotion and maintenance of competition in Zimbabwe through, *inter alia*, the establishment of a competition enforcement authority and merger regulation.²⁶ Merger regulation is provided for in provisions scattered throughout the Act from the definition of mergers in section 2 to the functions of the Competition and Tariff Commission (CTC)²⁷ in section 5 and its investigative and adjudicative powers in sections 28 and 31 respectively. This structure is one of the aspects that will be put under scrutiny in this discussion where its role and relevance in advancing an effective merger regulatory system in Zimbabwe is questioned.

This Chapter by and large, aims at providing the crucial roadmap to the entire study. The principal aim of this chapter is to explore the salient aspects of merger regulation in Zimbabwe as provided for under the Competition Act or otherwise, developed through practice. The

²³ Gal MS *Competition Policy for Small Market Economies* (2003) 195-6; Goldberg (2007)(note 1 above) 94.

²⁴ Goldberg (2007) (note 1 above) 94.

²⁵ Competition Act [Chapter 14:28] of 1996.

²⁶ Long Title to the Act.

²⁷ The CTC is the competition authority of Zimbabwe. It was established by section 4 of the Amendment Act to replace the old Industry and Trade Competition Commission.

objective is to analyse and discuss merger regulation in Zimbabwe in general and identify, if any, the shortcomings therein. The key question is whether the current regulatory framework is effective enough to perform the functions of merger control? The Chapter advances the proposition that the current merger regulatory framework is generally unsuitable to advance an effective regulatory mechanism capable of promoting beneficial corporate transactions without unnecessarily sacrificing the established principles of merger control: the protection of the competitiveness of the market structure.

In order to explore the above issues, this Chapter will be divided into four distinct but related Parts. Part II will present an overview of the Competition Act. Focus will be on the purpose and scope of the Act, in other words, the Act's application. Questions will be asked as to whether the Act's application as provided therein is able to advance its stated purpose. Part III will present an analysis on merger regulation as provided under the Act. This Part, which will be divided into two subsections, will beg, in the main, the question as to whether the current substantive provisions aimed at merger regulation are adequate to promote the aims of the Act in general and provide for an effective merger regulation system in particular. The first section will analyse the substantive provisions relating to, *inter alia*, the definition of the concept of corporate mergers as provided under the Act. Here, the legal opinion provided in *Ex parte Caledonia*²⁸ will be discussed and it will be argued that the fact that there is no consensus as to what types of mergers are covered under the provision is an indictment on the statutory definition and the merger regulatory system. The other section will focus on the standard for merger assessment that is provided, if at all, by the Act and applied by the regulatory authority. Again questions will be raised as to whether the Act provides a clear enough test for merger assessment. Despite the fact that the CTC had developed a commendable approach to merger assessment, it will be argued that the Act needs to provide sufficient clarity on the matter.

The last two Parts will focus on the merger regulatory authority, its structure and how this impacts upon effective merger regulation. Part IV will argue that the current structure where both the investigative and adjudicative functions are bestowed, in principle, upon a single entity, is

²⁸ *Ex parte: Caledonia (Africa) Limited In re: Blanket Mine (1983)(Private) Limited and Competition and Tariff Commission* (2006). (Opinion of de Bourbon AP (SC) of 9 December 2006 (unreported, on file with the writer).

unattainable. A compelling case will be made for the separation of these functions and hence the need to revise the current structure. Part V will discuss procedural matters relating to merger regulation, including the provisions relating to appeals and reviews and how these generally affect the normal functioning of the competition authorities and how they might impact on the system's approach to the failing firm doctrine, in particular on the issues of time and expediency. The Chapter will conclude by recapping and highlighting the main shortcomings identified during the course of the discussion and by so doing, lay a foundation upon which to consider how these issues are dealt with in selected jurisdictions in ensuing chapters.

3.2 The Competition Act: purpose and scope

The Act is intended 'to promote and maintain competition in the economy of Zimbabwe.'²⁹ This is the statute's primary goal as all the other stated objectives in one way or the other are intended to advance this goal. For instance, mention is made of the establishment of a competition enforcement authority and provision for mechanisms aimed at the regulation and prevention of certain practices that might hamper competition in the economy. Similarly, reference is made of the prevention and control of restrictive practices and monopoly situations as well as of the provisions of any matters incidental to the stated objectives.³⁰

It is submitted that the objectives of the statute are reasonable. The question however is whether the legislature succeeded in achieving these stated objectives by not only providing an adequate statute but also in coming up with a relevant regulatory framework? This question can only be meaningfully answered after an exhaustive analysis of all the salient elements of the statute using the merger regulation as the focal point. The immediate concern of this Chapter is whether the foundation for an effective merger regulation is laid in the purpose and scope of application of the Act.

²⁹ Long title to the Act.

³⁰ Ibid.

3.2.1 The Long Title and the objectives of the Competition Act

Promotion and maintenance of competition is the primary goal of competition law.³¹ In other words, competition law should aim at ensuring the protection of the competitive market structure through the regulation of anti-competitive market behaviour.³² It is only through the protection of the competition process that efficiency can be enhanced leading to improved consumer welfare as well as attainment of any other policy objectives. However, it is accepted that competition law can also aim to achieve other objectives such as industrial policy and social objectives.³³ The question as to what objectives must be included in a competition statute is

³¹ See note 32 below.

³² Over the years, a battle has been fought within the academic circle as to what is the goal of competition law or antitrust law as it is known in the US. This battle is more prominent in the US between two groups that have become known as the Chicagoans and the Realists. The Chicagoans represents a group of Chicago University trained economists whereas the Realists are a group that is basically critical to the Chicago school of thoughts, particularly, the exclusively economic approach to antitrust law. Proponents of the Chicago school argue that antitrust law is concerned with markets just as economics hence the exclusive goal of antitrust law is market efficiency. See on the Chicago school, Bork R *The Antitrust Paradox: a Policy at war with itself* (1978) 15-16; Easterbrook FH 'The Limits of Antitrust' (1984) 63 *Texas Law Review* 1, 13; Posner R *Antitrust Law: An Economic Perspective* (1976) 4, 8-22; Easterbrook FH 'Workable Antitrust Policy' (1984) 84 *Michigan Law Review* 1696, 1703; Easterbrook FH 'Is there a Ratchet in Antitrust?' (1982) 60 *Texas Law Review* 705,714-17. The Realist scholars argue that antitrust law's primary aim is the protection of the competitive market structure not only for enhancement of efficiency but for the benefit consumers. See on the Realist school, Fox EM and Sullivan LA 'Antitrust- Retrospective and Perspective: Where are we coming from? Where are we going?' (1987) 62 *New York University Law Review* 936, 970; Thorelli H *The Federal Antitrust Policy: Origination of an Antitrust Tradition* (1954) 166-70, 170,180-86; Lande RH 'Wealth Transfer as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 *Hastings Law Journal* 65; Letwin WL 'Congress and the Sherman Antitrust Law 1887-1890' (1956) 23 *University of Chicago Law Review* 221. It is however submitted that the focus should not be on the exclusiveness of competition/antitrust law but rather on a midway house in which both efficiency and enhancement and market protection for ultimate consumer benefit is key. See on this mid-way house approach Hamner KJ 'The Globalization of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China' (2001-2002) 11(2) *Journal of Transnational Law and Policy* 385, 404; Monti G *EC Competition Law* (2007) 2.

³³ See Chetty V 'The Place of Public Interest in South Africa's Competition Legislation : Some Implications for International Antitrust Convergence' *American Bar Association Section of Antitrust Law 53rd Meeting*, Washington D.C.(March 30-April 1, 2005) 4

determined by a number of country specifics.³⁴ These factors include the country's socio-economic history which demands the advancement of a broader objective in the competition statute; the evolution of the statute and the current policy drive.³⁵

In the case of Zimbabwe, all the above mentioned factors are very critical to its competition law. The point here is that the stated objectives in a competition statute is merely a reflection of the legislature's impression of what matters need to be considered in the statute. As such, the question is not about what should be contained in a competition statute but rather on how those matters that are encompassed should have been framed. It is thus imperative that this discussion be viewed in this context.

It appears from the long title and the objectives that what the legislature intended is that the Act promotes and maintains competition in the economy of Zimbabwe. This broadly framed objective acknowledges the importance of competition in the country's economy³⁶ and accordingly recognises two scenarios. The first is that there might be no competition at all. The second is that there might be competition but its existence can be threatened by various conduct. The first scenario is addressed by promoting competition whereas the second is addressed by putting in place mechanisms to maintain competition.

The Act states that what needs to be promoted and maintained is 'competition.' The term 'competition' in this case is not defined in the interpretation provision of the Act.³⁷ This 'omission' can be considered as an intentional one on the part of the legislature having the result that the term can be ascribed an ordinary meaning as implying a situation of rivalry and, in the

³⁴ The factor that influences the formulation and development of competition law and policy varies from one jurisdiction to another. Although the main goal might be to protect the competition process, it follows that the factors that determine the policy might not be the same throughout all the competition law regimes.

³⁵ Ibid. See on the factors that influenced the development of competition law and policy in Zimbabwe, Mhamhare G 'Southern Africa Development Community (SADC) regional competition policy' (2012) in Drexel J, Bakhom M, Fox EM, Gal MS and Gerber DJ (eds.), *Competition Policy and Regional Integration in Developing Countries* 56-65,58.

³⁶ See Chapter 2 in 2.2.

³⁷ Section 2 headed 'Interpretation' provides for the definitions to interpret certain terminology used in the statute.

business context, inter-firm rivalry.³⁸ Thus it can be said the Act aims at promoting inter-firm rivalry where there is none and ensuring its continuation where it already exists. However, no reference is made to the quality of this rivalry: is it mere rivalry or must be intensive rivalry? Does this qualification regarding the quality of rivalry make any difference at all in ensuring the effectiveness of the Zimbabwean competition system?

Competition is accepted to be good for the general economy and for consumers in particular.³⁹ A market where firms compete is characterised by conduct that is aimed at attracting customers and consumers.⁴⁰ These include investing in innovation to enhance the production of both new and quality and quantity products.⁴¹ This results in efficiency that is spilt over to customers and consumers in the form of lower prices for goods and services.⁴² However, this situation can only be realised by a market that has effective competitors capable of putting pressure on the market participants to consider innovation, enhance efficiency and lower prices.⁴³ It is not only a matter of having as many market participants as one can imagine but rather having as many effective competitors as can be achieved. Similarly, effective competition must not mean excessive rivalry that is capable of driving away any incumbents or potential entrants for this can have negative long term effects.⁴⁴ Effective competition must thus be taken as an optimal degree of market rivalry that is healthy to the maintenance of beneficial competition on the market.⁴⁵ It is submitted that the objective of competition law should thus not be contained in a mere rhetoric of promoting and maintaining of competition but rather must be expressed in such a way as to promote effective competition. It is further submitted that it thus follows that the Act should unequivocally state that it aims at promoting and maintaining effective competition in the

³⁸ Whish R *Competition Law* (6ed) (2009) 3.

³⁹ Ibid,4-6.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid, 4.

⁴³ Ibid.

⁴⁴ Singh A and Dhumale R 'Competition Policy, Development and Developing Countries' (1999) *South Centre Trade Related Agenda (T.R.A.D.E) Working Paper* 7, 12.

⁴⁵ Ibid.

economy of Zimbabwe. After all, it is effective competition that is beneficial to the economy in general and consumers in particular.

It can be pointed out that the first signs of deficiency in the merger regulatory system are in the manner in which the primary objective of the Act is framed. It is submitted that reference to mere promotion and maintenance of competition is not enough. The extent to which this deficiency impacts on the overall effectiveness of competition law and merger regulation will be unearthed when merger regulation (in particular the failing firm doctrine) will be discussed later in this study. Suffice to state at this stage, the very Act provides that a merger can only be prohibited if it is found to have the likelihood of ‘substantially’ lessening or preventing competition.⁴⁶ The term ‘substantially’ denotes a *de minimis* approach⁴⁷ where the concern should be about the material impact on competition and not on any prevention or reduction of competition.⁴⁸ Similarly, provision is made for the consideration of, *inter alia*, ‘whether the merger will result in the removal of efficient competition’⁴⁹ therefore not merely ‘competition’, as a factor that may be considered in assessing the likely competitive effects of a merger. These illustrations support a suggestion that the objective provision needs to reflect the actual focus of the Act as being ‘effective competition’ and not merely ‘competition.’ After all, this is the point of departure in the interpretation of the entire Act’s provisions hence the need for clarity and the elimination of any uncertainties.

3.2.2 The application of the Act

Section 3 provides that the Act ‘applies to all economic activities within or having an effect within the Republic of Zimbabwe’⁵⁰ with the exception of specified activities.⁵¹ These exempted

⁴⁶ Section 32(4)(a).

⁴⁷ The *de minimis non curator lex* is an ancient Latin expression which translates to mean that the ‘law does not concern itself with trifles.’ See Ehrlich E *Amo, Amos, Amat and More* (1985) 100; Garner B (eds.), *Black’s Law Dictionary* (7ed) (1999) 443.

⁴⁸ *International Shoe Co.*(note 22 above) 298, 50 S.Ct.89, 74 L Ed. 431 (1930); *Standard Fashion Co.v Magrane-Houston Co.* 258 U.S. 346, 357, 66 I Ed.653, 658, 42 Supp. Ct.Ct.Re. 360 (1922).

⁴⁹ Section 32 (4a)(i).

⁵⁰ Section 3 (1).

⁵¹ Section 3(1)(a)(i)-(v).

activities are rights acquired under; ‘(i) the Plant Breeders Rights Act [*Chapter 115*]; or (ii) the Copyright Act [*Chapter 26: 01*]; or (iii) the Industrial Designs Act [*Chapter 26:01*]; or (iv) the Patents Act [*Chapter 26:03*]; or (v) the Trade Marks Act [*Chapter 26:04*]’ but only to the extent that such rights do not constitute defined unlawful conduct under the Act. Other exemptions include the legitimate activities of trade unions to an extent that such activities are aimed at advancing the legal rights of their member (employees) in terms of labour laws.⁵² Of significance is that the Act does not extend this exemption to the state’s economic activities⁵³ and also that it provides for how the competition regulators should relate with other sectorial regulators.⁵⁴

Section 3(2) clearly brings under the scope of the Act, any activities by the state that constitutes economic activities and as such might impact on the competitive structure of the market in which such activities are conducted. This is a welcome provision given that the State is an important economic player through various agencies such as statutory enterprises or parastatals. However, as noble as the provision might be, the question is whether it is of any practical effect? Firstly the provision provides that ‘this Act shall bind the State to the extent that the State is concerned in the manufacture and distribution of commodities.’⁵⁵ It may be asked whether this limits the

⁵² Section 3(1)(b).

⁵³ Section 3(1)(2).

⁵⁴ Section 3(3). Sectorial regulators are those established and constituted under other statutes to regulate specific sectors that falls under those statutes’ jurisdictions. These includes the Zimbabwe Electricity Regulatory Commission (ZERC) established under the Electricity Act [*Chapter 13:19*] of 2002 as amended by the Electricity Amendment Act 3 of 2003 to regulate matters relating to the generation and distribution of electricity; the Registrar of Banks and Financial Institutions established by the Banking Act [*Chapter 24:20*] of 1999 as a department under the Ministry of Finance to regulate banking and financial institutions; the Commissioner of Insurance established under the Insurance Act [*Chapter 34:07*] as the responsible authority to regulate inter alia, mergers and acquisitions in the insurance industry subject to the approval of the CTC as evidenced in *Merger of Aykroyd Insurance Brokers and Hunt Adams & Associates*, CTC/M&A/Jun2001; the Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) established under the Postal and Telecommunication Services Act [*Chapter 12:05*] (Act 4 of 2000) as the regulator of cellular, postal and telecommunication services and the Broadcasting Authority of Zimbabwe (BAZ) established under the Broadcasting Services Act [*Chapter 12:01*] (Act 3 of 2001) as the regulator of broadcasting services in Zimbabwe. See general on the sectorial regulators in Zimbabwe, Batham V ‘Zimbabwe’ (2005) in Mehta P (eds.,) *Competition Regimes in the World- A Civil Society Report* 308-09.

⁵⁵ Section 3(2).

application of the Act to State activities comprising only of ‘the manufacture and distribution of commodities?’ If so, does this constitute an effective or limited application of the Act?

The Act does not define what constitutes an ‘economic activity’ to which it applies.⁵⁶ It is submitted that the phrase ‘economic activity’ as used here denotes any activity that is carried out for purposes of producing, distributing and consumption of goods and services. This interpretation finds support in the Act itself⁵⁷ and was further given impetus in the emphasis by the need to apply the general competition policy to both private and public entities.⁵⁸ It follows that if the phrase ‘economic activity’ is broadly interpreted as was proposed in the *Ex parte Caledonia* opinion,⁵⁹ State activities that fall outside the manufacturing and distribution sector are excluded from the Act’s scope. Accordingly, if these activities involve mergers then the Act cannot be applied thereto. It may be asked who then regulates those transactions or whether they are unregulated? It is submitted that the answer to these questions may be in the affirmative if a strict application to the provision is applied. However, it may then be asked whether this is what was intended by the legislature? It is submitted that the legislature might have intended to exclude certain State activities from the application of the Act but surely never intended these activities to go unregulated either under this statute or elsewhere. However, the problem here is that there is a definite uncertainty on the issue and that it requires clarification. This can only be achieved by doing one of the following: (a) expressly defining the phrase ‘economic activity’ in the broadest sense possible, or (b) clearly stating that ‘the Act applies to all State activities to the extent they amount to an economic activity as defined for purposes of this Act.’

⁵⁶ *Ex parte Caledonia* (note 28 above) para.2. See for a detailed discussion of this opinion in 3.3.2.1 below.

⁵⁷ See section 2(1) defines ‘price’ as including ‘any consideration whatsoever in respect of the distribution of a commodity or service.’ The same section also refers to ‘the production or distribution of any commodity or service’ in defining a restrictive practice.

⁵⁸ See for instance the Implementing Policy Change (IPC) Study of Monopolies and Competition Policy in Zimbabwe (March 13, 1992) 6 8 (‘*the Study of Monopolies and Competition Policy (1992)*’) (on file with the writer) ,where it was emphasised that the scope of an ideal competition policy must apply not only to private businesses but also to the government activities given the role the latter had played in promoting an anti-competitive market structure in the economy.

⁵⁹ *Ex parte Caledonia* (note 28 above) par.2.

As indicated above, the Act provides that it applies to *all economic activities within or having an effect within Zimbabwe*. Assuming that the issue of what type of transactions are covered under the Act is settled, the remaining issue is to what extent the Act applies to these activities, in other words, what jurisdiction does the Act have regarding these activities? Is its jurisdiction confined to Zimbabwe or does it go beyond Zimbabwe? For the Act to apply, the economic activity must have two characteristics. It must either have been conducted ‘within’ Zimbabwe or must have ‘an effect within’ the country. The first scenario is a straightforward one: any economic activity that is conducted within Zimbabwe is subject to the Act to assess its competition implications. It is the second scenario that raises issues.

A literal interpretation of the provision shows that even if an activity is conducted outside Zimbabwe, the Act applies thereto if it has effects on the country. This is evidenced by the use of the term ‘or’ implying that it applies to a different scenario than the one assumed by an activity conducted within the country, which scenario can only refer to activities outside the country. However, it is submitted that it is not the activity itself that the Act intends to regulate but rather the effects of such activity on competition. This ‘effects based’ approach⁶⁰ is an acknowledgement of the reality that corporate transactions that are conducted outside the country can have negative implications for the country’s competitive market structure.⁶¹

However, it appears the first scenario is at variance with this approach as it suggests that the Act applies to all economic activities within Zimbabwe and not necessarily to the effects of such activities, a situation that is submitted, is somewhat unattainable. Given that almost every activity can be broadly construed as involving an economic activity, it suggests that the Act

⁶⁰ See *Competition Commission and Botswana Ash (Pty) and others v, American Soda Ash Corporation and others*. Case No.49/CR/Apr00 AND 87/CR/Sep00; *United States v Aluminium Co. of America* 148 F 2d.416, 444 (2d Cir.1945); *Hartford Fire Insurance Co. Petitioners v California and Others and Merrett Underwriting Agency Management Limited and Others, Petitioners v California and Others*, 133.S.Ct. 2891 (1993). See generally Griffin JP ‘Extraterritoriality in US and EU Antitrust Enforcement’ (1999) 67 *Antitrust Law Journal* 15; Hamner (2001-2002)(note 32 above) 391.

⁶¹ Ibid.

should be applied to regulate almost every conduct. Selling bread for instance, amounts to an economic activity. The legislature surely did not intend to regulate the actual selling of bread but the effects that might arise therefrom. These effects are that as a result of the manner in which bread is sold, consumers are prejudiced by either economically unjustified high prices such as occasioned by monopolistic rent seeking and not resonating with the costs of production or methods of producing bread that result in high cost and that are transferred to the consumers in form of price hikes.⁶² It is this effect and not the transaction that must be regulated. As such clarity on the provision can be sought from comparative jurisdictions such as South Africa where a similarly worded provision exists⁶³ and where the competition authorities have had an occasion to deal with this jurisdictional aspect.⁶⁴

It is submitted that the effects-based approach makes the provision broad enough to cover aspects of jurisdiction as well as what is actually regulated. If the focus is on the effects of the transaction, then the question as to whether the Act applies to transactions concluded outside Zimbabwe but having an effect within the country will be solved.⁶⁵ The ‘effects based’ approach acknowledges that, even though legislation are creatures of domestic statutes and as such strictly speaking, meant to only have only local jurisdictions,⁶⁶ merger regulation presents a different scenario in that a merger that is concluded outside the country can have equally devastating effects within that country. As such focusing on the effects of a merger gives the merger regulatory authorities the opportunity to regulate those effects.

It is therefore submitted that the Act can be applied to cover even the effects of transactions that are concluded outside Zimbabwe if such effects impact upon the competitive structure of the

⁶² See generally on the potential anti-competitive effects of mergers especially on the effects on the consuming public, von Kalinowski JO ‘Section 7 and Competition Effects’ (1962) 48 (5) *Virginia Law Review* 827,829.

⁶³ See section 3(1) of the South African Competition Act of 1998.

⁶⁴ *Ansac cases* (note 60 above) .For a further discussion see Moodaliyar K ‘Competition policy in the SADC: a South African perspective’(2012) in Drexl J, Bakhom M, Fox EM, Gal MS, Gerber DJ (eds.) *Competition Policy and Regional Integration in Developing Countries* (2012) 66-85, 78.

⁶⁵ *Ex parte Caledonia* (note 28 above) para. 6.

⁶⁶ Moodaliyar (2012)(note 64 above) 78.

market. A case in point is a merger involving two foreign companies which transaction is conducted outside Zimbabwe. However, the result of the transaction is that the shareholding and ownership structure in a Zimbabwean registered company, that is the subject of the merger, changes hands. The question is whether the Zimbabwean Act can be applied to such a situation?⁶⁷ If the approach that neither of the transacting entities are resident in Zimbabwe nor was the transaction concluded in Zimbabwe is followed, then the Act does not apply.⁶⁸ However, if the ‘effects based’ approach is applied, the situation can be different and the Act can find application. This is because this approach focuses not on the actual transaction in cases where the transaction is concluded outside Zimbabwe but rather on whether such a transaction has any effects within Zimbabwe. It is clear that the effect of such a transaction in the example is a change in control of a Zimbabwean company, which change in control is the primary element of the merger definition⁶⁹ and it is accepted that merger regulation is concerned not necessarily with the transaction but with the extent to which it alters the control of an entity for this has the effect of influencing the firm’s market behaviour.⁷⁰

In *Ex parte Caledonia*, the arguments that were advanced in support of the position that the Zimbabwean Act does not have jurisdiction beyond the country’s boundaries were mainly the general principles relating to jurisdiction in civil proceedings.⁷¹ These general principles are

⁶⁷ See for instances *Ex parte Caledonia* (note 28 above) 1 where Blanket Mine (1983) (Pvt) Ltd, a Zimbabwean registered company with all its shares owned by Kinross Holdings Zimbabwe Ltd, another Zimbabwean registered company was to be acquired by Caledonia Holdings Zimbabwe (Pvt) Ltd which was owned by Blanket (Barbados) Holdings Ltd, a company registered in Barbados. Blanket Barbados was in turn owned by Kinross Gold Corporation of Canada until April 2006 when Kinross Gold Corp. of Canada sold all its issued share capital in Blanket Barbados to Caledonia Holdings (Africa) Ltd, an entity registered outside Zimbabwe. The transaction in question then was concluded outside Zimbabwe.

⁶⁸ See *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 (3) SA 913 (A) 928 (‘where the plaintiff and the defendant are both foreign peregrine (*extranei, uitlanders*) both a recognised *ratio jurisdictionis* as well as arrest of the defendant or attachment of his property are essential to found jurisdiction’).

⁶⁹ Section 2(1) defines a merger as the acquisition or establishment of a controlling interest in another entity.

⁷⁰ See the European Commission decision in Case No. IV/M. 890- *Blokker/Toys ‘R’ Us*, OJ L326/1, 25.11.98, para.13.

⁷¹ See *Ex parte Caledonia* (note 28 above) para.6; *Siemens v Offshore Marine Engineering* (note 68 above) 928.

mainly rules of convenience aimed at ensuring that the order-granting authority is able to enforce its orders otherwise the merger enforcement exercise will be futile.⁷² It thus appears that merger regulation through the application of the effects-based approach provides a rationale for an exception to these general principles.

Having observed that the stated objectives of the Act although broader, need clarity to advance the goals of an effective merger regulatory framework and that the Act's purpose is broad enough to extend to as many transactions as possible, the next task is to explore whether the actual provisions aimed at regulating corporate mergers give effect to the purpose and objective of the Act and hence provides an effective merger regulatory framework.

3.3 The Competition Act and merger regulation

It can be asked whether the Competition Act provides for an adequate merger regulatory framework and whether the current merger regulatory framework is adequate not only to give effect to the stated objectives and purpose of the Act but also to promote beneficial corporate restructuring transactions. Is the current merger regulatory framework effective to meet the demands of a changed business operating environment, that is, balancing the need to promote beneficial corporate transactions particularly those aimed at ensuring firm survival in difficult times on one hand, with maintaining a competitive market structure that is beneficial to the immediate, medium and long term economic development of Zimbabwe on the other hand? These questions will be explored here in (a) a generalised discussion on merger regulation focusing on mainly the procedural aspects under the Act, (b) substantive matters relating to the definition of a corporate merger and the extent to which this impacts on the effectiveness of the system, and (c) the substantive assessment test.

3.3.1 General

3.3.1.1. The pre-notification requirement: procedure and formalities

⁷² See note 71 above.

(a) Pre-notification

The Act requires all transactions with a value at or above the prescribed threshold to be notified.⁷³ This threshold is calculated as ‘the combined annual turnover or assets in Zimbabwe, either in general or in respect to the specific industries.’⁷⁴ The method for calculating the annual turnover and assets is set by the Minister, being ‘the Minister of Industry and Commerce or any other Minister to whom the President may, from time to time, assign the administration of this Act.’⁷⁵ Although parties to a ‘notifiable merger’ that is, one valued at or above the prescribed threshold, need to compulsorily file a merger notification, provision is made for the notification of ordinarily non-notifiable mergers as well.⁷⁶ A ‘non-notifiable merger’ is defined as one falling short of the prescribed threshold and which as such does not need to be notified.⁷⁷ However, there is an exception to this being that the Commission might require parties to a non-notifiable merger to notify such a merger, if in the opinion of the Commission, the said merger ‘is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.’⁷⁸

⁷³ Section 34 (2).

⁷⁴ Section 34(1)(a).

⁷⁵ Section 2(1). The current threshold is 1 200 000 United States Dollars. See section 2 of the Competition (Notifiable Merger Thresholds)(Amendment) Regulations No. 2 of 2011 published in Statutory Instrument 110 of 2011. At the time of writing, the US\$ was adopted as one of the official currency in a multicurrency environment after the local currency, the Zimbabwean dollar was abandoned at the height of inflation and economic meltdown. See also UNCTAD ‘Zimbabwe’ in *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* (2012) UNCTAD/DITC/CLP/2012/1, 16, available at http://unctad.org/en/PublicationsLibrary/ditccpl2012d1_Comparative_Report_en.pdf (accessed 21 September 2012) (herein after ‘UNCTAD A Tripartite Report (2012)’).

⁷⁶ Section 34(3).

⁷⁷ Section 34(2).

⁷⁸ Section 34(3). Section 13A(1) read with subsection (3) of the South African Competition Act of 1998 requires mergers that are classified as either large or intermediate in terms of section 11(5) to be notified before they are implemented. Although mergers classified as small are not ordinarily notified, section 13(2) provides that such mergers can be notified either voluntarily or if the South African Competition Commission requires them to be so notified under specified circumstances in terms of section 13(3).

The requirement that even ‘non-notifiable’ mergers might need to be notified is an acknowledgment of the reality that the size of the merging firms, though a useful indication of the likely effects on the competitive structure post-merger,⁷⁹ is not decisive as mergers involving smaller firms can provide an equally competitive threat. This is particularly so if the pre-merger market conditions exhibit fragile signs like a history of collusion amongst the incumbent firms in general and those contemplating the merger in particular.⁸⁰ There is also a possibility that even though the merger might not create a dominant merged entity and the individual firms in the relevant market might not be dominant, the unilateral effects thereof might be harmful to competition, if conditions permit, through collusive practices.⁸¹ The provision is thus essential in ensuring that the regulatory framework extends to as many transactions as possible regardless of their size. It also confirms what has been observed earlier, namely that the object of the statute must be to promote and maintain ‘effective competition’ in the economy through providing for mechanisms that ensure the scrutiny of all economic activities that are likely to lessen or prevent effective competition. However, this single provision alone cannot be taken to mean that this task is completed. The extent to which this provision assists in the advancement of an effective merger regulatory framework hinges more on the ability of the other provisions to do the same. This task will be explored throughout this Chapter. Suffice to state in line with the old adage: give credit where credit is due.

⁷⁹ The bigger the merging firms and the bigger the merged entity, the greater the market power to be achieved or strengthened and the greater the chances of negatively impacting on competition through engaging in various anti-competitive practices.

⁸⁰ See for instance section 32(4a) (c) of the Competition Act which provides as one of the factors that must be taken into account when assessing the likely effects of the merger on competition as the ‘level, trends of concentration and history of collusion in the market.’

⁸¹ See *Airtours/First Choice* OJ [2000] L93/1, [2000] 5 CMLR 494 and upon appeal Case T- 342/99 *Airtours v Commission* [2002] ECR II-2585, [2002] ALL ER (EC) 783. The issue in his case was whether the EU MR 4064/89 was applicable to cases of unilateral effects by non-dominant firms through the use of the collective dominance test. The proposed transaction could have seen the post-merger market structure having the merged entity, *Airtours/First Choice* with 32% of the market share, Thomson 27% and Thomas Cook 20%. Clearly none of these parties as individuals commanded a dominant position and neither did the merged entity. However, the unilateral effects can still be harmful through the possibility of collusion.

(b) Who notifies and what to include?

There is no mention as to who must notify the merger. However, a look at the provision suggests that either of the merging parties can notify.⁸² It follows that the notification fees that are required to accompany the filing⁸³ can be paid by either of the notifying parties. This construction that either of the merging parties can file the notification is a common sense approach that seeks to avoid multi-filing of the same transaction to the same authority, a situation that can unnecessarily overwhelm the reviewing authority. Given the catastrophes associated with such a situation, it is submitted that surely the legislature would not have intended such in its stated bid to provide for the promotion and maintenance of competition through, *inter alia*, merger regulation.

In addition to the payment of the prescribed fees, the notification must be done in a prescribed manner, following prescribed formalities and supplying the required information and particulars.⁸⁴ This form should be completed in writing.⁸⁵

Importantly, the notification must provide certain information including the particulars of the merging parties, the details of the proposed transaction and the merging parties' view of the competition implications of the proposed merger and any other information that might be required by the competition authorities.⁸⁶ It is in the interest of the merging parties to supply

⁸² See section 34(3) refers to 'the merging parties.'

⁸³Section 34A(2) read with Statutory Instrument 109 of 2011 Competition (Notification of Mergers)(Amendment) Regulation No.5 of 2011 amending section 4 of the Statutory Instrument 270 of 2002 Competition (Notification of Mergers) Regulation 2002 by inserting section 3 into the Regulations which provides that 'the maximum and minimum fee level shall be US\$50 000-00 and US\$10 000-00 respectively

⁸⁴ See generally section 34A (1)and (2)). The notification must be on a prescribed form, Form CTC: Merger 1.(Merger Notification Form (for 'Notifiable Mergers') Form CTC: Merger 1).

⁸⁵ Section 34A (1). However, with the advancement in technology and the reduced burden it places on merging parties, one wonder whether writing should include electronic means as well. This is an issue of interpretation as mere writing can include both forms, manual and electronic given that the dictionary or ordinary meaning of the term 'writing' entails 'letters or characters that constitutes readable matter.' See *The Free Online Dictionary-Thesaurus and Encyclopedia*, available at <http://www.thefreedictionary.com/writing>, (accessed 11 April 2013).

⁸⁶ Section 34A (2) read with SI on Merger Notification Form.

such information in as much detail as possible for a detailed notification will expedite the review process.⁸⁷ The authorities will not need to request further information and the merging parties will not have to wait for an unnecessarily longer period before they know the fate of their proposed transaction. It becomes a win-win situation for both the competition authorities as custodians of the system and the merging parties as immediate stakeholders of the system. It is submitted that competition will win given that, considering that all things being equal, the reviewing authorities will be able to consider all information necessary to ascertain the likely extent to which the proposed transaction will impact upon the competitive structure of the relevant market and consider the appropriate action thereupon. The merging parties will not have to endure unnecessary delays before they are aware of the fate of their proposed transaction.

(c) *When to notify?*

Section 34A (1) expressly provides that a ‘notifiable merger’ must be notified within 30 calendar days of either (a) the conclusion of the merger agreement or (b) acquisition of a controlling interest.⁸⁸

The first scenario requires the merging parties to file a notification within 30 days of completing the merger agreement. This means that the authorities are only made aware of the proposed transaction after it had been completed but before it is implemented. What are the consequences of this on the preservation of competition, if any? It is submitted that it is possible that by the time that the formal merger agreement is concluded, the acquiring firm might already be influencing the target firm’s market behaviour. It is also possible that other market participants,

⁸⁷ *Medicross Healthcare Group (Pty) Ltd v Commission 55/CAC/Sep05* paras.33-34. See also Competition Commission of South Africa *Practitioner’s Guide Issue 6; Complete Merger Filing Requirements*, (30 March 2010) par. 2(c), available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Complete-filing-notice-Mch-2010.pdf>, (accessed 26 March 20120).

⁸⁸ Section 34A (1) (a) and (b) of the Competition Act. Although the section does not specifically refer to ‘calendar’ days, section 33(4) of the Interpretation Act [*Chapter 1:01*] provides that ‘where the time limited by an enactment for doing of anything expires or falls upon a Saturday, a Sunday or a public holiday, the time so limited shall extend to, and the thing be done on, the first following day that is not a Saturday, a Sunday or a public holiday.’ It is submitted that the 30 days are computed as calendar days and it is only the last day that is regarded as a business day.

once they are aware of the impending merger, might start to behave defensively either in an anti-competitive manner in anticipation of the proposed merged entity's arrival or in a pro-competition manner so as to carve a market niche in anticipation of the similar competition.⁸⁹ Thus by the time the merger agreement is concluded, the competitive market structure might already have been compromised and it might be difficult for merger regulatory authorities to address such a situation. This realisation probably prompted the second scenario: notification within 30 days of the acquisition of a controlling interest.

If parties are required to notify the proposed merger within 30 days of the acquisition of a controlling interest in another, it may be asked when a controlling interest is deemed to have been acquired. Is it the moment that the merging parties formally enter into an agreement for such an acquisition or is it only when there are indications that the acquiring firm is in control? If it is the latter, when can a party be said to be in control?

Given that the first scenario requires a merger to be notified within 30 days of conclusion of a merger agreement, it is submitted that it does not make much sense to interpret the acquisition of a controlling interest as the moment a formal agreement is concluded. This is for two reasons: firstly it amounts to a repetition of paragraph (a) in section 34A (1). The legislature could not have intended to repeat the same issue albeit, in different formulation. Either way, the use of 'or' in the provision is a clear indication that the legislature intended it to mean something else and not a mere repetition. Secondly, as indicated above, a controlling interest can be acquired long before the conclusion of an agreement. This leaves the last proposal, that a controlling interest is acquired when there are indications that the acquiring firm is in control.

A controlling interest is defined as 'any interest which enables the holder thereof to exercise through direct or indirect means, the control over the activities or assets of another.'⁹⁰ This interest is acquired through a variety of ways, including the acquisition or lease of shares or a combination of businesses.⁹¹ It follows that the merging parties must notify the transaction

⁸⁹ See generally Pangarkar N 'What Drives Merger Behaviour of Firms? Strategic Momentum versus Bandwagons' (2000) 3 (1&2) *International Journal of Organisational Theory and Behaviour* 37.

⁹⁰ Section 2.

⁹¹ See definition of a merger in section 2(1).

within 30 days of entering into any transaction that enables the acquiring party to exercise any form of control over the activities or assets of the acquired entity. Although the Act defines a controlling interest, it does not indicate how this interest scenario is exercised. It may be asked whether it is necessary to indicate how these scenarios are exercised.

The South African Competition Act, in its definition of a merger, refers only to ‘control’ without qualifying the quality thereof.⁹² It then follows this up with an illustration of situations where control can be exercised.⁹³ This is necessary to provide clarity on the unqualified concept of control. However, can the same be said to be necessary where control is already qualified? It is submitted that there is no single straightforward answer to this question. On the one hand there is an issue of clarity and simplicity and on the other hand there is an issue of rigidity against flexibility.

In principle there is no need to provide for instances of control given that the term ‘interest’ is broad enough to cover any instances that can be envisaged thereby. It is already an indication of the quality of control. Thus retaining the formulation as it is will ensure a simple but effective provision. However the effectiveness thereof depends on whether it is understood by and helpful to the intended beneficiary: the merging parties who must know when to notify a proposed transaction. This turns the focus to rigidity against flexibility.

It is submitted that the lack of judicial interpretation which is necessary in providing clarity to such issues is a factor that strongly supports some form of an indication, be it in the statute or provided by the competition authorities as guidelines. This problem is not only confined to this aspect but also relevant to many others as will be highlighted in the discussion of the failing firm doctrine. Merging parties need to know when to notify, that is, when it is deemed that a controlling interest has been acquired. Thus there is a need for clarity in form of legislative amendment or otherwise. However, in providing clarity to the concept of control, caution must be exercised in order to avoid rigidity. This rigidity can manifest in interpreting the concept through adopting a more formalistic approach that can conform whatever situation to a set

⁹² See section 12 (1) of the South African Competition Act of 1998.

⁹³ Section 12(2) of the South African Competition Act of 1998.

guidelines indicating control. Although this is only a possibility, it is nonetheless real. If such a formalistic approach materialises, it is submitted that it will be a negative development towards achievement of an effective merger regulatory system. There are however, a number of factors that would cause this possibility to remain only a possibility in practical terms and hence support the use of guidelines.

Firstly the approach of the CTC in merger review is one that is based on a case-by-case assessment.⁹⁴ In other words, each case is determined upon its own merits. This approach eliminates the possibility of adopting a one-way rigid review. Secondly the guidelines can be formulated in such a way as to clearly indicate that they are not meant to be exhaustive by using broad terms like ‘to include’, ‘not limited to’ or ‘*inter alia*.’ It can thus be stated that although the current formulation relating to the controlling interest is broad in itself; there is still a need to provide a further illustration in the form of guidelines given the lack of judicial decision that are necessary to interpret statutory provisions. It is thus submitted that this provision of clarity is a precondition for an effective merger regulatory framework and should be done in a manner that fosters flexibility.

(d) Consequences of non-compliance

What happens if merging parties fail to comply with the procedures relating to notification? In other words, what are the consequences of non-compliance and how do they impact upon the achievement of an effective merger regulatory system in general and in a changed business operating environment in particular?

Parties fail to comply with the notification requirement if they either (a) fail to give notice as required⁹⁵ or (b) proceed to implement the merger without approval.⁹⁶ The purpose of the pre-merger requirement is to ensure that the competition authorities scrutinise as many transactions

⁹⁴ In all the available material that the researcher has had a privilege to examine for purposes of this study, it was observed that there is no single criterion that was followed to determine merger cases. This points to the fact that the CTC employs a case-by-case approach to merger cases where the facts of each case determine its outcome.

⁹⁵ Section 34A(3)(a) read with subsection (1).

⁹⁶ Section 34A(3)(b).

as possible so as to adequately protect the competition process by making sure that only non-harmful mergers are allowed and blocking or remedying those that raise competition concerns.⁹⁷ It is important that any form of non-compliance with this procedure is accordingly sanctioned to the extent befitting.

The Act provides that non-compliance with formalities attracts a penalty.⁹⁸ The appropriate penalty depends on the circumstances of each case and the Act only provides a non-exhaustive list of the relevant factors that may be taken into account in assessing such a penalty.⁹⁹ However, it is generally accepted that failure to comply with a formality attracts a lesser sanction than wilfully implementing the merger without seeking approval or substantive violation of a statute.¹⁰⁰ The Act however does not quantify in monetary terms the penalties that might be imposed. These penalties are expressed as a percentage of either or both of the merging parties'

⁹⁷ *Bromor Foods (Pty) Ltd/ National Brands Ltd* 19/LM/Feb00 paras.35-36; *Duan et Cien AG/Kolosus Holdings Ltd* 10/LM/Ma03 para.136. See also Kovacic WE 'Merger Enforcement in Transition: Antitrust Controls on Acquisition in Emerging Economies' (1998) 66(4) *University of Cincinnati Law Review*1075 ('pre-merger notification mechanisms are a common element of modern antitrust practices in Western economies, and they reflect a consensus that , in principle, meaningful remedies frequently will be unattainable if antitrust intervention occurs after a transaction is completed and the operations of the merging parties are combined') ; Warner MAA 'International Aspects of Competition Policy-Possible Directions for the FTAA' (1999)22(1)*World Competition: Law and Economics Review* (it is difficult to unscramble the egg once the merger has been consummated).

⁹⁸ Section 34A(3).

⁹⁹ Section 34A(5).

¹⁰⁰ *Competition Commission v Edgars Consolidated Stores (Edcon) and Retail Apparel Group (RAG)* 95/FN/Dec02. In this decision, the South African Competition Tribunal noted that failure to notify was a procedural violation rather than a substantive one hence attracts a lesser penalty than the latter. The tribunal accordingly imposed a rather nominal fine of R250 000 instead of the statutory prescribed 10% of the violating parties' turnover which could have amounted to R85 million. See also *Competition Commission and Another v Dorbyl Engineering Management Co. (Pty) Ltd/Fastpulse Trading 26 (Pty) Ltd* 83/LM/Nov02 where a fine of R1.00 was imposed. However, cf. *Commission v Stracta Technology (Pty) Ltd* 83/LM/Nov02; *Commission v Citibank NA South Africa Branch/Mercantile Bank Ltd/Mercantile Bank Ltd* 91/LM/Nov04; *Commission v Oracle Corporation (South Africa (Pty) Ltd* 100/FN/Oct05 and *Commission v Edward Snell &Co. Ltd* 112/FN/Nov05.

annual turnover in the country as calculated from the financial documents for the preceding year.¹⁰¹ It may thus be asked how the CTC enforces its sanctions against such non-compliance?

The CTC can only impose a fine and mercifully wait for the merging parties to comply. This is because in the event of non-compliance, the CTC does not have the authority to enforce the penalties. It relies on the conventional courts to enforce its orders for it is merely an administrative tribunal without any judicial authority to issue self-executing orders.¹⁰² The CTC has to initiate civil proceedings before a court of law in order to enforce its own orders.¹⁰³ This is a major handicap that requires attention if the CTC is to be an effective regulatory authority and shake the tag of being ‘a toothless bulldog.’¹⁰⁴ Even if it can be said to have teeth¹⁰⁵ those teeth are few and more teeth are needed to give it a bite.

(e) Time frames for merger consideration

The last issue that will be discussed here before turning the focus on substantive aspects relates to timelines for merger consideration, in other words from the completion of the notification period to the final determination. Some of the aspects relating thereto will also be explored when discussing the institutional structure and the general structure of the Act, in particular relating to appeals and reviews of the CTC’s decisions.

The Act does not make reference to the period that the CTC must take to make a decision once a merger has been notified. However, some light on the time period is shed by provisions relating to authorisation of mergers following an application for such made in terms of section 35.¹⁰⁶ Section 35 provides that any party proposing to enter into a transaction that may be prohibited under the Act must apply for authorisation to the CTC.¹⁰⁷ Section 36 provides that if such an

¹⁰¹ Section 34A (4).

¹⁰² Section 34A(6).

¹⁰³ Section 34A(6).

¹⁰⁴ See ‘Tariff Commission no toothless bulldog’ *Zimbabwean Independent*, 9 September 2010. (Interview with Kububa AJ, Director of the Competition and Tariff Commission of Zimbabwe.)

¹⁰⁵ *Ibid.*

¹⁰⁶ Part IV of the Act.

¹⁰⁷ Section 35(1).

application is made, the CTC may decide to make an investigation with the purpose of determining whether or not to grant the application.¹⁰⁸ The Act then provides that any such investigation ‘shall be conducted, and any decision’ pursuant thereto ‘shall be reached, as expeditiously as possible.’¹⁰⁹ There is thus no binding time frame for either conducting an investigation or reaching a decision.¹¹⁰ The question however arises as to when a determination is considered to have been made ‘as expeditiously as possible’? Answering this question is critical in determining whether this provision assists in the achievement of an effective merger regulatory framework.

Taken literally, the phrase ‘as expeditiously as possible’ means as fast as can be practical.¹¹¹ Within the context of the provision this means the CTC must conduct the investigations and make a decision pursuant thereto without any undue delay taking into account all the necessary factors.¹¹² These factors might include the complexity of the case that affects the time taken to investigate and the level of details supplied by the parties thus the emphasis that merging parties need to supply as detailed information as possible to expedite the review process. However, the question still remains as to whether the absence of an actual time frame affects the effectiveness of the regulatory system, and if so, how this can be remedied?

It is submitted that there are two sides to this issue. On the one hand the provision promotes flexibility as the Commission is not tied to any rigid deadlines.¹¹³ On the other hand, the open-endedness of the provision creates legal uncertainties and potentially prolongs the determination period as the CTC can take as much time as it wants to make a determination for as long as it is in its view reasonable.¹¹⁴ It may be asked who determines that it is an expeditious process in any

¹⁰⁸ Section 36(2).

¹⁰⁹ Section 36(5).

¹¹⁰ *Ibid.* See *UNCTAD A Tripartite Report* (2012) (note 75 above) 16, 183, 184.

¹¹¹ *The Oxford Dictionary of English* (2011) defines ‘expeditious’ as doing with speed and efficiency.

¹¹² See *European Council Regulation 139/2004 on the control of concentrations between undertakings*, OJ [2004] 124/1 (‘the ECMR.’) art. 9 (6) which obliges national jurisdictions to make decisions without undue delay in case of referrals.)

¹¹³ *Ibid.*

¹¹⁴ See *UNCTAD A Tripartite Report* (2012) (note 75 above) 184.

given circumstance. Thus the issue once again turns on flexibility, legal certainty and rigidity. It is submitted that flexibility is promoted through giving the authority a leeway to make decisions without the fear of missing deadlines. Legal certainty is promoted through providing a defined time periods for making such decisions. And lastly and unfortunately in a bid to create legal certainty, it is submitted that a rigid provision can follow. It is however possible to achieve both flexibility and certainty by (a) providing statutory time frames, (b) in-house administrative commitments or, (c) legally binding administrative guidelines.¹¹⁵

Although the Authorisation of Mergers Regulations provides for a 90 day period within which the CTC has to determine such an application,¹¹⁶ the fact that no classifications are made for mergers, either on size or complexity of transactions, still works to render this effort ineffective in providing certainty. Furthermore, these administrative guidelines are non-binding and they can be disregarded at any time.¹¹⁷ Their effectiveness depends on the extent to which the CTC respects its internal processes.¹¹⁸ It is submitted that these shortcomings relating to unspecified timeframes for merger determination can best be overcome by providing defined timeframes within the Act that will be complemented by the administrative guidelines.¹¹⁹

¹¹⁵ UNCTAD *A Tripartite Report* (2012) (note 75 above) 184.

¹¹⁶ Section 4(2) (a) and (b) of Statutory Instrument 295 of 1999 Competition (Authorization of Mergers) Regulations, 1999. See also note 88 on the calculation of the days.

¹¹⁷ See *California v Sutter Health Sys.*, 1340 F. Supp. 2d. 1109, 1120, 1128-32 (N.D.Cal.2001). See further Brannon L and Brandish K 'The Revised Horizontal Merger Guidelines: Can the Court Be Persuaded?' (2010) *The Antitrust Source*, available at <http://www.cgsh.com/files/Publication/47e0571f-2ae8-4626-90ec-04be6ab182f9/Presentation/PublicationAttachment/343a1b8b-a693-4717-a539-0c1f2d1a4d0e/Oct10-BrannonC.pdf>, (accessed 10 February 2013).

¹¹⁸ It is assumed that since the courts and private parties are not bound by administrative guidelines and considering that these guidelines play a crucial role in illustrating the competition authorities' approach to several aspects of competition, it follows that their effectiveness hinges more on the formulating authorities' commitment to adhere to them.

¹¹⁹ See for instance in South Africa where section 13(5)(a) of the Competition Act 89 of 1998 provides that Competition Commission has to make a determination within 20 business days of notification of intermediate and small mergers. However, such a period can be extended by a further 40 business days in terms section 13 (5)(a), or section 14 (1)(a). Section 14A(1)(b), 13(5)(a), 14(1)(a) of the Act and Rule 34(2)(a) of the Commission's Rules provides that in cases of large mergers, a determination has to be made within an initial 40 business days which can

The procedural aspects of merger regulation play a crucial role in providing an effective regulatory framework. It is submitted that the Act has done a relatively good job to that effect. However, there is still a lot of work that needs to be done to accomplish the status of an effective regulatory system. It is accepted though that the system can never be perfect but it must thrive to address any identifiable deficiencies. The identification of such deficiencies is the main focus of this Chapter and how to address them is the thrust of the study. The next sections of this Part explore how the substantive aspects of the system had, if at all, aided in advancing the object and purpose of the Act: to promote and maintain effective competition through, *inter alia*, merger regulation on one hand, and to provide for a framework that promotes beneficial corporate transactions on the other hand.

3.3.2 The Competition Act and substantive aspects of merger regulation

3.3.2.1 A merger defined

(a) What transactions are covered?

The statutory definition of a merger as provided is important in two ways. First it gives effect to the objective and purpose of the statute by clarifying its scope of coverage. Second it is the face of the merger regulating provision and as such an indication of how effective the entire competition statute is. The question however here is whether the legislature provided a definition that advances the quest for an effective merger regulatory system and by extension the competition system.

Section 2 of the Competition Act defines a merger as:

be extended with a maximum of 15 days per request with consent from the merging parties and the Competition Tribunal.

[T]he direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of—

- (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
- (c) any means other than as specified in paragraph (a) or (b).¹²⁰

The definition refers to three situations as constituting a merger for purposes of the Act. The first contemplates the acquisition or establishment of a controlling interest over the whole or part of a business of a competitor. The second part refers to a ‘supplier, customer.’ Lastly, reference is made to the acquisition or establishment of a controlling interest over the whole or part of a business of another person. The issues that need to be considered here is what type of transactions are covered by the definition. It also needs to be considered to what extent the statutory definition advances the purpose of promoting and maintaining competition in the economy by regulating all economic activities having an effect within the country.

Generally, there are three types of mergers.¹²¹ These types usually have one common feature namely the likelihood to negatively impact upon the competitive structure of the market.¹²² However, the extent to which this happens varies hence the difference in regulatory concerns.¹²³

The first type of merger occurs between firms having one or more product lines in direct competition.¹²⁴ This type is known as horizontal merger. The rationale behind regulating horizontal mergers was clarified by the US Supreme Court in *United States v Philadelphia*

¹²⁰ Section 2 as amended by section 2 of the Competition Amendment Act 29 of 2001.

¹²¹ See generally, Gaughan (2007)(note 9 above) 13.

¹²² See generally Goldberg (2007)(note 1 above) 93.

¹²³ See notes 126, 128 and 130 below.

¹²⁴ See *The Coca-Cola Company/ Cadbury-Schweppes* [2000] CTC/M&A/Dec00; *Merger of the National Insurance Company of Zimbabwe Limited (Nicoz) and Diamond Insurance Company Limited (Diamond)* CTC/M&A/May2002; *Rothmans of Pall Mall (Zimbabwe) Limited/ British American Tobacco (Zimbabwe) Limited* [1999] CTC/M&As/Sept99. (Both firms were players in the cigarette manufacturing industry in Zimbabwe); *Aykroyd Insurance Brokers/Hunt Adams & Associates* (note 46 above); See generally Von Kalinowski J ‘Business Organizations’ (1979) *Antitrust Laws and Trade Regulations*, section 19.02(1).

*National Bank*¹²⁵ as being that it ‘produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market...’,¹²⁶

The second type of merger occurs between firms with one or more product lines in a customer-purchaser relationship.¹²⁷ This type is commonly known as a vertical merger and is condemned on the basis that, besides the potential to eliminate an effective market participant, the merger can foreclose other market participants and results in preferential and often discriminatory distribution between the firms having a customer-purchaser relationship.¹²⁸

The last type of merger is known as a conglomerate merger and involves firms that do not share any form of economic relationship either as direct competitors or customer-purchasers.¹²⁹ Generally, merger control condemns conglomerate mergers on the basis that they might have some horizontal or vertical elements. However, there is an age old debate as to whether pure-conglomerate mergers must be subjected to merger regulation and be condemned.¹³⁰ Pure-conglomerate mergers are those involving parties that are not related in any economic sense and probably without any possibilities of any horizontal or vertical elements.¹³¹

¹²⁵ *United States v Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed. 2d. 915 (1963).

¹²⁶ *Ibid.*

¹²⁷ *Shashi Private Hospitals/PSMI* (note 18 above) (a merger between a health care provider and a health insurer). See generally von Kalinowski (1979) (note 124 above) section 19.02(2)(a).

¹²⁸ A merger between a customer and a purchaser can result in the establishment of a vertical relationship in which the customer (supplier) will engage in restrictive practices of exclusionary nature whereby it will prefer the purchaser over any other similar market participants. See for instance the CTC concerns in *Shashi/PSMI* (note 18 above) in imposing conditions to the effect that PSMI was not to prefer claims from Shashi patients over other hospitals as well as directing its medical insurance holders to go to the same hospital.

¹²⁹ *Falcon Gold Zimbabwe/ Cellular Systems* [2002] CTC/M&A/Oct02. See generally *FTC v Procter and Gamble Co.*, 386 US 568, 577 (1967). See also Standridge LW and Santopietro AR ‘Regulating the Pure Conglomerate Merger: Important Legislative Task or Useless Exercise?’ (1979) 30 *Syracuse Law Review* 607,608; Korah V ‘The Control of Conglomerate Mergers in the United Kingdom’ (1970) 15 *Antitrust Bulletin* 761.

¹³⁰ See generally Standridge and Santopietro (1979) (note 129 above); Korah (1970) (note 129 above) 759.

¹³¹ See generally for definition of a pure conglomerate mergers, Standridge and Santopietro (1979)(note 129 above) 608.

The first scenario provided by the definition, that is, ‘of a competitor,’ refers the acquisition or establishment of a controlling interest over the whole or part of a business of a competitor. This contemplates a horizontal merger and hence it can be stated that the legislature expressly intends the Act to apply to such types of mergers. As indicated above, this is no surprise given that horizontal mergers pose the greatest threat to competition. The second scenario provided by the definition refers to the whole or part of the business of a supplier and or customer. Again there appears no doubt as to what the legislature intended as this indicates a vertical merger. This leaves the third scenario: the acquisition or establishment of a controlling interest over the whole or part of the business of an ‘other person.’ Following that the first and second scenarios denote horizontal and vertical mergers respectively the question is whether it is correct to assume that the third scenario should be taken to denote a conglomerate merger being the last unattached type? Did the legislature intend to cover all types of mergers or only those that pose a competition threat? It is submitted that the answers to these questions lie in the interpretation of the phrase ‘or other person.’

The *Ex parte Caledonia* opinion¹³² *inter alia*, explored the matter regarding the interpretation of the ‘or other person’ element of the statutory definition of a merger in Zimbabwe. It raises the question as to what type of mergers are contemplated by ‘or other person.’ It may be asked whether the phrase is a mere confirmation that the Act applies to horizontal and vertical mergers or rather that it goes beyond those two to include pure-conglomerate mergers as well.

Ex parte Caledonia made an attempt to clarify the definition of corporate mergers as provided in the Competition Act. This followed a communication by the CTC to two companies registered in Zimbabwe, Caledonia Holdings (Africa) and Blanket Mine that an agreement concluded between their respective controlling companies for the sale of shares constituted a notifiable merger in terms of the Act.¹³³ Blanket Mine operated a gold mine near Gwanda in Zimbabwe and all its issued shares were owned by then Kinross Holdings Zimbabwe (Private) Limited now Caledonia

¹³² *Ex parte Caledonia* (note 28 above).

¹³³ *Ibid*, 1.

Holdings Zimbabwe (Private) Limited, an entity registered in Zimbabwe.¹³⁴ Caledonia was in turn wholly owned by Blanket (Barbados) Holdings Limited, a Barbados registered company which was itself owned by Kinross Gold Corporation of Canada.¹³⁵ In 2006, Kinross sold all its issued shares in Blanket Barbados to Caledonia Holdings Africa of Canada.¹³⁶

The effect of the above transaction was that the shares of Blanket Barbados were transferred from Kinross Gold of Canada to Caledonia Holdings Africa.¹³⁷ The ownership of the gold mine situated in Zimbabwe also changed hands.¹³⁸ Although these transactions were conducted outside Zimbabwe, the effect thereof was a change in the ultimate shareholding and control of a company in Zimbabwe that have economic interests in a gold mine near Gwanda.¹³⁹ There was no notification of the merger hence the CTC wrote to the Zimbabwean firms informing them of its intention to impose a penalty for non-compliance with the statutory requirement.¹⁴⁰ The parties then sought a legal opinion that was presented to the CTC and was accepted with the consequences that it had laid the foundation for the notion that mergers that are neither horizontal nor vertical are not covered by the statutory definition.¹⁴¹

In determining the whether the transactions were covered by the statute as notifiable mergers the opinion focused on (i) the application of the Competition Act and (ii) the definition of merger.

(i) The Application of the Act

¹³⁴ *Ex parte Caledonia* (note 28 above) 1.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ex parte Caledonia* (note 28 above) 1.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Section 34A (3) provides that ‘ the Commission shall impose a penalty if the parties to a merger (a) fail to give notice of the merger as required by subsection (1), (b) proceed to implement the merger without the approval of the Commission.’ Subsection (4) provides that such a penalty ‘ may not exceed ten per centum of either or both of the merging parties’ annual turnover in Zimbabwe as reflected in the accounts of any party concerned for the preceding financial year.’

¹⁴¹ See UNCTAD *A Tripartite Report* (2012)(note 75 above) 182; Kububa (2009) (note 6 above) 4.

The application of the Act was discussed above and will not be repeated here.¹⁴² This section will concern the aspects relating to the application of the Act only to the extent that it impacts upon the statutory definition of a merger. As indicated, section 3(1) provides that the statute applies to ‘all economic activities within or having an effect within the Republic of Zimbabwe.’ The relevant question is what does ‘all economic activities’ mean within the context of the statutory definition? Does ‘all economic activities’ only relate to certain types of mergers that have an effect on competition within the country or does it refer to all types as long as they have a similar effect?

Although the *Ex parte Caledonia* opinion disputed the Act’s application to the transaction concerned on the basis that, *inter alia*, it was externally concluded and as such the statute did not have application,¹⁴³ it correctly pointed out that the presence of an economic activity is not the litmus test for conferring jurisdiction on the statute.¹⁴⁴ The question that ultimately needs to be answered is not whether there was an economic activity having an effect on competition within Zimbabwe but rather whether such an activity resulted from a transaction that constitutes a merger as defined. It is this aspect that raises the issue as to what types of mergers are covered by the statutory definition.

(ii) Defining a merger

The question is what types of mergers did the legislature intend to regulate as covered by the definition in section 2? Is it only between economically related entities or between any entities for as long as they have an effect on competition within Zimbabwe?

It is not in issue that section 2 applies to horizontal and vertical mergers. It may however be asked whether it is limited to only these types to the exclusion of pure-conglomerate mergers

¹⁴² See 3.2 above.

¹⁴³ *Ex parte Caledonia* (note 28 above) 3 par.6.

¹⁴⁴ *Ibid*, 3.

even if the latter has an effect on competition within the economy of Zimbabwe. If so, it may further be asked whether this is what the legislature intended, namely, providing a definition that creates a statutory gap in merger regulation? *Ex parte Caledonia* interpreted the phrase ‘or other person’ as used in the definition as referring only to any such person who falls in the same category as competitor, supplier or customer.¹⁴⁵ Accordingly, it stated that the legislature intended the statute to apply to horizontal and vertical mergers and only to pure-conglomerate mergers to the extent that they have either horizontal or vertical effects.¹⁴⁶ This interpretation is premised on the *eiusdem generis* rule.¹⁴⁷ This rule was stated as follows by Cockram:

Where a list of items which form a genus or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words.¹⁴⁸

Applying this rule, the opinion concluded that the definition refers to ‘competitor, supplier, customer or other person’ implying that the general expression ‘or other person’ only refers to those in the same class as a competitor, supplier and customer.¹⁴⁹ In other words, the definition is only limited to horizontal and vertical mergers as they involve competitors, suppliers, customers and ‘other persons.’ According to this interpretation, the intention of the legislature was to limit the application of the statute to only those ‘economic transactions’ between ‘competitors, suppliers, customers *and similar persons.*’¹⁵⁰ This effectively excludes pure-conglomerate mergers from the definition of mergers that must be notified and scrutinized by the CTC as well as limit the application of the statute in general.

It is submitted that the aforementioned could not have been the legislature’s intention for the following reasons: Firstly, it has been shown that the Act’s aim is to promote and maintain

¹⁴⁵ *Ex parte Caledonia* (note 28 above) 6.

¹⁴⁶ *Ibid* 3, par 6. See note 141 above.

¹⁴⁷ Also known as the *eiusdem generis* rule.

¹⁴⁸ Cockram G *The Interpretation of Statutes* (3rd ed) (1987) 154. See further *Quazi v Quazi* 1980 AC 744, 807-8; *Sacks v City Council of Johannesburg* 1931 TPD 443; *S v Makandigona* 1981 (4) SA 439 (ZAD).

¹⁴⁹ *Ex parte Caledonia* (note 28 above) 6.

¹⁵⁰ UNCTAD *A Tripartite Report* (2012)(note 75 above) 82. italics added.

competition within the economy of Zimbabwe through effective merger regulation. Effective merger regulation entails that there must be a system in place capable of ensuring that *any* ‘economic activity’ having an effect in Zimbabwe or any substantial part thereof is scrutinized by the CTC. The term ‘economic activity’ is broad enough in its ordinary sense to encompass all the three types of corporate merger transactions, namely horizontal, vertical and conglomerate mergers. Thus on this point there is nothing to suggest that the legislature intended to limit economic activities in the form of mergers to only two of the three types of known mergers.

There might not be a clear provision to determine which types of mergers are covered under the statute but one thing is clear, and that is that the legislature intended to provide a statute with a mechanism to promote and maintain competition within the economy of Zimbabwe through, *inter alia*, the regulation of mergers. It is then inconceivable that the same legislature in the same statute could have ‘intended’ to limit merger regulation to only two of the three known merger types given that they all pose equally harmful threats to achieving the goal of promoting and maintaining competition in Zimbabwe. It is thus submitted that there is ample evidence to suggest that conglomerate mergers are covered by the definition.

The phrase ‘or other person’ can be construed as a catch all phrase that is meant to capture all other forms outside those specified as between competitors, suppliers and customers. If the legislature really intended to maintain the same line of persons, it is submitted that it would have used the word ‘and’ not ‘or.’ ‘And’ means ‘in addition to’¹⁵¹ and in this case suggesting in addition to competitor, suppliers and customers whereas ‘or’ suggests a diversion from the list. Thus the use of ‘or’ entails that the legislature intended to expand the list to include even those persons outside the specified list. There is nothing in the statute to suggest that such a construction is wrong. In fact, it is submitted that there is ample evidence to support it. The objectives of the statute are clear in their indication that the statute is meant to bring under the CTC’s scrutiny, as many transactions as possible, as long as they are ‘economic activities’ having an effect on the Zimbabwean economy and aimed at promoting and maintaining competition within the economy.

¹⁵¹ See The Free Dictionary, available at <http://www.thefreedictionary.com/AND>, (accessed 21 December 2012).

In 2001, the principal Competition Act was amended to, *inter alia*, improve merger regulation.¹⁵² The Amendment Act, in addition to inserting the current definition of mergers, introduced a compulsory pre-merger notification regime in which all mergers meeting a set threshold need to be notified to the CTC before implemented.¹⁵³ The rationale behind this requirement is clear: to bring to the attention of the CTC as many corporate transactions as possible. This signalled the legislature's intention to expand the application of the statute in merger regulation, an intention that would be in vain if the definition of the merger is applied restrictively.

Statutory interpretation techniques or rules, as they are referred to, are meant to find the meaning of words and phrases used in statutes so as to help arrive at the intention of the legislature when enacting the statute.¹⁵⁴ Anyone purporting to be interpreting the meaning of words and phrases used in a statute must therefore strive to bring the words and phrases close to the intention of the legislature as can be ascertained and to avoid overstepping this function or pushing it too far for this can defeat the intention of the legislature. Thus the legal opinion in *Ex parte Caledonia* in interpreting the statutory definition of a merger, applied the *eiusdem generis* rule to define the phrase 'or other person.' However, it is the writer's considered view that the rule was misapplied and the statutory definition of merger was misinterpreted.

It is submitted that the guiding factor in judicial decision making must be that each case turns upon its own facts. As such, the question of whether the acquisition of Blanket Mine by Caledonia Holdings should have been notified might be decided by other factors as correctly pointed out in the opinion regarding who was to notify.¹⁵⁵ However, barring any technicalities in formalities, the conclusion that the statutory definition covers only mergers between parties sharing an economic or similar relationship to the exclusion of non-related entities is misleading

¹⁵² Competition Amendment Act 29 of 2001 substituted the merger definition in section 2(1) of the Act and inserted Part IV on pre-merger notification into the Act.

¹⁵³ Section 12 of the Amendment Act introduced Part IV into the Competition Act.

¹⁵⁴ See *R v Takaendesa* 1972(4) SA 72 (R.A.D).

¹⁵⁵ *Ex parte Caledonia* (note 28 above) 6.

and must not be used as a precedent for it is submitted that, it is simply a bad one. Any slight indication that the legislature intended such approach must be eliminated from the statute.

The application of the rule in determining the meaning of the phrase ‘or other person’ as used in the statutory definition of a merger results in absurdity as it would mean that only economic activities having an effect on the economy of Zimbabwe in the same class as competitor, supplier and customer would constitute a merger whereas other economic activities with similar effect on the economy of Zimbabwe which are not in the same *genus* or class as ‘competitor, supplier, customer’ would not constitute a merger.¹⁵⁶ It is submitted that there is enough ammunition provided in the statute to determine the extent to which the legislature intended the statute to apply in general and the types of mergers covered in particular. As such, the application of the *eiusdem generis* rule was not proper as it had the effect of creating an artificial gap in the statutory merger definition. The rule should not be applied as a general rule of application but rather cautiously¹⁵⁷ to avoid misinterpretation of statutory provisions. In particular, in constructing the meaning of ‘or other person’ as used in section 2 ‘it must be remembered that the *eiusdem generis* rule is only one of many rules of construction; it is not to be invoked automatically whenever general words follow particular words.’¹⁵⁸

¹⁵⁶ See also *Claudius Murawo v Grain Marketing Board* SC27/09 (2008) 7-8 where the SC in a labour case rejected the application of the *eiusdem generis* rule as resulting in absurdity. The Court noted that applying the rule would mean that ‘activities inconsistent with the express or implied condition of his contract or employment which are in the same genus or class as “incitement, intimidation (and) indulging in disorderly behaviour” would constitute acts of misconduct whilst other “activities inconsistent with the express or implied condition of his employment” which are not in the same genus or class as “incitement, intimidation (and) indulging in disorderly behaviour” which – could be more serious activities, would not constitute acts of misconduct.’ See further Madhuku L *An Introduction to the Zimbabwean Law* (2010) 155(‘rule does not apply if it defeats the clear purpose of the legislation or is contrary to the clear intentions of the legislature.’)

¹⁵⁷ See *Rex v Nolte* 1928 AD 377, 382 (the rule itself is not one that has to be applied with caution, and is not of general application.)

¹⁵⁸ *S v Makandigona* 1981 (4) SA 439 (ZAD) 443H-444A.

Probably the opinion and its seemingly growing influence and acceptance¹⁵⁹ that the legislator intended to exclude pure-conglomerate mergers from the ambit of the statutory definition can find some solace in what Standridge and Santopietro termed the lack of uniformity on opinions regarding the economic effects of conglomerate mergers within the economics literature.¹⁶⁰ Some authors maintain that even during increased periods of merger activities (so-called merger waves), there is little evidence that conglomerate mergers pose danger to either economic concentration or results in anti-competitive practices.¹⁶¹ However, there are still other authors who maintain that a conglomerate merger equally poses a threat to competition.¹⁶²

A merger involving firms operating in unrelated markets and sharing no economic activity normally raises eyebrows as to the rationale behind it. As opposed to horizontal and vertical mergers, conglomerate mergers may not be motivated by the need to rationalize operations and as such they have the potential to affect both efficiency and production capacities of merging parties.¹⁶³ Thus it is important to regulate them to ensure that they are not contrary to public interest.¹⁶⁴ Given the role of public interest considerations in Zimbabwean merger regulation, it is thus increasingly difficult to imagine any reason why the legislature can be said to have intended to exclude conglomerate mergers from the purview of the statute.

It has been shown that the legal opinion in *Ex parte Caledonia Holdings* which laid the foundation for accepting that the definition of mergers in section 2 does not cover pure conglomerate mergers is not only in contrast to the greater objectives of the statute but creates an

¹⁵⁹ This acceptance that the Act does not apply to pure conglomerate mergers is disputed by this writer.

¹⁶⁰ Standridge and Santopietro (1979)(note 129 above) 608.

¹⁶¹ See for instance, Markham J *Conglomerate Enterprise and Public Policy* (1973); Seiner P *Mergers: Motives, Effects, Policies* (1975); Lorie JH and Halpern P 'Conglomerates: the Rhetoric and the Evidence' (1970) 13 *Journal of Law & Economics* 140.

¹⁶² See generally, Federal Trade Commission (FTC) *Economic Report on Conglomerate Merger Performance* (1973); Mueller WF 'Conglomerates: A 'Non- Industry' in Adams W (eds.,) *The Structure of American Industry* (1982) 442. Korah (1970)(note 129 above) 762 (since involves firms in unrelated activities, might provide less scope for rationalization hence operate against public interest.

¹⁶³ See Korah (1970)(note 129 above) 762.

¹⁶⁴ See Von Kalinowski (1962) (note 602above) 829.

artificial gap in the statutory definition of a merger. There is no evidence to support a construction that limits the application of the statute to conglomerate mergers that are ‘economic activities’ having an effect on the economy of Zimbabwe. On the contrary, the promotion and maintenance of competition in the economy of Zimbabwe requires that every corporate transaction meeting the prescribed thresholds must be notified and scrutinized accordingly.

However, regardless of the point of view that one might adopt, it is submitted that there is a need to clarify the statutory definition of a merger in Zimbabwe to avoid theorising on such a crucial matter given the absence of judicial jurisprudence in the area of merger regulation that might assist in interpreting such phrases as ‘of another’ as used in the statutory definition of a merger. The proposed clarity to this provision is a subject of later Chapters. Suffice to state here that the legislature needs to provide a clearer definition that can only provide one conclusion, that is, the statutory merger definition is wide enough to cover all types of mergers so as to give effect to the objective and purpose of the entire statute.

This study will thus assume the position that the statutory definition provided in the statute is broad enough to cover all types of mergers. There is however room for improvement by providing legislative clarity to put the question to bed once and for all. This clarity is important because the current definition has already influenced the approach of the CTC who appears to have incorrectly bought into the opinion that the statutory definition does not cover mergers outside the vertical and horizontal category,¹⁶⁵ or one can say, have created confusion within the regulatory spheres.

The further question that requires attention and that is critical in assessing the effectiveness of the merger regulatory system is what actually does the legislature intend to regulate? Of course it is mergers, but is it mere business transactions or the effects thereof? In other words, is it the

¹⁶⁵ See Kububa (2009) (note 6 above) 4 (that the definition does not cover all types of mergers) and Competition and Tariff Commission of Zimbabwe (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part (1) Mergers and Acquisitions* (2006) (unpublished on file with writer) 21 (that it applies to all types).

acquisition of a business of another or the acquisition of means that affect competition on the relevant market? These issues can only be addressed by identifying the core operative element of the definition.

(b) The acquisition or establishment of a controlling interest

A merger occurs when one or more persons acquire or establish a controlling interest in the whole or part of a business of another. The application of the Act is thus triggered not necessarily by the acquisition of the business of another but rather by the acquisition or establishment of a controlling interest.¹⁶⁶ The acquisition of a business or shares is only one of the methods by which a controlling interest can be acquired or established. A controlling interest is defined as any interest which enables the holder thereof to exercise through direct or indirect means, the control over the activities or assets of another.¹⁶⁷ The ultimate element is thus the acquisition of control. It is therefore the acquisition or establishment of control that is central to merger regulation.

What is control and why is it important in merger regulation? This issue had received a fair amount of attention in many jurisdictions where it is also a key component of merger control.¹⁶⁸ Control is not defined in the statute. Rather the statute provides for a definition of a ‘controlling interest.’¹⁶⁹ The latter in turn makes reference to control. A look at the definition of a controlling interest shows that it is only an indication of the quality of control that must be acquired or established for a transaction to constitute a merger. This broader assertion is crucial in that it gives the definition a broader application and as indicated above,¹⁷⁰ largely extinguishes the need to provide an illustration of instances of control.¹⁷¹

¹⁶⁶ UNCTAD *A Tripartite Report* (2012) (note 75 above) 15.

¹⁶⁷ Section 2(1) of the Act.

¹⁶⁸ See also the EC decision in *Blokker/Toys ‘R’ Us* (note 69 above) par.13.

¹⁶⁹ Section 2(1).

¹⁷⁰ See 3.3.1.2.(c) above.

¹⁷¹ However, as stated earlier, it is this writer’s view that such an illustration cannot do any harm to the statute as it will simply aid clarity.

A statutory provision can be simple but still effective. This is achieved through providing for broadly formulated concepts especially where the objective and purpose of the relevant statute are formulated in a broader manner. This is true of the Zimbabwean merger regulating statute, the Competition Act. However, it is submitted that the effectiveness of a competition statute cannot be exclusively measured by its provisions as they appear but must also be measured by the practical realities in the business operating environment. This observation is as important here as it is important elsewhere in this research, for instance on the question as to whether public interest considerations must be included in merger control;¹⁷² whether the Zimbabwean competition authorities need to adopt a lesser standard in reviewing mergers involving failing firms during crisis periods¹⁷³ and crucially on what model is suitable for Zimbabwe. With this in mind, it is important to consider the concept of control and controlling interest within two contexts: (a) the merger notification requirement and (b) the protection of competition principle.

The relevance of the concept of control in the context of merger notification has already been discussed in this chapter.¹⁷⁴ However, it is important to provide a recap of the issue in order to put the current discussion into perspective. Merger notification is crucial in ensuring that the competition authorities are able to effectively protect the competitive market structure.¹⁷⁵ This is through providing a mechanism that enables them to scrutinise as many transactions as possible before they are implemented and cause harm to competition.¹⁷⁶ This exercise will be futile if merging parties, who are the subject of the process, are not able to determine when their

¹⁷² See generally Lewis D 'South African Competition Law: Origins, Content, and Impact' in Dhall V (eds.) (2007)(note 1 above) 340-363, 360-61; Riecke WD 'The Competition Act, 1998: An Economic Perspective' (1999) 67(2) *South African Journal of Economics* 257; Lewis D 'The Role of Public Interests in Merger Evaluation' (2002), speech delivered at the International Competition Network (ICN) *Merger Working Group*, (Naples 28-29 September 2002), available at <http://www.comptrib.co.za/assets/Uploads/Speeches/Lewis5.pdf>, (accessed 28 March 2012); Hatzenberg T 'Competition Policy and Enterprise Development: The Role of Public Interest objectives in South Africa's Competition Policy' (2004), available at <http://www.competition-regulation.org.uk/conferences/southafrica04/Hartzenberg.pdf>, (accessed 10 April 2012).

¹⁷³ See generally Fox (2007)(note 2 above).

¹⁷⁴ Note 70 above.

¹⁷⁵ See note 97 above.

¹⁷⁶ *Ibid.*

transactions must be notified. It is thus important to clarify in as simple terms as possible when a controlling interest is deemed to have been acquired or established for purposes of notification.¹⁷⁷

The second context is the relevance of the concept of control in merger control in general, that is, in protecting the competitive structure of the market. Control, which is not defined in the Act, can be described as the ‘possibility of exercising decisive influence on a firm.’¹⁷⁸ This broader definition is in line with the need for merger regulation to protect the competitive market structure from potential negative effects of corporate transactions. By acquiring or establishing control over another firm, an entity will be able to determine how the controlled firm will behave on the market. This is in addition to depriving the controlled firm of the ability to conduct itself in an independent manner on the relevant market.¹⁷⁹ An independent firm is necessary for the maintenance of a competitive market structure in that it can resist the incentives of collusive practices and other anti-competitive practices.

By providing that a merger occurs where ‘one or more’ firms acquire another, the legislature did not only acknowledge the business reality that more than one entity can jointly acquire another but that control can be jointly acquired or established and be exercised as such.¹⁸⁰ This emphasises the observation that the concept of control in merger regulation must be interpreted widely in order to give effect to the spirit and purpose of an effective competition statute through merger regulation. A broader interpretation goes beyond considering merger as the acquisition of ordinary ownership, that is, acquisition of legal ownership by meeting a certain threshold for such particularly in terms of corporate law,¹⁸¹ but also through asset acquisition.¹⁸²

¹⁷⁷ Currently the definition in section 2(1) does not provide such an illustration.

¹⁷⁸ See *Blokker/Toys ‘R’ Us* (note 69 above) para.13.

¹⁷⁹ UNCTAD *A Tripartite Report* (2012) (note 75 above) 15.

¹⁸⁰ *Ibid*,16.

¹⁸¹ The regulation of the acquisition of legal ownership for purposes of corporate law is meant primarily to protect the interests of the shareholders and creditors of the acquired firm.

¹⁸² See for instance, section 2(1) of the Act defining a merger making reference to the fact ‘that a controlling interest is achieved as a result of’, *inter alia*, ‘the purchase or lease of the shares or assets of a competitor, supplier, customer or other person.’

Finally, merger regulation provisions are triggered by changes in control.¹⁸³ This occurs for instance where a transaction results in (a) an entity that was owned by a single firm became owned by a different firm (owned by A now B), (b) a firm that was owned by more than one entities became owned by a single entity (from A, B, C and D to A) or, (c) a firm that was co-owned being individually owned (from co-ownership to joint ownership). The change in control thus brings about structural changes in the relevant market as the way in which the acquired entity behaves pre-merger cannot be said to remain as such post-merger. This is because post-merger it would be influenced by the business models and behaviour of the controlling entities. Accordingly, without acquisition or establishment of a controlling interest, there are no structural changes in the market and the concentration of assets or control is unlikely hence the regulatory authorities are unlikely to be involved.¹⁸⁴

The statutory definition of a merger, though it largely succeeds in providing a broader definition, still requires some clarity as evidenced from the opinion in *Ex parte Caledonia Holdings*.¹⁸⁵ This clarity must take the form of a simple but broader provision. There is thus a need to further clarify the concept of ‘controlling interest’ as it is provided by the Act.

Having discussed the first aspect of the substantive aspects of merger regulation, the statutory definition of a merger and highlighted the need for clarity, the next section will focus on the standard that is employed to determine whether or not to approve the notified merger – the substantive assessment test. The preliminary issue is what the test actually entails and whether the test is clearly identified in the Act. Regardless of the aforementioned, it may be asked whether the test itself is effective in merger regulation within the country’s context, that is, to promote beneficial corporate transactions that are a necessity in a perennial crisis environment without prejudicing the competitive market structure.

3.3.2.2 The standard for merger assessment: the substantive assessment test

¹⁸³ UNCTAD *A Tripartite Report* (2012) (note 75 above) 15.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ex parte Caledonia Holdings* (note 28 above).

After a transaction that is a merger as defined has been notified, the next step is for the CTC to determine the fate of the proposed transaction. This determination is essentially an assessment of whether or not to approve the proposed transaction. To make such an assessment requires employing a certain standard that assesses the likely competition effects of the concerned transaction and taking into account any relevant factors and then to determine whether such factors can neutralise the aforesaid anti-competitive effects.

This assessment is a substantive test for it cannot be based on procedural requirements since a failure to comply or compliance with the procedural aspects of merger regulation as indicated earlier¹⁸⁶ cannot be a basis for either prohibiting or approving a merger. Surely basing a decision as to whether or not to approve a proposed transaction on procedural considerations constitute an injustice to merger regulation. This is because basing decisions on technicalities would result in the prohibition of mergers that raises no competition concerns and blocking of beneficial mergers simply because the parties had not met certain procedural requirements. It is submitted that this is not what merger regulation intends to achieve hence the legislature provides for penalties as safeguards to ensure compliance.¹⁸⁷ Of relevance here is that critical corporate transactions would be blocked without any consideration of the primary objective and purpose of the Act: promotion and maintenance of competition in the economy through, *inter alia*, merger regulation.

¹⁸⁶ See notes 98 and 140 above.

¹⁸⁷ Section 34A (3) of the Competition Act. In addition to administrative penalties provided under the Act for non-compliance (section 34A (3)), there are a variety of remedies that the CTC can utilise in cases of violation of the notification requirements. Section 30 empowers the CTC to negotiate with any offending party with the view of disconnecting the offending merger, terminating it or divesting from it. These remedies are normally contained in conditions imposed as part of conditional approval of mergers. See generally on the use of the remedies by the CTC, *Falcon Gold Zimbabwe/Cellular Systems Limited merger* (note 129 above) (CTC approved the merger on condition that Falcon Gold de merge from Cellular System within 12 months of listing); *Colcom/Cattle Company merger* CTC/M&As/Nov03 (merger approved on condition that parties agree to divest from cattle auctioneering business); *Rothmans of Pall/BAT merger* (note 124 above) (approved on condition that, inter alai, BAT dispose of its surplus cigarette making equipment). See generally on antitrust remedies, Cavanagh E 'Antitrust Remedies Revisited' (2005) 84 *Oregon Law Review* 147.

Competition statutes have established various substantive assessment tests to be applied by regulatory authorities.¹⁸⁸ The ultimate aim is to assess the likely competitive effects of the transaction concerned and consider if there exist any circumstances to justify the approval of the merger regardless of its effects if the circumstances outweigh the said effects. This exercise involves a delicate balancing exercise.¹⁸⁹ The fate of the merger can only be determined after the completion of this balancing exercise. The ability of any test employed in merger assessment to give effect to this balancing act is an important factor in providing an effective merger regulatory system in general and in particular, in the context of Zimbabwe where there is a need to promote corporate transactions on one hand, and protect the competitive structure on the other hand. The question is therefore what test is applied in Zimbabwe and whether this test is clearly formulated in the Act. It may further be asked whether the statutory provisions are generally supportive of an effective substantive assessment test.

The above issues must be considered within two broad and related contexts: (a) the entire merger regulatory framework must pull towards a single objective, namely, ensuring the promotion and maintenance of an effective competition system and, (b) promote beneficial corporate transactions without sacrificing the principles necessary for the protection of the competition process. The issue as to what standard is applied in merger appraisal will be considered from two angles, namely the statutory provisions and thereafter the CTC's approach.¹⁹⁰

¹⁸⁸ In the US, the substantive assessment test is contained in section 7 of the Clayton Antitrust Act Ch.323 38 Stat, 730 (1914) as Codified as amended at 15 U.S.C. sections 12-27 as '...the effect such an acquisition may be substantially to lessen competition or to tend to create a monopoly.' In the EU, the test is contained in article 2(2) of the *European Council Regulation 139/2004 on the control of concentrations between undertakings* OJ [2004] L24/1 ('the ECMR') which assesses whether or not the merger (concentration) would significantly impede effective competition in the common market or part thereof due to the creation or strengthening of a dominant position. In South Africa, the test is provided in section 12A of the Competition Act of 1998 and basically assesses whether or not a merger is likely to substantially lessen or prevent competition within a defined market and if it can or cannot be justified on substantially benefits grounds including public interest.

¹⁸⁹ Goldberg (2007)(note 1 above) 94.

¹⁹⁰ The CTC 's approach will be derived from mainly executive summaries that are available to the writer given that the CTC does not publish its decisions in any manner that might provide sufficient detail as the case in other jurisdictions such as South Africa where decisions of the competition authorities are readily available as reported

(a) *The Act and the test*

The Act does not have a particular part that is dedicated to merger regulation.¹⁹¹ One might point to the size and comprehensiveness of the South African statute which is about 256 pages in contrast to the 34 pages of Zimbabwean statute to support the *status quo*. However, having merger control provisions housed in one part of the statute is not an alien concept as the Act is divided into various Parts already. It is submitted that what such an approach will achieve is to address the issues relating to clarity and promote much needed effectiveness of the statute in general. A simple statute will still be retained with space to make alterations as and when the need arises. This point can be illustrated by the untidy current structure of the Zimbabwean competition statute where it is submitted, some recent amendments relating to merger regulation appears as patches and out of place. For example, following the 2001 amendment, factors for determining the likelihood of a merger to substantially prevent or lessen competition were provided as section 32(4a) when the Principal Act already had section 4 with a subsection (a). The only difference is that the amendment is bolded. It is submitted that such a structure is potentially confusing as it become difficulty to cite the said sections.. This does not seem a real issue until one considers the practical implications thereof.

As stated, after all the theoretical questions as to whether the Act is effective have been considered and various suggestions have been made, the ultimate question is whether the intended beneficiaries of such suggestions will actually benefit. If the Act does not prevent, for instance, mergers that will create a dominant market player capable of effecting price increases to the detriment of customers and consumers, the question is whether, after such mechanisms are put in place, such mergers can be prevented and the ability to engage in such practices can be curtailed. Similarly if the structure of the Act is deemed to be unsuitable, can any change thereto affect the merging parties' ability to make use of the merger provisions? As for the regulatory

cases on the respective authorities' websites, the EU where the decisions of the European Commission are also reported in *Official Journal* of the EU and the US where antitrust cases are reported in various in case reports. The writer exclusively relied on these summaries as they appeared in unpublished reports or studies or availed to him as unreported and unpublished extracts.

¹⁹¹ Cf. the South African Competition Act of 1998 where Chapter 3 is dedicated to merger regulation and is promptly headed as 'Merger Control.'

authorities, it is submitted that it can be said that as the custodians of the statute they can find their way through the jungle but the same cannot be said of merging parties. Thus a well-structured statute becomes a necessity.

By a well-structured statute, it is meant a statute where merger control provisions are housed in a single Part of the statute as opposed to the current structure where they are scattered throughout the Act. The current structure makes it difficult for one to ascertain what the actual test for merger assessment is. This can be illustrated by taking a quick tour through the Act. The long Title provides that merger regulation is one of the objectives of the Act. Section 2(1) defines a merger and makes reference to a controlling interest which is not separately defined in the same section but somewhere else given that the interpretation section is arranged in alphabetical order. The bulk of provisions relating to merger control are found under the functions and powers of the Commission.

Section 5 provides that functions of the Commission include ‘to study trends towards increased economic concentration with a view to the investigation of monopoly situations and the prevention of such situations where they are contrary to public interest.’¹⁹² The Commission is empowered under section 28 of the Act to make any investigations as it consider necessary ‘in order to ascertain whether any merger has been, is being or is proposed to be made.’¹⁹³ Section 30 also gives the Commission the power to negotiate with a view of reaching a settlement with any person who is involved in a merger or proposed merger so as to ‘terminate, prevent or alter’ any such merger or monopoly situation.¹⁹⁴ Following the investigation, section 31 empowers the Commission to make relevant orders after being satisfied that the merger or proposed merger is or will be contrary to public interest.¹⁹⁵

Section 32 provides that:

¹⁹² Section 5(1)(d) of the Act.

¹⁹³ Section 28(1)(b)(i).

¹⁹⁴ Section 30(1).

¹⁹⁵ Section 31 (2).

In determining, for the purposes of section thirty-one, whether or not any [...] merger is or will be contrary to the public interest, the Commission shall take into account everything it considers relevant in the circumstances, and shall have regard to the desirability of –

- (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and
- (b) promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and
- (c) promoting, through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competitors into existing markets.¹⁹⁶

Provision is further made that:

[T]he Commission shall regard a merger as contrary to the public interest if the Commission is satisfied that the merger -

- (a) has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe; or
- (b) has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.¹⁹⁷

And that:

When determining whether or not a merger is likely to substantially prevent or lessen competition the Commission shall consider any of the following factors as many be relevant-

- (a) the actual and potential level of import competition in the market;
- (b) the ease of entry into the market, including tariff and regulatory barriers;
- (c) the level, trends of concentration and history of collusion in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the merged parties having market power;
- (f) the dynamic characteristics of the market including growth, innovation and product differentiation;
- (g) the nature and extent of vertical integration in the market;
- (h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;
- (i) whether the merger will result in the removal of efficient competition.¹⁹⁸

¹⁹⁶ Section 32(1).

¹⁹⁷ Section 32 (4).

Finally section 36 provides that after receiving an application for authorisation of a merger¹⁹⁹ and after completing an investigation if it considers it necessary, the Commission shall;

- (a) grant the authorization sought by the applicant, subject to such terms and conditions as the Commission thinks appropriate, if the Commission is satisfied that the agreement, arrangement, practice or conduct concerned is not contrary to the public interest; or
- (b) refuse to grant the authorization sought by the applicant, if the Commission is not satisfied as provided in paragraph (a).
- (c) The Commission shall observe the requirements of section thirty-two in determining whether or not any agreement, arrangement, practice or conduct is contrary to the public interest.²⁰⁰

The above provisions not only highlight the fact that the merger control provisions are scattered throughout the statute but also that it is complicated to ascertain the substantive assessment test used to determine whether or not a merger should be approved. It must be highlighted also that in none of these provisions is it expressed what the standard for merger assessment is that needs to be applied. It is thus left to the merging parties to try and figure out what standard is applied. This dilemma of performing such a task will be discussed below.

(i) What is the test for merger assessment in terms of the Act?

Just a mere perusal of the provisions quoted above shows that the legislature keeps making reference to ‘an inquiry’ as to whether a merger or proposed merger is or will be contrary to the public interest.²⁰¹ It may be asked whether the substantive standard for merger assessment is the public interest test.²⁰² It is submitted that the closest that one can think of another test is an assessment as to whether a merger or proposed merger is likely to substantially prevent or lessen

¹⁹⁸ Section 32(4)(4a).

¹⁹⁹ This application is provided for in terms of section 35 of the Act. Section 35 provides that any person contemplating to enter into any transaction including a merger that might be affected under the Act must seek authorization from the Commission before implementing such a transaction.

²⁰⁰ Section 36 (2) read with (3).

²⁰¹ See sections 32(1) and (4) and 36 (2) and (3).

²⁰² UNCTAD *A Tripartite Report* (2012) (note 75 above) 16.

competition. However, section 32 categorically rules this option out as the substantive test by providing that this inquiry is but only a factor that is considered when determining whether or not a merger is contrary to the public interest together with a consideration of whether a merger is likely to create a monopoly situation.²⁰³ It thus appears that the Act provides a public interest standard as the substantive assessment test. The question then arises as to whether this test is formulated adequately enough to promote effective merger regulation.

The starting point in the above inquiry is naturally what public interest is for purposes of the Act. A merger is deemed to be contrary to public interest if it either (a) ‘has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe’²⁰⁴ or, (b) ‘has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest.’²⁰⁵ These considerations are only an indication of when a merger is regarded as being contrary to public interest and not necessarily a clarification as to what constitutes public interest. Provision is made for a non-exhaustive list of factors as evidenced from the legislature’s use of the phrase ‘shall consider the following factors as may be relevant’ in section 32 (4a) that can be considered ‘to determine whether or not a merger is likely to substantially prevent or lessen competition.’²⁰⁶ However, neither these factors nor any provision is helpful in answering the question what the concept of public interest entails as used in the Act.

The legislature did nothing more that refer to the traditional competition test which is an assessment of the likely effect of the merger on competition, both in what it considers as an indication that a merger is contrary to public interest and a non-exhaustive list to assess such indications. A merger is contrary to public interest in terms of the Act if it either lessens or is likely to lessen the degree of competition in the country or creates or is likely to create a

²⁰³ See section 32(4)(a) and (b) of the Competition Act.

²⁰⁴ Section 32 (4)(a).

²⁰⁵ Section 32 (4)(b).

²⁰⁶ Section 32(4) (4a). See also *Schuman Sasol/Price’s Daelite* 10/CAC/Aug01, 5 and further Kokkoris I and Olivares-Caminal R *Antitrust Amidst Financial Crises* (2010) 58.

monopoly situation.²⁰⁷ As much as the legislature provides for a test that ultimately conforms to established standards of merger regulation, the basic element of the standard, public interest, remains largely undefined.²⁰⁸ Before considering the effects of the undefined public interest concept, it is imperative to highlight some key features of the competition test.

By using the term ‘likely’ the legislature recognises that merger review is largely a predictive process where the effects of any given merger are not conclusive.²⁰⁹ However, to avoid absurdity in the predictive process, the adjudicator is guided by factors that are provided in the statute that makes the exercise a reasonable one.²¹⁰ A merger cannot be condemned as being contrary to public interest simply because it is likely to either lessen the degree of competition or create a monopoly situation in Zimbabwe. It must do this to a material extent as shown by the use of the term ‘substantially.’²¹¹ This position is further strengthened by making reference to ‘competition in Zimbabwe or any substantial part of Zimbabwe.’ Thus to make a reasonable assessment as to whether the merger is likely to have a material effect on the degree of competition on the entire or substantial part of the country involves a correct identification of the relevant product and geographic market.²¹² It is only after correctly identifying the relevant product market that one can ascertain the likely extent to which the degree of competition can be lessened post-merger. Similarly, it is said one can ascertain with any degree of reasonableness the extent to which the merger will affect competition within the country by correctly defining the geographical markets that are likely to be affected post-merger.²¹³

²⁰⁷ Section 32(4)(a) and(b).

²⁰⁸ UNCTAD *A Tripartite Report* (2012) (note 75 above) 184.

²⁰⁹ See also *Schuman Sasol/Price’s Daelite* (note 198 above) 5 and further Kokkoris and Olivares-Caminal (2010) (note 198 above) 58.

²¹⁰ See *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal* [2003] 1 CPLR 25 (CAC) 33 c (the prediction must not be unsubstantiated speculation).

²¹¹ See notes 46,47 and 48 above.

²¹² See Lewis (1992)(note 2 above) 4 (the definition of relevant market is significant as a prior step in conducting the competition analysis).

²¹³ *Ibid.*

However, even though the legislature provided for a platform upon which these factors can be considered, it is submitted the test's main handicap is the use of an undefined public interest concept. The public interest concept in the ordinary sense refers to the unorthodox competition considerations that go beyond the traditional pure economic consideration.²¹⁴ In other words, non-competition factors that underpins in most cases, a broader social, economic and political policy framework.²¹⁵ However, by not defining the public interest concept and using it to refer to the traditional competition concerns, it is submitted that the legislature struck a dagger into the very heart of the test and the effectiveness of the system. The failure to distinguish the public interest concept from the traditional competition concern suggests that the legislature viewed the two as the same. The implications thereof will be discussed in later parts of the Chapter especially in reference to the structure of the CTC and how it impacts upon effective merger regulation.

Whereas it is accepted that laws can only be effective if they are designed to suit a particular jurisdiction's specific needs,²¹⁶ it is submitted that it is surely not to be accepted that this gives the national law-maker the 'Freedom of Rome' to come up with clearly unacceptable concepts and definitions that only help in causing confusion. Taking the public interest concept to mean anything pro-competition might not be a wrong idea but it is not a great one either as this leaves the entire system at the mercy of abuse. Public interest is public interest regardless of how it is defined. After all, 'what's in a name?'²¹⁷ as 'definitions do not yield any knowledge about the real world, but they do influence impressions of the word.'²¹⁸

It has been shown above that the Act does not with any conviction, provide a definition for the public interest concept as it is used as the test for merger assessment. What is provided is

²¹⁴ Lewis (2007) (note 172 above) 359-60.

²¹⁵ Ibid.

²¹⁶ See Fox EM 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 *Internal Law Lawyer* 151; Fox EM 'Competition, development and regional integration: in search of a competition law fit for developing countries' (2012) in Derxl et al (eds.,) (2012)(note 35 above) 273-290, 279.

²¹⁷ Shakespeare W *Romeo and Juliet* (1599) 11,ii,1-2.

²¹⁸ Stigler GJ *Memoirs of an Unregulated Economists* (1988) 94.

probably a functional definition which is quite problematic given how the concept has been applied elsewhere²¹⁹ and the endless challenges that are associated with an undefined public interest concept.²²⁰ If it is a functional definition, it may be asked whether it is reflected in the CTC approach to merger assessment. The CTC has provided a clear hint of what amounts to public interest in two ways: (a) putting it at the centre of merger regulation and, (b) use of what it considers as public interest to impose conditions for merger approval. It may be asked whether this can act not only to clarify this concept but to provide an effective substantive assessment test.

(b) The CTC approach and practice

In his presentation at a Conference on Competition Law, Economics and Policy in South Africa hosted by the South African Competition Commission and Competition Tribunal in 2009,²²¹ Kububa, the Zimbabwean CTC director, stated that in examining mergers, the Commission first determines whether or not the merger is likely to substantially prevent or lessen competition in the country or any substantial part thereof by assessing a number of factors provided in the Act.²²² Then, if it appears that the merger is likely to raise competition concerns after examining the relevant factors in the first leg, the Commission will determine whether the otherwise anti-competitive merger is likely to result in any substantial benefits in the form of technological benefits or any other pro-competitive benefits that can outweigh the anti-competitive effects.²²³

²¹⁹ See for instance, section 12A (3) of the South African Competition Act of 1998 which provides for a clearly demarcated public interest concept.

²²⁰ See 3.4.1.2 (b) below.

²²¹ The Competition Commission, Competition Tribunal and the Mandela Institute *The 3rd Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa* (Pretoria, 3-4 September 2009), available at <http://www.compcor.co.za/assets/Uploads/events/10-year-review/parallel-la/>, (accessed 20 September 2010).

²²² Kububa (2009)(note 6 above) 4. See also similar provision in section 12A(1) of the South African Competition Act of 1998.

²²³ *Ibid.* See also section 12A (1)(a)(i) of the South African Competition Act of 1998.

Then lastly, the Commission will have to determine whether the merger can or cannot be justified on public interest grounds.²²⁴

What the CTC director presented was a three-pronged substantive assessment test in the mould of the South African test. However, there are a number of concerns with this. Firstly, as much as the test is a commendable one, it is nowhere stated in the Act as such. This is in sharp contrast to the South African test that is clearly stated as such in the South African Competition Act of 1998²²⁵ and accordingly applied by the competition authorities.²²⁶ It is thus difficult to imagine where the CTC derives the authority to apply a test that is not provided for in the statute. This does not however mean that their actions cannot be justified for that test is not alien to merger control as evidenced from its utility in the South African context. Furthermore, it is a suitable test given that it provides a standard assessment that takes into account both traditional competition concerns in the first leg, efficiency considerations in the second leg, and importantly, public interest considerations that reflects the country's policy thrust, in the last leg. This public interest leg however leads to the second concern relating to the implications of the undefined public interest concept in Zimbabwean merger regulation.

Secondly, whether or not the CTC employs the public interest test as the exclusive assessment criterion becomes academic as the very problems that are associated with the test in the first place are also relevant when the public interest consideration is used as merely a leg of the test.²²⁷ However, because the public interest concept is undefined in the Act, one is left to wonder what exactly the CTC will consider in making this determination in terms of the third leg of their assessment. Do they employ the same approach to that is provided by the Act where public interest is defined as nothing more than the traditional competition concerns? Or do they

²²⁴ Ibid. See also section 12A(1)(a)(ii) and (b) of the South African Competition Act of 1998.

²²⁵ Section 12A (1) of the South African Competition Act of 1998.

²²⁶ *Industrial Development of South Africa Ltd v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital (Pty) Ltd/Anglo-Vaal Mining Ltd* 45/LM/Jan02 and 46/LM/Jun02.

²²⁷ See 3.3.2.2 (a) (i) above.

stick to the better and clearer approach adopted in the South African statute and consider public interest as something besides the traditional competition issues?

If the CTC follows the footsteps of the Act and confines the public interest concept to the traditional competition concerns,²²⁸ then the essence of the test presented by the CTC director is lost. This is because the entire exercise becomes a repetition of only one issue: whether or not a merger is likely to substantially prevent or lessen competition in the whole or a substantial part of the country. It is submitted that the CTC does not intend the test to be interpreted that way and as such there is more to the public interest consideration than what the Act states. What then is considered?

It is submitted that an overview of some of the decisions issued by the CTC will provide an answer as to what factors are considered as public interest.²²⁹ In 2000, the CTC approved a merger involving the acquisition by the Coca-Cola Company of the beverage brands of Cadbury-Schweppes which included the Mazoe and Calypso brands.²³⁰ The merger was approved on conditions that the Coca-Cola Company in addition to acquiring the beverage brands of Cadbury-Schweppes, also acquire Schweppes Zimbabwe, the manufacturers of the brands, as a going concern.²³¹ The acquired brands were to be maintained on the local market and further to be developed for the regional market. The Coca-Cola Company was also to invest into the modernisation of the local Schweppes bottling plant.²³² The CTC's conditions were meant to encourage and facilitate Direct Foreign Investment and help domestic companies to become competitive at the regional market.²³³

²²⁸ See section 34 (4).

²²⁹ Again it must be reiterated and re-emphasised that these decisions are only available in form of Executive Summaries that are unpublished and the writer had to rely on the equally unpublished studies of the CTC or conference presentations to derive some information thereon.

²³⁰ *Coca-Cola Company/ Cadbury-Schweppes merger* (note 124 above).

²³¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165) 37.

²³² *Ibid*, 25.

²³³ *Ibid*.

In the *Portland Holdings/Pretoria Portland Cement merger*²³⁴ the CTC approved the merger involving the acquisition by a South African registered cement manufacturer, Pretoria Portland Cement Company Limited (PPC) of the entire issued share capital of a local cement manufacturer, Portland Holdings Limited (Porthold) in a horizontal merger.²³⁵ The CTC found that although the two parties were both involved in cement manufacturing at the same level of production, the merger was unlikely to create a monopoly situation in that market given the existence of other players.²³⁶ The merger was found to result in public interest benefits such as facilitating direct foreign investment into the country. The CTC then approved ‘the merger on condition that PPC gives a formal undertaking to honour its commitments to maintain Porthold as a going concern and to continue producing cement in Zimbabwe.’²³⁷ The conditions were thus aimed at facilitating direct foreign investment, modernisation of a local concern so that it could continue to produce on the domestic market and at the same maintain the competition in the relevant market.²³⁸

The CTC in the *Total Zimbabwe/Mobil Oil Zimbabwe merger*²³⁹, the *BP Zimbabwe/Castrol Zimbabwe merger*²⁴⁰ and *Rothmans of Pall Mall (Zimbabwe)/ British American Tobacco (Zimbabwe)*²⁴¹ was concerned with facilitating indigenisation and localisation of economic

²³⁴ *Acquisition of Portland Holdings Limited by Portland Cement Company Limited*, CTC/M&As/ Aug01.

²³⁵ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165) 43.

²³⁶ *Ibid*, 44.

²³⁷ *Ibid*.

²³⁸ *Ibid*, 25.

²³⁹ *The Merger of Total Zimbabwe and Mobil Oil Zimbabwe*, CTC/M&As/Sep05); (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above) 67.

²⁴⁰ *Merger of BP Zimbabwe and Castrol Zimbabwe*, CTC/M&As/Jan01;,(CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above) 40.

²⁴¹ *Rothmans of Pall Mall/BAT merger* (note 1224 above); (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above) 31.

activities.²⁴² The CTC thus approved these mergers on condition that the relevant merged entities dispose of their surplus capacity in form of machinery and equipment to local investors.²⁴³ The indigenisation and localisation of economic activities²⁴⁴ is an important consideration in Zimbabwe given that it gives impetus to one of the most topical issues in the country's economic development: the indigenisation debate.²⁴⁵ Regardless of the merits or lack thereof, of this debate, which is beyond the scope of this thesis, its consideration by the CTC only serves to confirm that competition law in general and merger regulation in particular, cannot be taken as existing on an island. In other words, as much as its focus should be on the protection of the competition process,²⁴⁶ this cannot be the exclusive goal of competition policy and law.²⁴⁷ It is accepted that the protection of the competition process is central to competition law but it is submitted that the law cannot deny the contextual realities in any given jurisdiction where it is supposed to operate including the policies that shape economic thinking such as indigenisation. It

²⁴² CTC (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above) 31.

²⁴³ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above) 31.

²⁴⁴ This consideration is similar to that provided under section 12A(3)(c) of the South African Competition Act of 1998 aimed at enhancing the economic participation of historically disadvantaged groups giving effect to the country's broad based black economic empowerment policy. See also the Broad-Based Black Economic Empowerment Act 53 of 2003.

²⁴⁵ The Zimbabwean government's indigenisation and economic empowerment policy started in the 1990s through programmes aimed at creating a vibrant economy that would cater for the wider population through availing economic participation opportunities. In 2004, the 'Revised Policy Framework for Indigenisation of the Economy' was adopted proving the principles for the formulation of the Indigenisation and Economic Empowerment Act [Chapter 14:33] of 2008 which gives the policy legal effect. See further Mupazviriho P 'Unpacking Zimbabwe's Indigenisation Policy, legislation and Way Forward' (2011), presentation by the Permanent Secretary in the Ministry of Youth Development, Indigenisation an174174

²⁴⁶ See *Brown Shoe Co. v U.S.* 370 U.S. 294, 320 (1962) where it was remarked in an *obiter* by Warren CJ that '...taken as a whole the legislative history illuminates congressional concern with the protection of competition not competitors and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.' See also Whish (2009)(note 38 above) 1.

²⁴⁷ Hamner (2001-2002)(note 32 above) 403 (difficult to have an exclusive goal for antitrust due to intertwined national interests); Monti (2007)(note 32 above) 2.

follows that the CTC cannot ignore the Zimbabwean society's economic concerns even if they go beyond the protection of the competition process.²⁴⁸

By taking into account as relevant factors, the need to facilitate indigenous ownership together with the dismantling of market entry barriers so as to facilitate new entrants into concentrated industries and sectors,²⁴⁹ the CTC approach reflects the broader historical context in which merger regulation developed.²⁵⁰ Amongst other things, competition policy which gives rise to the current merger regulation system was mooted after realising that the pre-Act market structure was highly concentrated²⁵¹ with high levels of entry barriers²⁵² that kept indigenous business people out of economic participation.²⁵³ Thus the need to promote black indigenous participation in the economy as promoted through the CTC's merger regulation approach is understandable.

Although the CTC helps to clarify what must be considered in assessing the public interest dimension of merger regulation, there are still a number of shortcomings in the system. Firstly, regardless of the expression by the director that the CTC in practice employs a three-pronged assessment test, such test, as indicated, is not evidenced in the Act. This raises the question as to whether the CTC derives its authority from elsewhere. As a creature of statute, it is expected that

²⁴⁸ See Lewis (2007)(note 172 above) 360 ('the authorities may well understand the pitfalls in balancing competition and public interest, it is equally recognised that a competition statute that simply ignores the impact of its decisions on employment or on securing greater spread of black ownership, would consign itself and the authorities that it creates to the scrap heap.')

²⁴⁹ See *Rothmans of Pall Mall/BAT* (note 124 above); *BP Zimbabwe/Castrol Zimbabwe* (note 240 above) and *Total Zimbabwe/Mobil Oil mergers* (note 239 above).

²⁵⁰ See on history of competition law in general in Zimbabwe, Mhamhare (2012)(note 35 above) 57-58; (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006)(note 165 above)15-19, Kububa (2009) (note 6 above) 1-3; UNCTAD *A Tripartite Report* (2012)(note 75 above) 173-176.

²⁵¹ See Chapter 2 in 2.5.

²⁵² See Chapter 2 in 2.5.2.3.

²⁵³ See Kovacic WE 'Competition Policy, Economic Development, And the Transition to Free Markets In the Third Word: The Case of Zimbabwe' (1992-93) 61 *Antitrust Law Journal* 250-270, 258; Brett EA 'From Corporatism to Liberalisation in Zimbabwe: Economic Policy Regimes and Political Crisis, 1980-1997' (2005) 26(1) *International Political Science Review* 91-106, 98 and 99.

whatever approach that the CTC might adopt must have its roots in the Act. This must not be taken to mean that the current approach is wrong, it is clearly a commendable one. However, the fact that the Act does not provide for a clear test for merger assessment presents a challenge to the merging parties and other interested parties who rely on the Act as their starting point.

Secondly, even though the CTC had shed light on what constitutes ‘public interest,’ this cannot take away the deficiencies in the Act, namely that the concept is not defined. It is submitted that the clarity provided by the CTC is not enough. This is because its decisions are not readily available if they are available at all. There are no guidelines as to what factors the CTC assesses to determine public interest. Although the public interest consideration can be defended as being a mirror of the country’s broader competition policy, this argument does not suffice to justify the fact that the public interest concept is undefined and needs legislative clarity. Surprisingly, the said competition policy which supposedly underlies Zimbabwean merger regulation is not contained in any single available document.²⁵⁴ The effect thereof is that only the CTC has the privilege of determining what qualifies as “public interest” for purposes of merger assessment. It is submitted that this privilege is prone to abuse by the very custodians of the system, should they feel it is in their interest to do so as they alone are privy to what it means. However, if what Lewis described above²⁵⁵ is anything to go by, then there is hope that the volatile concept will not be abused. After all, there has been no reported incident of such an abuse. However, as much as it is hoped that the pleasant situation remains as such, surely things cannot be left to chance. The possibility of abuse exists and it is not guaranteed that the current composition of the authority that respects the system will remain in place. Things can always change hence prevention is better than cure. It is submitted that the real safeguard thus lies in providing a statutory definition of public interest in the mould of the South African statute which approach appears to be applied on a practical level by the CTC in any event and which clearly demarcates the concept as opposed to an elastic concept.

²⁵⁴ UNCTAD ‘Voluntary Peer Review of Competition Law Policy: Zimbabwe-Overview’ (2012) *UNCTAD/DITC/CLP/2012/1*, 3 par.11.

²⁵⁵ See note 248 above.

It has been shown that there is no clarity on what the test for merger assessment is actually is. The Act provides a public interest test that some accepts as the test for merger assessment.²⁵⁶ The CTC insists that the test is the inquiry as to whether the merger is likely to substantially lessen or prevent competition in the country.²⁵⁷ These two divergent views indicate the need for clarity. It is argued that both approaches are relevant in their own respects but that the Act needs to clearly pronounce on the matter. It is also suggested that given the central role played by the public interest concept, there is a need to provide a clear statutory definition of the concept. The *status quo* does not promote an effective merger regulatory framework.

To advance the above thesis, it is necessary to further assess the implications of an undefined public interest concept in merger regulation by discussing the institutions tasked with merger regulation. The next Part will consider in the main, the question as to whether the institutions responsible for merger regulation are suitable to promote an effective merger regulatory system. The ultimate question is whether the current merger regulation provisions are sufficient and whether the CTC approach is adequate.

3.4 The Competition Act and merger regulating institutions

This Part discusses institutional aspects relating to merger regulation in Zimbabwe as provided by the Act. The main focus will be on the structure of the CTC as the principal merger regulator and assesses how the current structure impacts upon the effectiveness of the regulatory system. The independence or lack thereof, of the CTC, will be put under spotlight with a view to assessing whether the CTC can effectively stand the challenges imposed by the elastic public interest concept that is provided for by the Act.

It is submitted that the effectiveness of institutions tasked with merger regulation is a non-negotiable aspect of merger regulation. In other words, it is of paramount importance that merger

²⁵⁶ See UNCTAD *A Tripartite Report* (2012) (note 75 above) 16.

²⁵⁷ Kububa (2009)(note 6 above) 4.

regulators are effective so as to promote whatever intentions the legislator might have had in enacting competition statutes. In the case of Zimbabwe and in particular in the context of this study, the CTC needs to be equipped to deal with whatever challenges the Act's shortcomings as highlighted above might pose to the merger regulatory system, for instance, the lack of clarity and the threat posed by an undefined public interest concept.

In considering the effectiveness of institutions established to regulate competition related aspects of the economy, there are two main assumptions that come to mind. These are (a) an institution that is able to meet its statutory objectives is effective²⁵⁸ and, (b) regulatory institutions in developing countries are generally ineffective as they are plagued by problems of lack of independence from the political establishment, poorly funded, inadequately resourced and generally inexperienced.²⁵⁹ Although these assumptions may be true, this section will not seek to challenge them but rather to consider the extent to which the CTC can be measured against these assumptions.

3.4.1 The CTC: functions, structure, and independence

3.4.1.1 Functions of the CTC

The Long Title to the Act provides that the Act aims to promote and maintain competition in the economy of the country through, *inter alia*, providing for merger regulation and establishing an

²⁵⁸ See Kububa AJ 'Criteria for evaluating the effectiveness of competition authorities' (2007), presentation by the Zimbabwean Competition and Tariff Commission Executive Director at the *Intergovernmental Group of Experts on Competition Law and Policy*, (Geneva 17-19 July 2007).

²⁵⁹ See generally Zogbhi V (2009) 'Strategic Priorities of Competition and Regulatory Agencies in Developing Countries' in Mehta and Evenett (eds.) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* 89-209, 89 and 96. See also OECD 'Challenges and Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition' (2004) Contribution from Fair Trading Commission of Jamaica, Session 11 *OECD Global Forum on Competition* (2004).

enforcement authority in form of the CTC. Although this provision refers to the institution as the Industry and Trade Competition Commission (ITCC), the 2001 amendment introduced the CTC²⁶⁰ which replaced the ITCC and these changes are reflected elsewhere in the statute.²⁶¹ It is however submitted that the Long Title must be amended to clearly reflect the aforementioned changes.

The objective above, as stated in the Long Title, is further given effect by Part II which establishes the CTC,²⁶² constitutes it²⁶³ and provides for its functions.²⁶⁴ Part IV further provides for the powers of the CTC as *inter alia*, to conduct investigations into certain practices specified under the Act,²⁶⁵ prohibit the furtherance of such practices pending the investigations;²⁶⁶ negotiate settlements with concerned parties if deemed necessary²⁶⁷ and make relevant orders.²⁶⁸ However, as will be shown below, these provisions are not in themselves adequate to create an effective merger regulating institution.

The CTC is the supreme merger regulatory institution.²⁶⁹ This means that it enjoys supremacy over sectoral regulators established under various statutes that governs those sectors.²⁷⁰ This is true given that the Act requires even sectoral regulators to apply for authorisation of mergers that fall within their jurisdictions if they have an effect on competition in Zimbabwe.²⁷¹ However, section 3(3) provides that the sectoral regulator ‘shall, unless the enactment establishing it

²⁶⁰ Section 4 of the Competition Amendment Act 29 of 2001.

²⁶¹ See for instance, section 4 of Part II of the Competition Act.

²⁶² Section 4 as amended by section 4 of the Competition Amendment Act 29 of 2001.

²⁶³ Section 6 of the Competition Act

²⁶⁴ Section 5.

²⁶⁵ Section 28.

²⁶⁶ Section 29.

²⁶⁷ Section 30.

²⁶⁸ Section 31.

²⁶⁹ Section 3(3) provides that any sectorial regulator established under any other enactment authorizes a merger; it must make an application for final authorization from the CTC. See also Kububa (2009)(note 6 above) 5.

²⁷⁰ *Ibid.*

²⁷¹ Section 3(3) of the Competition Act.

expressly provides otherwise, apply to the Commission’ as required under the Act.²⁷² This proviso claws back the supremacy of the CTC by allowing other statutes to have provisions that might require sectoral regulators to have final decisions on mergers within their sectors. Furthermore, despite the Act not expressly excluding the conduct of sectoral regulators from its application,²⁷³ it is clear that the legislator intended the CTC to cooperate where necessary with these regulators. Section 5(2) provides that for effective execution of its statutory functions including its regulatory mandate, ‘the Commission shall have power to do or cause to be done,[...]all or any things *under the Act* either solely or jointly with others.’²⁷⁴ Cooperation is essential as it enables the CTC to acquire relevant information as well as ensuring that objectives of other statutes are not sacrificed under the guise of promoting and maintaining competition in the economy. This realisation is real given that other statutes might also not be concerned with the promotion and maintenance of competition within the sectors under their jurisdictions.

Section 5(1)(i) provides in addition to all the stated functions of the CTC that it also has ‘to perform any other functions that may be conferred or imposed on it by this Act or any other enactments.’²⁷⁵ This provision was introduced by the amendment Act of 2001.²⁷⁶ It may be asked what implications it has on the effectiveness of the CTC as the principal merger regulator. It is

²⁷² Section 3(3).

²⁷³ Prior to 2000, the South African Competition Act of 1998 in section 3(1) ousted the Competition statute’s jurisdiction in bank mergers that were governed by the Banks Act 94 of 1996. See *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA). However, section 3(1) (a) and (d) were deleted by section 2(a) of the Competition Second Amendment Act of 2000 and paragraph (d) has since been deleted by section 2(a) of the amending statute. The amending statute added into the 1998 Act section 3(1A)(a) which confers concurrent jurisdiction between the competition authorities and sectoral regulators. See also section 21 (1)(h) which provides that the Competition Commission have to negotiate agreements with any sectoral regulators. Section 82 provides for relations between the completion authority and other agencies. See also *South African Raisings (Pty) Ltd and Another v SAD Holdings Ltd and Another* 2001 (2) SA 877 (SCA) where the South African Supreme Court ruled that the Marketing of Agricultural Products Act 47 of 1996 does not oust the competition authorities’ jurisdiction in matters relating to prohibited practices as regulated under section 44 of the Competition Act of 1998.

²⁷⁴ Section 5 (2) of the Competition Act. Italics added.

²⁷⁵ Section 5(1).

²⁷⁶ Competition Amendment Act 29 of 2001.

submitted that the phrase ‘imposed by any other enactments’ implies that the CTC is not only expected to perform its competition enforcement mandate but also any other mandate that might be imposed by other statutes, even those that are not concerned with competition or related issues. Even though this construction might be considered as being too negatively speculative, it is submitted that it is a reality for one cannot discount it given the formulation of the provision. The term ‘imposed’ means that the CTC does not necessarily have a say in what tasks to perform even if required to go beyond its mandate as a competition law enforcement authority. Whereas one can point to the inclusive nature of the competition policy that underlies the Act, surely this does not justify such a vague provision. It is submitted that the fact that the CTC is a creature of statute does not mean any other statute can impose upon it. The CTC’s mandate must be limited to the enabling statute and not to ‘any other’ as this potentially duplicates roles with other institutions as well as hampers the effectiveness of the CTC as a competition enforcement authority and a merger regulator.

The above observation can be illustrated by a similar provision that requires the CTC to perform price monitoring, cost and profits as directed by the Minister.²⁷⁷ This proviso was also inserted into the Act by the Amendment Act of 2001. Although the CTC never actually performed price monitoring functions,²⁷⁸ the fact that it is provided as one of its statutory functions is reason enough to sound alarm bells. There is in fact, nothing that can stop the Minister from triggering the provision. If the Minister feels like doing so, then the CTC will find itself doing more than competition enforcement. It is submitted that one can point to the fact that price monitoring and control is linked to studying costs and profits on a particular market or industry which are, to an extent competition elements. However, these aspects although they might point to an anti-competitive market structure, are not indicative of anti-competitive practices. As such, the price monitoring function remains hugely misplaced.

²⁷⁷ Section 5(1)(h). Again this provision was introduced into the Act by section 5(h) of the Competition Amendment Act 29 of 2001.

²⁷⁸ Kububa (2009) (note 6 above) 19.

The price monitoring function that the legislator imposed upon the CTC is also duplicated in the National Incomes and Prices Commission Act²⁷⁹ which creates a statutory institution to, *inter alia*, monitor prices.²⁸⁰ The fact that the CTC is expected, when directed, to perform similar functions, is a potential source of conflict with the Price Monitoring Commission and raises a number of issues, primarily whether the CTC needs to do the price monitoring functions that can be done by another institution. If the answer is in the affirmative, then it may be further asked whether price control is the appropriate form of market intervention that competition law envisages in order to address the evils of market failures.

The question arises whether the Price Monitoring Commission is not sufficient to perform price controls? Does Zimbabwe need the competition enforcement authority to do the same function? It appears there is nothing to justify two statutory bodies doing a single function. It is thus submitted that this lack of justification is an indication that the Act should not provide price control as one of the CTC's functions. This merely places a burden on the institution that also has to perform tariff regulation functions.²⁸¹

The issue of price control function not only raises the relevance of such a mechanism in the context of competition regulation but also exposes what has been described as the 'smuggling of some interests' that were meant to be replaced by competition law and policy.²⁸² Prior to the economic reforms, price controls were used as a mechanism to control the power of big private businesses that were perceived as a threat to the new government.²⁸³ This was regarded as necessary given the role that those big private businesses played in sustaining the erstwhile

²⁷⁹ National Incomes and Prices Commission Act [Chapter 14:32]

²⁸⁰ The National Incomes and Prices Commission. The Act in its long title expressly provides as its objective the establishment of the National Incomes and Prices Commission as mandated with the 'developing of pricing models for goods and services produced in the country with the view to balancing the viability of the producers and welfare of the people of Zimbabwe.'

²⁸¹ Section 5(1)(g) read with Part IV B of the Act.

²⁸² See Lachman W 'The Development Dimension of Competition Law and Policy' (1999) in *UNCTAD Series on Issues in Competition Law and Policy* (1999) 16.

²⁸³ Kububa (2009)(note 6 above) 1.

colonial regime²⁸⁴ hence the post-independent government's sceptical approach.²⁸⁵ These businesses were largely responsible for perpetrating an anti-competitive market structure through unregulated monopolies.²⁸⁶ Competition law and policy was thus mooted as a potential tool for reforming the market structure. This was through, *inter alia*, targeting the anti-competitive behaviour of big businesses through a host of market based reforms. These reforms were centred on promoting competition that was believed to be able to force businesses to behave competitively in order to attract customers²⁸⁷ without necessarily having their arms being twisted by the government through such mechanisms as price controls. Competition thus became an incentive to behave competitively and competition law became the intervention mechanism for enforcing it.²⁸⁸ However, it is submitted that the resurfacing of price controls can only be explained in two ways. First, that the government is not sure of the ability of competition law to enforce competition and regulate market failures. Secondly, the adoption of competition law as part of market based reforms was a half-hearted effort as the government still has faith in its pre-reform mechanisms.²⁸⁹

Whatever the motive behind resurfacing of price controls, justified or otherwise, it is submitted that such a motive defies economic reasoning premised on market determinates that influences prices and unnecessarily imposes an additional burden upon the CTC. It is common cause that after the price controls were triggered, the situation in Zimbabwe did not improve much as companies responded by withholding their products that they were being 'forced' to sell below

²⁸⁴ See Kububa (2005)(note 6 above) 279.

²⁸⁵ See Herbst J 'The Consequences of Ideology in Zimbabwe' in Baynom S (ed.), *Zimbabwe in Transition* (1992) 54.

²⁸⁶ See Chapter 2 in 2.5.2.3 (c).

²⁸⁷ Wish (2009)(note 38 above) 3 (competition forces business to behave competitively in order to attract customers); Posner (2011)(note 19 above) 359.

²⁸⁸ Lewis (2007)(note 172 above) 350.

²⁸⁹ A convincing argument is given for the reintroduction of price controls as Government's response to control the sinister motives behind a spate of unjustified price increases of basic commodities in the wake of general elections in 2000. These developments were regarded as being motivated by political factors rather than any economic considerations. See Kububa (2005)(note 6 above) 303.

the hyperinflationary cost of production.²⁹⁰ The reality of the situation is that the price control function, whereof the effectiveness is questionable, should not be performed by the CTC as another institution exists namely the National Incomes and Prices Monitoring Commission that is better positioned to perform them.

3.4.1.2 The independence of the CTC

Crucially, the Act provides that ‘subject to this Act, in the lawful exercise of its functions under this Act, the Commission shall not be subject to the direction or control of any other person or authority.’²⁹¹ It also provides that the Commission is a body corporate capable of suing and being sued.²⁹² Whereas there is nothing special about the CTC’s being a body corporate, surely the legislature made a very bold and significant statement in section 5(3). This statement which underpins the independence of the CTC as the regulatory institution is significant for the effectiveness of the entire competition system and merger regulation.²⁹³

It is submitted that an independent regulator can be the missing link between a structurally deficient statute and an effective merger regulatory framework. It ensures that competition concerns are given adequate consideration²⁹⁴ and at the same time is vital for giving the entire regulatory system much needed credibility.²⁹⁵ Thus the legislature’s intention to create an independent competition enforcement institution and merger regulatory authority is applauded. However, it may be asked whether in the CTC the legislature actually created an independent institution.

²⁹⁰ See generally Wines M ‘Zimbabwe’s Price Controls Causes Chaos’ *New York Times*, 3 July 2007.

²⁹¹ Section 5(3) of the Competition Act.

²⁹² Section 4.

²⁹³ See generally on institutional independence, Oliviera G, Machado EL and Novaes ‘Aspects of the Independence of Regulatory Agencies and Competition Advocacy’ in Mehta PS and Evenett SJ (eds.) *Politics Triumphs Economics? Political Economy and Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) 285-326, 285.

²⁹⁴ *Ibid*, 285-326, 285.

²⁹⁵ *Ibid*, 287.

In order to assess whether the legislature created an independent merger regulator that is capable of ensuring an effective merger regulatory framework, it is important that the question as to what constitutes an independent institution is considered. It is commonly assumed, and rightfully so, that a regulatory authority is one that is free of external influence, particularly political in nature.²⁹⁶ However, this is not necessarily a true reflection of the extent to which such an authority is independent. Whereas no competition authority can claim to be absolutely independent of either political or other influences²⁹⁷ an effective regulatory authority must at least 'have a sufficient degree of implementing policies without the interference of political agents or private sector interest.'²⁹⁸ An independent authority must be seen to be both independent and to conduct itself in a manner consistent with such status. Accordingly, an independent authority is one that is capable of applying and enforcing legal rules without being subjected to any external influences²⁹⁹ and without fear of political appraisals.³⁰⁰

In assessing whether or not the Zimbabwean legislature created an independent and effective CTC, two vintage points can be used, (a) the structure of the CTC and (b) the supporting provisions of the Act.³⁰¹

(a) Structure of the CTC

The regulatory authority is split into two arms: the Board of Commissioners (referred in the statute as the Commission) headed by a Chairperson³⁰² and the Competition Directorate headed by a Directorate appointed by the Commission.³⁰³ The statutory functions of the Commission

²⁹⁶ Oliveira, Machado and Novaes (2009) (note 293 above) 291.

²⁹⁷ Mehta PS and Evenett SJ (eds.), *Politics Triumphs Economics? Political Economy and Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) 27.

²⁹⁸ See Zoghbi (2009)(note 247 above) 108.

²⁹⁹ *Ibid.*

³⁰⁰ See Pedersen L and Sorensen E 'Transfer and Transformation in Processes of Europeanization' (2004) (2004) *European Group of Public Administration Annual Conference*, Ljubliana, Slovenia (September 2004) 8.

³⁰¹ By supporting provisions here is meant other provisions that are relevant to merger regulation.

³⁰² Section 6 of the Competition Act.

³⁰³ Section 17 (1).

are provided as *inter alia*, (a) competition advocacy and³⁰⁴ (b) studying and investigating merger trends with a view to preventing them from creating monopoly situations that are contrary to public interest.³⁰⁵ The Directorate is merely portrayed as an administrative arm of the Commission.³⁰⁶

The President appoints members of the Commission from a list selected by the Minister.³⁰⁷ This provision confirms the point that regulatory authorities can never be absolutely independent. It is submitted that if politicians play a role in determining senior appointments, it is also possible that they can exert their influence through those appointees. Another worrisome issue relates to the structure described above. In merger regulation, the Directorate though presented merely as an administrative arm, performs some investigative function as may be delegated by the Commission in terms of sections 17(1) and 14 (1) of the Competition Act.³⁰⁸ This position at least bestows upon the Commission the investigative and adjudicative powers, a situation that contradicts good governance principles in particular, the doctrine of separation of powers.³⁰⁹ However, this position is not reflected in the statute and the Commission can at any time take away the delegated powers.³¹⁰ At present, the statute confers upon the Commission both the investigative and adjudicative functions making it the police, prosecutor and adjudicator.

³⁰⁴ Section 5(1)(a).

³⁰⁵ Section 5(1)(d).

³⁰⁶ Section 17(1).

³⁰⁷ Section 6(1) read with (2).

³⁰⁸ Kububa (2005)(note 6 above) 355. Section 14 (1) empowers the Commission to set up various committees in order to execute its mandate effectively. Section 17(1) provides that the Director can perform any mandate assigned to him by the Commission.

³⁰⁹ The doctrine of separation of powers though not absolute, provides that the State functions are divided into three but distinct organs. These are the executive who formulate policies, and enforces the legal rules; the legislature which makes amends and repeals laws in accordance with the policies formulated by the executive; and the judiciary which interprets and applies the legal rules. The maintenance of these distinctions is not only a good governance practice but also ensures the efficient operation of the State through promoting the independence of the functionaries. See on the doctrine of separation of powers, Montesquieu CL *The Spirit of the Law* (1748) VIII, 2.

³¹⁰ *Ibid.*

Given that the Commission must be constituted by members representing a cross-section of the society, that is various interests,³¹¹ bestowing upon the Commission both investigative and adjudicative powers, even in principle, is not advisable. It is difficult to envisage a Commission that is independent of these vested interests if they are an integral component thereof. As such the Commission's independence might be greatly compromised by its internal composition. It is accordingly suggested that the practical situation where the Directorate conducts investigations and the Commission acts as an adjudicator be reflected in the Act.

(b) The supporting provisions

It has been noted above that the Act does not provide a satisfactory definition of the public interest concept.³¹² This raises the question as to what relevance this has on the role of the CTC as a merger regulator and in particular its independence? The importance of public interest considerations in merger regulation is that they provide the ultimate test for merger assessment.³¹³ However despite this crucial role, the concept remains largely undefined. This *status quo* has been perpetrated mainly by a combination of lack of litigation in merger cases and subsequent lack of judicial clarification.³¹⁴ The undefined concept of public interest makes its application seemingly endless and subjects it to a host of interpretations. Political forces can hide behind public interest claims to frustrate corporate transactions even when they clearly pose no serious threats to competition. The reality of this can be illustrated by the recent developments in South Africa in the much publicised *Wal-Mart/ Massmart* large merger case.³¹⁵

The South African Competition Appeals Court (CAC) dismissed relentless efforts by several Government Ministers to block the proposed merger between, Wal-Mart, the world's largest

³¹¹ Section 6(2) of the Competition Act.

³¹² See 3.3.2.2 above.

³¹³ Section 32(1) of the Competition Act.

³¹⁴ UNCTAD *A Tripartite Report* (2012) (note 75 above) 176; Kububa (2009)(note 6 above) 6.

³¹⁵ *South African Commercial Catering and Allied Workers Union (SACCAWU), The Minister of Economic Development, The Minister of Trade and Industry and The Minister of Agriculture and Fisheries v The Competition Commission, The Competition Tribunal of South Africa, Wal-Mart Stores Inc. and Massmart Holdings Limited* 110/CAC/Jul 11 and 111/CAC/Jul1.

retailer incorporated in the United States of America (USA) and the local Massmart Holdings.³¹⁶ The challenge was premised mainly on what the Government ministers claimed as ‘the protection of public interests.’³¹⁷

On a number of occasions, the South African authorities had successfully and rightfully so, managed to fend off numerous attempts to smuggle into merger regulation, private interests disguised as public interests.³¹⁸ It is submitted that this success can be attributed to two main factors, namely a clearly defined concept of public interest and the structure of the competition authority that guarantees its independence.³¹⁹

The South African Competition Act provides a clearly defined concept of public interest in merger regulation. Section 12(1)(a)(ii) and (b) provides that when assessing whether or not a merger is likely to substantially lessen or prevent competition, the authorities must consider whether it [merger] can or cannot be justified under substantial public interest grounds. Section 12A(3) goes on to lay down a closed list of substantial public interest grounds as the effect of the

³¹⁶ *Wal-Mart/Massmart* (note 315 above). The Ministers are; Minister of Economic Development; Minister of Trade and Industry and Minister of Agriculture and Fisheries brought a combined appeals and review against earlier decisions by the Competition Tribunal to approve the large merger between Wal-Mart and Massmart.

³¹⁷ See for instance *Glaxo Wellcome plc./Smithkline Beecham plc.v The Competition Commission* 58/AM/May01 pars.20 and 26 where the Tribunal in unconditionally approving an intermediate merger between two pharmaceutical firms, though expressed sympathy with the Treatment Action Campaign (TAC), dismissed the TAC’s request to have the merger approved on conditions that the merging firms ‘allow serious competition for all medicines needed for the treatment of opportunistic infections in HIV/AIDS and anti-retroviral for HIV.’ The Tribunal held that there was no legal basis to prohibit the merger or impose any conditions for approval in the absence of a showing that the merger would substantially lessen or prevent competition. See also *Standard Bank Investment Corporation Ltd. v Competition Commission* 2000 (2) SA 797 (SCA).

³¹⁸ *Gold Fields Ltd/Harmony Gold Mining Co. Ltd* 43/CAC/Nov04 (an attempt to wildly interpret the public interest requirement to the effect that merging parties need to show that a merger brings significant public interest benefits even if raises no competition concerns was dismissed).

³¹⁹ Section 12A(3) of the South African Competition Act clearly defines the factors that must be taken into account is assessing the likely public interest implications of a merger. Chapter 4 provides for an independent competition authority comprising of the Competition Commission, the Competition Tribunal and the Competition Appeals Court.

merger on (a) a particular industrial sector or region,³²⁰ (b) employment³²¹ (c) the ability of small-sized business or firms previously owned or controlled by historically disadvantaged groups to compete,³²² and (d) ability of national industries to compete internationally.³²³ The closed list³²⁴ is a tool that the competition authorities can and have used to guard against any attempt to stray from the set perimeters.

In addition to the substantive assessment test, provision is made for parties showing substantial public interests to intervene in merger proceedings.³²⁵ However, this participation is also restricted to the grounds provided in section 12A (3) and mentioned above and to the extent that the merger impacts upon them.

The South African Competition Act establishes a three-tiered competition authority.³²⁶ This authority consists of (a) the Competition Commission as an independent arm tasked primarily with the promotion of competition through, *inter alia*, conducting and making determinations into prohibited practices,³²⁷ (b) the Competition Tribunal as an adjudicative arm with some appellate powers from decisions of the Competition Commission³²⁸ and (c) the Competition Appeals Court as a review and appellate court.³²⁹ This structure promotes internal checks and

³²⁰ Section 12A (3)(a) of the South African Competition Act. See also *Nasionale Pers Ltd/Education Investment Corporation Ltd* 24/lm/May03 par.23 (effects of the merger on the education sector); *PSG Investment Bank Holdings Ltd/Real Africa Durolink Holdings Ltd* 31/LM/May01 (effect on bank exit on the banking sector).

³²¹ Section 12A (3)(b) of the South African Competition Act of 1998.

³²² Section 12A (3)(c) of the South African Competition Act of 1998.

³²³ Section 12A (3)(d) of the South African Competition Act of 1998.

³²⁴ See *Industrial Development of South Africa Ltd v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital* (note 226 above) par 35.

³²⁵ Section 18 of the South African Competition Act. The Minister (defined as of Trade and Industry in s1(1)(xvi)) can participate in merger proceedings on public interests grounds. However see *Wal-Mart/ Massmart* merger (note 315 above) where other ministers participated as well.

³²⁶ Chapter 4 of the South African Competition Act.

³²⁷ Part A of Chapter 4 read with ss19 (1), 20(1)(a), (b) and 21 of the South African Competition Act of 1998.

³²⁸ Section 26 (1) read with ss27 (1)(a) and (c) of the South African Competition Act of 1998.

³²⁹ Section 36 (1) in Part C of Chapter 4 read with ss37 (a) and (b) of the South African Competition Act of 1998.

balances within the system that not only guarantees effectiveness and transparency in merger regulation, but has been effectively employed within the context of public interest to ensure proper application of the concept.³³⁰ The three-tiered competition authority provides a buffer against possible misdirection and misapplication of the public interest concept.

The recent *Wal-Mart/Massmart* merger decision demonstrates the importance of an independent regulatory structure and confirms the significance of the three-tiered regulatory authority. After finding that the merger raised no serious competition concerns since Wal-Mart was not an active participant on the local market, the Commission recommended that the Tribunal conditionally approve the merger in order to address some public interest concerns raised therein.³³¹ The Tribunal approved the merger.³³² However, this decision was challenged by several South African Government Ministers,³³³ a challenge that was subsequently thrown out by the Competition Appeals Court.³³⁴ The CAC's decision to approve the merger under such pressure vindicates the independence of the South African merger regulatory authorities.

In the case of Zimbabwe, the undefined public interest concept makes it difficult for one to imagine how the CTC can manage to withstand similar pressure as that exerted upon its South

³³⁰ In *Shell South Africa (Pty)Ltd/ Tepco Petroleum (Pty)Ltd* 66/LM/Oct01, the Tribunal though concurring with the Competition Commission that the merger involving a firm owned by previously disadvantaged person attracts some serious public interest concerns, found that the merger did not raise any competition concerns (pars. 36 and 39). However, the Tribunal cautioned the Commission's approach in advancing its public interest mandate. It cautioned the effectiveness and usefulness of the conditions that the Commission had proposed (par 49). It further reiterated that although the Commission's role is to both promote and protect competition and specified public interest (par 51), such should not be used to produce results that do not only amount to unacceptable commercial interference but also serve no public interest thereby making a mockery of the entire system. In *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/Apr05 the Competition Appeal Court in overturning the Tribunal's decision in a matter involving alleged anti-competitive behaviour, similarly rejected the Tribunal's approach of introducing policy favouring small sized business enterprises.

³³¹ *Wal-Mart Stores Inc./Massmart Holdings Limited* 73/LM/Nov10 par.22 referring to page 4 of the Commission's report to the Tribunal.

³³² *Wal-Mart/Massmart merger* (note 315 above).

³³³ See note 316 above.

³³⁴ *Wal-Mart/Massmart merger* (note 315 above).

African counterparts in the *Wal-Mart/ Massmart* case. This situation is aggravated by the internal structure of the competition authority. The fact that there has never been cases of such influence³³⁵ can only provide solace but to a limited extent. It is not guaranteed that the *status quo* will remain neither is it guaranteed that the current composition of the CTC will remain. Change is a reality and one can thus not predict with certainty as to whether the relative calm will prevail for ever. As such it is always advisable to be on the safe side. This safe side can only be provided by ensuring that the CTC is not only independent in principle, but is supported by a statute that guarantees its independence. It is only a truly independent CTC that will be able to promote beneficial corporate restructuring transactions without sacrificing the principles aimed at maintaining a competitive market structure. In other words, only through a well-structured and well supported institution can a right balance be achieved.

3.4.1.3 The Administrative Court and the right to appeal

The Act provides for a right to appeal Commission decisions to the Administrative Court.³³⁶ The Administrative Court is a specialised institution established by the Administrative Court Act³³⁷ whose jurisdiction depends on conferment by a specific statute.³³⁸ The Administrative Court acts as a court of appeal for decisions of administrative tribunals such as the Competition Commission.³³⁹

The Competition Act is one of the many statutes that confers appellate jurisdiction upon the Administrative Court.³⁴⁰ The right of appeal against the Competition Commission's decisions is subject to the Administrative Court's rules.³⁴¹ Although provision is made for the Administrative

³³⁵ UNCTAD *Zimbabwe-Overview* (2012)(note 254 above) 3.

³³⁶ Section 40 of Part VI.

³³⁷ Administrative Court Act [*Chapter 7:01*].

³³⁸ Feltoe G, *A Guide to the Administrative and Local Government Law in Zimbabwean* 4th ed (2006) 25.

³³⁹ *Ibid.*

³⁴⁰ Section 40 (1) of the Competition Act of 1996 provides that any party that is aggrieved by a decision of the Competition Commission may appeal to the Administrative Court.

³⁴¹ Section 40(2).

Court to be specially constituted for purposes of hearing competition appeals,³⁴² the Act subjects competition litigants to any shortfalls within the Administrative Court's practices. There is, for instance, no provision regarding urgent competition matters. It is therefore suggested that the right to appeal provided in the Act be revised to include a right to speedy resolution of urgent matters. This provision will be in line with the High Court rules relating to urgent applications where litigants will be required to establish the urgency of their matter in addition to the merits thereof.³⁴³ This requirement is especially needed when dealing with cases involving failing firms where time is of essence.³⁴⁴

It is submitted that the small size of the economy and relatively small number of cases that the Commission handles to a larger extent justifies the prevailing appeal process. In larger economies such as South Africa, this arrangement might be unsuitable given the number of cases that are handled by competition authorities. The need to have an independent institution as the appellate body also justifies the use of the Administrative Court for that purpose. However, there is a need to tailor-make the procedure of the Administrative Court so that it becomes more accommodative to urgent competition cases.

Section 40 provides that 'any person who is aggrieved by a decision of the Commission [...] may appeal against it to the Administrative Court.'³⁴⁵ 'Person' is not defined in the Act hence shall be ascribed its ordinary legal meaning to mean any entity capable of acquiring legal rights and obligations, be it a natural or artificial entity.³⁴⁶ Thus an entity which has the capacity to sue in the Administrative Court is contemplated by the provision. However, the issue relates to the

³⁴² Section 41.

³⁴³ See Rule 244 of the High Court of Zimbabwe Rules of 1977 governing urgent applications governs urgent applications. See generally *Progressive Teachers' Union of Zimbabwe and Others v Zimbabwe Congress of Trade Unions and Others* HC173-11, 3 ('a matter is urgent, if at the time the need to act arises, it cannot wait.')

³⁴⁴ The central concept behind the failing firm doctrine is that in the absence of the merger, the alleged failing firm will exit the relevant market. It follows then that any delays in determining a failing firm claim will compound the already precarious situation of the alleged failing firm with the effect that even if the merger is to be eventually approved (following the delay), the rationale thereof might be defeated for there will be no 'rescue merger.'

³⁴⁵ Section 40(1) of the Competition Act.

³⁴⁶ Section 3(3) of the Interpretation Act [*Chapter 1:01*] defines a person as including a party.

prefixing of that entity with ‘any’ in the context of the provision. Does this confer the right of appeal upon *any* entity regardless of whether they participated in the Commission proceedings or not? Is the right restricted to only those who have participated in the Commission proceedings leading to the decision that became the subject of appeal?

It is submitted that the term ‘any’ as used here implies a wider consideration beyond whatever might be specified. Accordingly, it is submitted that the right of appeal is also conferred upon persons who were non-parties to the initial Commission decision. It is further submitted that such a construction ensures the participation of broader interest in merger proceedings, a situation that carries both merits and demerits. On the positive side, this enables any party who can prove substantial interest in the matter to get involved therein. This can work to protect the competition process through pulling of resources in class actions. However, this is also a leeway that can be exploited by vested interests to get involved in the proceedings solely for the protection of their interests even if such interests have nothing to do with the protection of the competition process. Furthermore, such a vaguely formulated provision can result in endless proceedings as ‘any’ person can simply partake in the proceedings once having proved an interest (the interest being the protection of the competition process as part of the undefined public interest concept).

It is not certain whether the legislature intended the right to appeal to be conferred exclusively upon ‘parties’ who might have participated in the initial decision that became the subject of appeal. If this was the intention, then one would envisage a situation where the provision simply refers to ‘any party’ rather than ‘any person.’

Another problematic area is that the provision makes reference to a right to appeal but not a right to review. Although provision is made for review to the High Court,³⁴⁷ it is not practical to expect parties who require an appeal to go the review way just because provision is made for review by the High Court or the High Court rules provides for general urgent application procedure.³⁴⁸ A review is simply not an appeal.³⁴⁹ There appears no justification to either treat an

³⁴⁷ Section 33 (3) (a) of the Competition Act.

³⁴⁸ See note 343 above.

appeal as a review or denying the right to a review. Strictly speaking, an appeal is not an equivalent of a review for the two denotes different procedural aspects. It is thus submitted the provision should be amended to reflect that is also encompasses reviews.

3.5 Conclusion

This discussion has highlighted a number of the shortcomings within the merger regulatory framework in Zimbabwe. These are either the lack of clarity on fundamental aspects of merger regulation such as the statutory definition of a merger and the standard employed in determining the fate of a merger. The precarious structure of the CTC does nothing to mitigate the situation but rather aggravates it. This has also being highlighted as an area that needs reform to improve the current regulatory framework. The next question is whether this inherently weak system is able to sustain an additional burden posed by a changed business operating environment in which the need to promote and maintain a competitive market structure is pitted against the need to promote beneficial corporate restructuring transactions implemented through ‘rescue mergers.’ In other words, it may be asked whether the system can provide a right balance in promoting beneficial corporate restructuring transactions in a changed environment without sacrificing the principles necessary for promoting and maintaining competition? It is the ability of the system to find the right balance that determines whether or not it is an effective one in the context of this discussion.

Whether or not the Zimbabwean merger regulatory framework is able to balance the promotion of beneficial corporate restructuring transactions implemented through mergers and acquisitions in a crisis environment and the need to promote and maintain competition within the country’s economy is the main focus of this study. Accordingly, the remaining parts of this study will focus on the interpretation and application of the failing firm doctrine in corporate merger regulation as this consideration is the most important single factor in merger regulation during a

³⁴⁹ For the difference between an appeal and review in legal proceedings, see generally *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZRL 469 (S) (proceedings are different) and further Garner B (ED) *Black’s Law Dictionary* (2004) 105 and 864 respectively.

harsh business operating environment. The next Chapter will put this doctrine within the Zimbabwean context in a bid to assess the effectiveness of this aspect of the Zimbabwean merger regulatory system in promoting beneficial corporate transactions implemented through mergers and acquisitions on one hand and the preservation of an effective competitive market structure on the other.

Chapter 4: The interpretation and application of the failing firm doctrine in Zimbabwe

4.1 Introduction

Merger regulation provides the single most important element of the Zimbabwean competition system. This is due to the central role that it plays in the advancement of the system's main goal: the promotion and maintenance of competition within the economy of Zimbabwe.¹ Through effective merger regulation, all other competition concerns that the system aims at addressing, can be dealt with. For instance, by regulating anti-competitive business combinations, the issue of monopolisation can be catered for. Similarly, through effective regulation of anti-competitive effects of business combinations, restrictive business practices are also dealt with.

The importance of an effective system for regulating corporate mergers and acquisitions does not only start and end with the role the former plays in the maintenance and promotion of competition in the country's economy. An effective merger regulatory system also plays a critical role in the country's socio-economic wellbeing in difficult times. These difficult times largely denotes the economic challenges that the country might be facing that in turn affect its economic performance in general and poses a threat to the survival of corporate entities in particular. The combination of these two factors in a harsh socio-economic environment characterised by two features, namely an increase in corporate restructuring transactions aimed at corporate survival, and an increase in corporate attempts to maximise profits through engaging in anti-competitive practices to the detriment of both the competitive market structure as well as consumer welfare.²

¹ Long Title to the Competition Act [*Chapter 14: 28*] (Act No. 7) of 1996 as amended by the Competition Amendment Act 29 of 2001. Reference to the Competition Act or the Act hereinafter shall mean the Act as amended.

² Kububa AJ 'Overview of Competition Policy and Law in Zimbabwe' (2009) *Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa* (Pretoria, 3-4 September 2009) 6 (transactions notified during the Zimbabwean economic crisis period revealed serious competition concerns than in normal times).

Although one might sympathise with the corporate plight to survive in a harsh macro-economic environment, it is clear that some of the survival strategies employed by corporate businesses may pose a serious threat to the overall economic recovery of the country in general and may disadvantage consumers in particular. It follows then that corporate survival transactions implemented commonly through mergers and acquisitions in a difficult business operating environment equally requires vigorous regulatory scrutiny similar to those implemented during normal periods.

Chapter 2 had shown that the general merger regulatory environment prevailing in Zimbabwe is not effective to advance the needs of an effective competition system.³ This Chapter further advances the thesis that there is a need to improve the Zimbabwean merger regulatory framework by employing the regulation of mergers involving firms in financially hard times as a focal point. As such, the interpretation and application of the failing firm doctrine in merger regulation will be used to advance the argument that the current merger regulatory framework is not effective not only in a normal environment, but critically where corporate survival is an important concern in merger regulation. It must be reiterated that the phrase ‘effective merger regulatory system or framework’ is employed here, as elsewhere in the study, to describe the ability of the system to create and sustain a balance between the promotion and maintenance of a competitive market structure and the promotion of beneficial corporate transactions. In a harsh economic environment, this balance is very important as illustrated by the dire business situation in Zimbabwe at the height of the economic meltdown. Financial institutions that normally provided a lifeline for companies were facing challenges as a relative number of them collapsed.⁴ Central Government initiatives aimed at assisting failing firms were either inadequate or non-existing.⁵ Corporate survival transactions consequently gained momentum. However, these transactions are not without a slope side as they are potentially anti-competitive. In fact, the CTC reported that the

³ Some of the shortcomings identified included mainly the lack of clarity on essential aspects of merger regulation such as the definition of a merger, the standard for merger assessment and the undefined public interest concept.

⁴ See Muchehe C ‘Revisiting banks’ collapse’ *The Sunday Mail* July22-28 2012, D4 (banks are ‘being interred at the financial sector cemetery.’)

⁵ For instance, the Distressed Industries and Marginalised Areas Fund (Dimaf) which was launched in October 2011 as a joint venture financial facility between the government and Old Mutual for assisting ailing firm and the Zimbabwe Economic and Trade Review Facility both remains largely on paper with no practical effects.

transactions notified during the economic challenges period revealed more competition concerns than normal.⁶

It is thus important to explore the effectiveness of the current merger regulatory framework in dealing with mergers involving failing firm claims. This consideration of the financial status of merging parties is commonly referred to as the “failing firm” doctrine in merger regulation.⁷ This Chapter poses the question as to whether the current Zimbabwean approach to the failing firm doctrine is adequate and effective to advance the needs of an effective merger regulatory framework. In other words, whether the statutory provisions giving effect to the doctrine as well as the CTC’s approach to the application thereof ensures that the system maintains a balance between the promotion of beneficial corporate transactions implemented through mergers and acquisitions and the protection of the competitive structure of the market.

In order to explore the above and any related issues, Part II of the Chapter will give an overview of the failing firm doctrine. This will be followed in Part III by a presentation and discussion of the provisions giving effect to the failing firm doctrine under the Competition Act. Here it will be demonstrated that these provisions are materially deficient in that they do not provide any guidelines as to how the doctrine is to be applied. Part IV discusses the CTC approach to the doctrine. The question that will be posed is whether the CTC approach cures the deficiencies within the statutory provisions. Part V will summarise the principles adopted by the CTC in applying the doctrine and it will be argued that the CTC approach is still not adequate to cure the statutory deficiencies identified in Part III. The Chapter will conclude by arguing that the current approach to the failing firm doctrine do not support an effective merger regulatory framework hence the need to strengthen it through providing adequate clarity.

4.2 The failing firm doctrine: a general overview

⁶ See Kububa (2009) (note 2 above) 6.

⁷ Kokkoris I ‘Failing Firm Defence in the European Union: A Panacea for Mergers’ (2006) *European Competition Law Review* 494 (failing firm doctrine take into account the financial status (financial distress) of a party to the merger). See notes 9 and 10 below.

The failing firm consideration in merger regulation is a doctrine that is accepted as capable of neutralising a finding that a proposed merger is likely to result in a significant loss to competition.⁸ Essentially, this doctrine which originated from the US Supreme Court's 1930 landmark decision in *International Shoe Co.*⁹ and has been applied in various jurisdictions, albeit in various formulations,¹⁰ considers the financial status of any of the merging parties.¹¹ If it can be established that the target firm's financial situation is dire to such an extent that it would inevitably exit the relevant market, a situation that would result in the deterioration of the competitive market conditions, then (provided that other conditions are met), the merger

⁸ *International Shoe Co. v FTC.* 280 U.S. 291, 302, 50 S.Ct.89, 74 L Ed.431 (1930).

⁹ The failing firm defence was first recognized in 1930 the US in *International Shoe Co.* (note 7 above) as an absolute defence where the US Supreme Court held that a transaction involving the acquisition of a failing firm was not an infringement of section 7 of the Clayton Act of 1914 [15 U.S.C 18] as it does not substantially lessen competition. Although the defence is not expressly provided for in the statutes, it has been given prominence through several case law decisions and in administrative guidelines issued by the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) the two antitrust authorities in the US. See US Department of Justice and Federal Trade Commission 1992 *Horizontal Merger Guidelines* revised in 1997 and most recent in 2010 (*US Revised Merger Guidelines* (2010)). For a discussion on the development of the failing firm defence in the US, see American Bar Association (ABA) *Section of Antitrust Law, Antitrust Law Developments* 6th ed., (2007) 363- 68. See also generally OECD 'Roundtable on the Failing Firm Defence – Contribution by the United States' (*DAF/COMP/WP (2009)99* (06 October 2009)); Kokkoris I 'Failing Firm Defence under the Clayton Act' (2007) *European Competition Law Review* 158 and Kokkoris (2006) (note 7 above) 494 (that the failing firm doctrine in both the US and the EU is not expressly provided for in the merger regulatory statutes but is given impetus in case-law jurisprudence).

¹⁰ See EU variation in Joined cases C-68/94 and C-30/95, *France v Commission* [1998] E.C.R. 1-1375 ; [1998] 4C.M.L.R. 829 par. 121 in an appeal from Case IV/M.308 *Kali und Salz/MdK/Treuhand* [1994] OJ L1866 where the European Court of Justice (CFI) rejected the French Government contention that the inclusion of the market share would have gone to the acquiring concern in a failing firm claim was not part of the original formulation in the US case in *International Shoe Co.* (note 8 above). See *Kali und Salz/MdK/Treuhand* par. 70 for the EU formulation of the failing firm doctrine. In South Africa, section 12A(2)(g) of the Competition Act 89 of 1998 acknowledges the failing firm doctrine as one of the factors to assess the likely effects of a given merger on the competitive structure of the market. See for the South African approach, *Santam Ltd/Emerald Insurance Co.Ltd and Emerald Risk Transfer (Pty) Ltd* 57/LM/Aug09; *Schuman Sasol (SA)/Price's Daelite (Pty) Ltd* 23/LM/May01 par.57; *Iscor Limited/Saldanha Steel (Pty) Ltd* 67/LM/Dec01 par.101; *Phodoclinics and Other/Protector Group Medical Services and Others* 122/LM/Dec05.

¹¹ See section 11 of the US *Horizontal Merger Guidelines*; par 89 of the EC *Horizontal Merger Guidelines*; section 12A(2)(g) of the South African Competition Act and section 32(4a)(h) of the Zimbabwean Competition Act.

is regarded as not being the cause of the deterioration in the market conditions.¹² The rationale behind this doctrinal approach is that the worsening of the market conditions would occur in any event, with or without the merger - thus prohibiting the merger as likely to be anti-competitive becomes a mere academic exercise.¹³ The failing status of the target firm renders it an insignificant market player and more importantly, one that cannot influence competitive behaviour of other market players.¹⁴ Accordingly, its elimination through acquisition by another, even a dominant firm, does not amount to the elimination of an effective market participant.¹⁵

In both the US and the EU, two of the three selected jurisdictions for comparative purposes,¹⁶ an establishment that a merger involves a failing firm constitutes an absolute defence to a finding that the proposed merger is likely to substantially lessen competition in the relevant market.¹⁷ This necessitates a narrow interpretation and strict approach to the doctrine,¹⁸ the

¹² *Kali und Salz* (note 10 above) L186/46 pars.50 and 72; Case IV/M. 1221 *Rewe/ Meini* [1999] OJ L 274/1, par. 63; Case IV/M. 993 *Bertelsmann/Kirch/Premiere* [1999] OJ L 53/1, L53/14 par 69; Case IV/M. 890 *Blokker/ Toys 'r' Us* OJ L326/1 par. 111; *Schuman Sasol* (note 10 above) par.66. See generally on lack of causality principle, Baccaro V 'Failing firm defence and the lack of causality: doctrine and practice in Europe of two closely related concepts' (2004) *European Competition Law Review* 11; Bavasso A and Lindsay A 'Causation in EC Merger Control' (2007) 3(2) *Journal of Competition Law and Economics* 181-202;

¹³ *Kali und Salz* (note 10 above) par. 72; Case IV/M. 744 *Saint Gobain /Wacker-Chemie/NOM* [1997] OJ L247/1, L247/43 par. 43.

¹⁴ *International Shoe Co.* (note 8 above) 302-303; *Brown Shoe Co. v United States* 370 U.S. 294, 319, 346, 81 Ed. 2D 510, 82 S.Ct. 1502 (1962); *United States v General Dynamics Corporation* 415 U.S. 486, 503, 504, 391 Ed 2d, 94 S Ct. 1186 (1974); *United States v Reed Roller Bit Company* 274 F Supp. 573, 584 (1967).

¹⁵ *Santam Ltd/Emerald Insurance* (note 10 above) par. 84; *Tiger Brands Ltd/ Ashton Canning Co. (Pty) Ltd Newco and Langeberg Foods International Ashton Canning Co. (Pty) Ltd* 46/LM/May05 par.84; Case IV /M. 053 *Aerospatiale/Alenia/de Havilland* [1991] OJ L334/42 par. 31.

¹⁶ See Chapters 5 and 6 of Part II of this study.

¹⁷ See section 11 of the *US Horizontal Merger Guidelines* (2010); par. 90 of the *EC Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ [2004] C 31/5. See also cases cited to in notes 10 and 12 above.

¹⁸ See generally, *Aerospatiale/Alenia/de Havilland* (note 15 above) L334/51 par. 31 (failure must be a result of financial difficulties and not an internal investment decision); *Kali und Salz* (note 10 above) par. 71 (doctrine must be considered within the broader context of the lack of causality principle) and par 80 (accepted only if offer is for the purchase of the entire failing firm not part thereof); *Blokker/Toys 'R' Us* (note 12 above) (the merging parties bears a high burden of proving the set criteria); *Saint Gobain/Wacker-Chemie/NOM* (note 13 above) L247/43 par. 43. In the US, the Supreme Court had in several decisions, categorically required that

rationale being that once the doctrine is established, an otherwise anti-competitive merger is allowed. Hence these jurisdictions require the merging parties to cumulatively meet a certain set of criteria.¹⁹ These criteria are products of years of judicial decisions and refinement and they are now contained in administrative guidelines.²⁰ However, the doctrine is largely a judicially created²¹ one as it is not expressed in the major legislative enactments that regulate mergers in the US and the EU.²²

The narrow interpretation and strict approach to the doctrine has earned it a tag of being notoriously difficult to meet.²³ This situation has even been confirmed by the US antitrust authorities.²⁴ In the US it is regarded as the only consideration that provides an exception to a

merging parties seeking refuge under the failing firm doctrine meet the strict requirements set for the said defence. These strict requirements were emphasised in such decisions as *United States v. Third National Bank in Nashville* 390 U.S. 171, 19 1 Ed 2D 1015, 88 S Ct. 882 91998); *Citizen Publishing Co. v United States* 394 U.S. 131, 22 1 Ed 2D 148, 89 S Ct. 927 (1969); *United States v Great Buffalo Press* 402 U.S. 549, 29 2d L Ed 170, 915 S Ct. 1692(1971). See also *Reed Roller Bit Company* (note 14 above) 583. See also Bavasso and Lindsay (2007) (note 12 above) 194 (failing firm doctrine drawn too narrow).

¹⁹ See section 11 of the US *Horizontal Merger Guidelines* (2010) and *International She Co.* (note 8 above) 302-303. In the EU, in Case COMP/M.2876 *NewsCorp/Telepiu* [2004] OJ L110/73 par 220, the Commission noted that since the parties had failed to meet the first two of the three set requirements, it was unnecessary to take the final test. See also Kokkoris (2006)(note 7 above) 494.

²⁰ *International Shoe Co.* (note 8 above) 302-303 refined in *Citizen Publishing Co.* (note 18 above) 136-39 and contained in section 11 of the *US Horizontal Merger Guidelines* (2010). In the EU, *Kali und Salz* (note 10 above) L186/49 par. 70 refined in Case COMP/M. 2314 *BASF/Eurodiol/Pantochim* [2001] OJ L132/45 pars. 140, 142 and 151 and contained in par. 90 of the *EC Horizontal Merger* (2004).

²¹ Kokkoris (2006) (note 7 above) 494

²² *Ibid.*

²³ See note 18 above. See further Lindsay and Bavasso (2007) (note 12 above) 194 and 195 (who noted that the EC Guidelines requires more than a demonstration of lack of causality and expressed the view that there must be no other additional criteria should the lack of a causal link be established); Low RE 'The Failing Company Doctrine: An Illusive Economic Defence under Section 7 of the Clayton Act' (1967) 35 (3) *Fordham Law Review* 425; Valentine DA 'Horizontal Issues: What's Happening and what's on the Horizon?' (1995), available at <http://www.ftc.gov/speeches/other/dvhorizontalissues.shtm>, (accessed 22 March 2012); Webber Wenzel 'The failing firm defence: A bridge too far?' (2001), Available at <http://www.webberwenzel.com/wwb/view/en/page1874?oxl=2974&Sn=Detail&pid=1874>,(accessed 26 October

²⁴ See Valentine (2005)(note 23 above) (the standards of the defense 'are strict . . . [and] rarely all satisfied, and, as a result, the defense is seldom invoked. In fact, the Supreme Court has not upheld its application since its 1930 *International Shoe* decision. '); Scheffman D, Coate M & Silvia L '20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective' (2002) 51, available at

violation of section 7 of the Clayton Act.²⁵ Similarly, in the EU it is considered as an exception to the lack of causality principle in that in the case of a failing firm, the deterioration in the market conditions are not a result of the merger but rather the likely exit of the alleged failing firm.²⁶

Even in a changed business operating environment, that is, in a crisis situation, the general consensus in these jurisdictions is that however favourable the situation might be and conducive the environment for rescue mergers might present itself, this narrow interpretation and strict approach must still be maintained.²⁷ The rationale behind such arguments is that the competition systems in these jurisdictions are adequately designed to meet the demands of a changed business operating environment.²⁸ The flexibility of US and EU merger regulatory framework allows for the maintenance of a higher standard for merger regulation even in crisis periods.²⁹ This is understandable as the flexible framework enables the merger regulatory authorities to consider the changed environment, an approach that the authorities had largely succeeded in applying in the context of failing firms.³⁰ However, the question is

<http://www.justice.gov/atr/hmerger/12881.pdf>, (accessed 12 April 2012) (the FTC has successfully challenged a number of mergers where a failing firm defense was alleged.); Friedman RD , 'Untangling the Failing Company Doctrine' (1986) 64 *Texas Law Review* 1375, 1376('[The failing firm defense] has often been ignored or scorned, and [is] rarely invoked with success in litigation.');

²⁵ Section 7 of the Clayton Act 15 U.S.

²⁶ *Kali und Salz* (note 10 above) par. 72; *Rewe/Meinl* (note 12 above) par. 63; *Blokker/ Toys 'R' Us* (note 12 above) par. 111.

²⁷ See generally Kokkoris I & Olivares-Caminal R *Antitrust Law amidst Financial Crises* (2010).

²⁸ See Jenny F 'Foreword' in Kokkoris and Olivares-Caminal (2010) (note 25 above); Calvino N 'Brussels: Part of the Problem or Part of the Cure?' *EU Competition and Public Law Report, Brussels focus* (2009), available at http://abreuadrogados.com/xms/files/05_Comunicacao/Artigos_na_Impreusa/Iberia_Lawyer_Artigo-MMP_fEB.2009.PDF, (accessed 23 October 2010)(Nadia Calvino is the Deputy Director General of the Directorate General Competition of the EU.)

²⁹ Ibid.

³⁰ See for instance, *General Dynamics Corporation* (note 14 above) 503 where the US Supreme Court accepted evidence of a 'weakened' rather than a typical failing firm as sufficient to negate the effects contemplated in section 7 of the Clayton Act of 1914. In *NewsCorp/Telepiu* (note 19 above) par. 211 where the European Commission cleared the merger despite its failure to meet the rigorous failing firm criteria. The basis for the clearance were that the merger would give rise to benefits that would be lost if it was to be blocked. Similarly, in Case COMP/M.2816 *Ernst& Young France/Andersen France* [2002] the Commission approved the merger despite it not meeting the typical failing firm requirement relating to the alternative purchase. See also Bavasso and Lindsay (note 12 above) 196.

whether in Zimbabwe, where it has been shown that the current regulatory system is not as effective as it should be, there is a need to maintain similarly higher standards even in a changed business operating environment? Actually, it may be asked what standards there are to maintain? Surely one cannot point to the currently weaker regulatory regime prevailing in Zimbabwe but should rather first improve the regime and only thereafter talk of maintaining the *status quo*. The issue is thus how to improve the standards rather than whether to maintain them.

South Africa adopts an approach that is remarkably different from that of the US and EU. The South African approach is underpinned largely by statutory considerations in merger regulation, that is, the provision that the failing firm doctrine is not a defence to an anti-competitive merger³¹ but a mere factor in assessing only but one leg of the substantive assessment test.³² A finding that a merger involves a failing firm does not result in the approval of a merger raising competition concerns.³³ Similarly, a failure to meet the failing firm requirements does not constitute a basis for condemning a merger.³⁴ The merger is still subjected to a further scrutiny to determine whether it can or cannot be justified on public interest grounds.³⁵ This approach is echoed in section 12A(2)(g) of the South African Competition Act which provides that in determining the likely competition effects of a merger, the authorities must assess, *inter alia*, ‘whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.’³⁶ The statute thus merely provides the failing firm doctrine as one of the statutory considerations in assessing the likely competition effects of a merger without providing any further clarification on the doctrine such as the criteria that must be met. This clarification has been provided by the South African competition authorities who have managed to develop a flexible approach to the doctrine especially taking into account the fact that it is not an absolute defence to an

³¹ *Iscor/ Saldanha Steel* (note 10 above) par. 101; *Schuman Sasol/Price’s Daelite* (note 10 above) par. 57.

³² Section 12A (2)(g) of the South African Competition Act of 1998. See also *Iscor Saldanha Steel* (note 10 above) par. 105.

³³ See note 31 above.

³⁴ *Ibid.*

³⁵ Section 12(A) (b) of the South African Competition Act of 1998.

³⁶ Section 12A (2)(g) of the SA Competition Act 89 of 1998.

otherwise anti-competitive merger³⁷ and that it is a distinct consideration that is separate from other known defences such as efficiency and public interest.³⁸

Finding a suitable approach to the regulation of corporate mergers involving firms in financial difficulties is not only an academic and theoretical exercise in the Zimbabwean context but is of practical importance to the system and hence it can be expected that such types of mergers will continue to occur as long as the economy faces challenges. Although the CTC might not have dealt with as many cases involving the failing firm doctrine as one might expect in a crisis environment where rescue mergers are expected to be common, the perennial economic crisis in Zimbabwe is a potential breeding ground for rescue mergers in which the failing firm doctrine is central. The peculiar situation in Zimbabwe is evidenced by the *Nicoz/Diamond* merger³⁹ in which two firms, both in financial distress, sought to merge in order to consolidate their business and survive the harsh operating environment. This is because these “rescue mergers” are a strategic means for corporate survival given the dire state of any other potential sources of corporate rescue such as the financial sector or government assistance.⁴⁰ This situation presents firms with the options to either automatically close down, or continue to operate whilst enduring recurring losses that are largely unsustainable for business viability resulting in the inevitable closing down and consideration of survival strategies in which corporate mergers in the form of “rescue mergers” become the preferred option.⁴¹

³⁷ See note 30 above.

³⁸ *Iscor Saldanha Steel* (note 10 above) pars. 98-99, 110(1). Cf. *NewsCorp/Telepiu* (note 19 above 8) par. 211; *International Shoe Co.* (note 8 above) 302-303; *General Dynamics* (note 14 above) 507; Case T-96/92 *CCE de la Societe Generale des Grandes Sources and Others v Commission* [1995] ECR 11-1213, pars 28 and 29; Case T-12/93 *CCE de Vittel and Others v Commission* [1995] ECR 11-1247 pars 38 and 39.

³⁹ *Merger of National Insurance Company of Zimbabwe (Nicoz) and Diamond Insurance Company Limited* CTC/M&As/May02.

⁴⁰ At the height of the crisis the financial sector was hard hit with several financial institutions collapsing. Although the government initiated some measures to save firms in financial distress in form of Distressed Industries and Marginalised Areas Fund (Dimaf) and the Zimbabwe Economic and Trade Review Facility these measures have been regarded as largely inadequate hence ineffective to meet the demands of firms in need. See note 5 above.

⁴¹ Corporate mergers in form of rescue mergers are generally the preferred tool for implementing corporate restructurings transactions in which one entity seek to offload its unprofitable assets and another will be seeking to expand its business through acquiring already established business and assets. See generally Valentine (1995)(note 23 above); Kokkoris and Olivares-Caminal (2010) (note 27 above) 105.

Although rescue mergers may be motivated by the genuine need of the involved firms to survive, they may result in the material alteration of the competitive structure of the market. Even in the harsh business operating environment, a merger can result in the post-merger creation or strengthening of a dominant position in the relevant market. This dominant position is prone to abuse to the detriment of customers and ultimately consumers through engaging in anti-competitive practices such as price fixing and hiking, output restriction and conditional selling.⁴²

It is accepted that rescue mergers aimed at ensuring corporate survival during crisis periods are essential for saving inevitable job losses in the event of corporate failures and maintaining the supply of goods and services.⁴³ These public interest benefits naturally pull towards approval of a merger whereas potential competition concerns associated with the creation or strengthening of a dominant position that can be abused to the detriment of customers and consumers pull towards the prohibition of the merger. How does one then create a balance between these two positions? It is submitted both the public interest benefits and corporate survival goals can be only achieved by a balanced approach that ensures that the regulation of corporate mergers and acquisitions promotes beneficial corporate transactions implemented through such mergers and acquisitions and at the same time ensures the protection of the competitive process of the market that is essential to the immediate, medium and long term economic growth. This significant balance can only be promoted and maintained through an effective merger regulatory mechanism and in the context of a harsh business operation environment, an adequate approach to the failing firm doctrine. This observation raises the question as to whether the Zimbabwean system is capable of supporting such an approach. These issues will be explored from two positions namely, the statutory position and the CTC approach.

4.3 The Act and the failing firm doctrine

The Act confirms the applicability of the failing firm doctrine. Section 32 provides that

⁴² See generally Whish R *Competition Law* (6ed)(2009) 194.

⁴³ See note 38 above.

- (4a) When determining whether or not a merger is likely to substantially prevent or lessen competition the Commission shall consider any of the following factors as many be relevant-
[...]
(h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.⁴⁴

This provision makes it clear that the failing firm doctrine, where relevant, must be considered in merger regulation. The doctrine is thus regarded as a factor in assessing whether or not a merger is likely to materially impact upon competition within the relevant market. The question as to whether it is an absolute defence to an otherwise anti-competitive merger or is merely a factor in assessing one aspect of a multi-legged substantive assessment test depends on the substantive assessment test provided for in the statute.

Section 31 read with section 32 provides that when determining the appropriate order to be made, the Commission must assess the public interest compatibility of any given merger.⁴⁵ It is submitted that these provisions impliedly set the public interest test as the standard for merger assessment.⁴⁶ However, the CTC director maintained that the CTC applies a three-pronged substantive assessment test in reviewing mergers.⁴⁷ According to him, the first leg of the three-pronged test begs the question as to whether the merger is likely to substantially lessen or prevent competition in the relevant market.⁴⁸ If the merger raises competition concerns, then it is asked whether the merger will result in substantial benefits that can offset these concerns and that cannot be obtained absent the merger.⁴⁹ The last leg is the public interest compatibility test where the question is, regardless of the results of the first two legs, whether the merger can be justified on substantial public interests grounds.⁵⁰

⁴⁴ Section 32(4a).

⁴⁵ Sections 31 and 32 of the Competition Act.

⁴⁶ UNCTAD 'Zimbabwe' in *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* (2012) UNCTAD/DITC/CLP/2012/1, available at http://unctad.org/en/PublicationsLibrary/ditccpl2012d1_Comparative_Report_en.pdf (accessed 21 September 2012) 16.

⁴⁷ Kububa (2009) (note 2 above) 4. See also section 12A of the South African Competition Act of 1998.

⁴⁸ Ibid. See also similar provision in section 12A(1) of the South African Competition Act of 1998.

⁴⁹ Ibid. See also section 12A (1)(a)(i) of the South African Competition Act of 1998

⁵⁰ Ibid. See also section 12A(1)(a)(ii) and (b) of the South African Competition Act of 1998.

There are two positions regarding the standard for merger assessment. The first position is whether or not a merger is compatible with public interest (the public interest test as implied from the Act.) The second is a three-pronged substantive test as stated by the CTC director. It is submitted that the fact that there is more than one position on the standard for merger assessment is a signal that the test for merger assessment in Zimbabwe is not clear. The importance of a clear standard is again emphasised as it enables one to place the doctrine accordingly. If the test is a single public interest test in which the substantial lessening or prevention of competition is a component, then it is submitted that it is possible that the failing firm doctrine can be an absolute defence. It however follows that if the test is a multifaceted one in which the competition leg is just but one of the legs, the failing firm doctrine is not an absolute defence for it constitutes a factor in assessing only one of the legs of the test. However, regardless of what standard is employed, one thing is certain, the failing firm doctrine must be taken into account where relevant in assessing the likely competitive effects of a merger.

Although the Act is not clear on the substantive assessment test for merger approval, the CTC has stressed that the failing firm consideration is only one of the three legs of the test.⁵¹ It follows that a finding that a merger involves a failing firm does not constitute a ground for approving the merger.⁵² The failing firm doctrine then does not constitute an absolute defence to an otherwise anti-competitive merger.⁵³ A multifaceted substantive assessment test entails that even if the failing firm doctrine is established, the merger is still subjected to a further scrutiny.⁵⁴ It is only after clearing all the hurdles that it is approved.⁵⁵ Similarly, if the failing firm doctrine is not established in assessing one of the legs, the merger can still be approved in theory if it meets the requirements of other legs.⁵⁶

⁵¹ Kububa (2009) (note 5 above) 4.

⁵² This position is similar to the one in South Africa. See note 31 above.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ However, in SA where the three pronged test is prominently employed, it is rare if not impossible for a merger that fails to meet the failing firm requirement to be cleared. This is because by failing to meet the doctrine, the merger is deemed inherently anti-competitive and as such an anti-competitive merger can seldom approved on public interest grounds alone. There are no known cases in which a merger was cleared or blocked on public interest grounds alone. See Lewis D 'South African Competition Law: Origins, Content and Impact' (2007) in Dhall V (eds.,) *Competition Law Today: Concepts, Issues, and the Law in Practice* 340-363, 360;

Despite the fact that the applicability of the failing firm doctrine is statutorily confirmed, there is nothing in the statute or elsewhere to clarify the doctrine. In other words, there are no statutory criteria for the application of the doctrine. This situation is aggravated by the absence of either judicial interpretation of the doctrine or administrative guidelines in the mould of either the US *Horizontal Merger Guidelines*⁵⁷ or the EU *Horizontal Merger Guidelines*.⁵⁸ The question that needs to be considered is whether it is necessary to have such clarification and if so, where and what form must the clarification take?

It is submitted that there is a need to provide clarity on the failing firm doctrine in Zimbabwe. The issue is how and where can such clarity be provided? Does it have to be in the Act or in form of administrative guidelines? Having settled on where to house the doctrine so as to provide clarity, the second issue that needs to be considered is what must be contained in the clarification? The issue of where and how the doctrine requires to be clarified will be addressed immediately and the second aspect relating to the contents of the clarification will only be addressed after a comprehensive discussion of the criteria that are employed in comparative jurisdictions. The first aspect presents two possible scenarios, namely (a) providing statutory clarity and (b) providing administrative guidelines.

4.3.1 Statutory clarity

This scenario envisages inserting through, an amendment to the Act, a provision that reads that in considering ‘whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail, *the Commission shall consider the following factors.*’⁵⁹ The factors should then be provided thereunder. It also needs to be established whether the factors must be contained in a non-exhaustive list or in a closed list.

Moodaliyar K ‘Competition policy in the SADC: a South African perspective’(2012) in Drexl J, Bakhom M, Fox EM, Gal MS & Gerber DJ (eds.,) *Competition Policy and Regional Integration in Developing Countries* 66-85, 69.

⁵⁷ Section 11 of the US *Horizontal Merger Guidelines* (2010).

⁵⁸ Par.90 of *EC Horizontal Merger Guidelines* (2004).

⁵⁹ Section 32 (4a)(h) of the Competition Act of 1996 with italics added to denote the suggested proviso.

The introductory part of the provision may provide that in assessing the failing firm doctrine, the Commission may consider where necessary, a given list of factors. However, these factors will have to be contained in a non-exhaustive list. This can be achieved by using such phrases as ‘including the following factors.’ A non-exhaustive list of factors promotes flexibility as the Commission will not be bound to consider specified factors but only the extent to which those factors will be relevant to a given merger.

The second option is providing such factors in a closed list. This approach entails that parties seeking to invoke the failing firm doctrine need to cumulatively meet the prescribed factors. This follows the US and EU approaches⁶⁰ and is typical of a strict and narrow approach to the doctrine. The exact extent to which the cumulative approach is suitable for Zimbabwe can only be made after considering how it has been utilised in other jurisdictions. Suffice to state here that providing a closed list of factors on the one hand potentially promotes a rigid approach to the failing firm doctrine as the Commission will be expected to ensure that merging parties meet all the set criteria. On the other hand however, it is submitted that the merging parties will be faced with a number of difficulties in trying to satisfy all the requirements of the doctrine before they get regulatory approval.

What are the implications of providing statutory clarity? Given that the failing firm doctrine is only one of the many factors that may be taken into account in assessing the likely effects of a given merger on competition, the question is what will become of the other factors? Does the legislature need to provide statutory clarity on such factors as the easy of entry into the market⁶¹ or the removal of an effective competitor?⁶² This sounds a daunting task but the question is whether it is impossible or merely impractical. The issue turns on whether providing statutory clarity on each and every factor compromises the simplicity of the statute and further hampers its clarity and ultimately its effectiveness. As much as the need for a simple statute is commendable, it is submitted that the focus should be on the need to have an effective statute. An effective statute does not necessarily have to be simple. It can be complex and still be effective. It is conceded that if effectiveness can be achieved through a

⁶⁰ See note 19 above.

⁶¹ Section 32 (4a)(b).

⁶² Section 32 (4a)(i).

simple statute, so much the better. However, it is submitted that the current statute in its simplicity, is vague and ineffective.

It is submitted that it is certainly not impossible neither is it impractical to provide statutory clarity for each and every factor envisaged in the standard for merger approval. As stated earlier, a simple statute is preferable only to the extent that it promotes effective merger regulation and advances the objectives of the Act that is, promoting and maintaining competition in the country. As such, if a simple statute cannot advance the objectives of the statute and promote effective merger regulation, then there is a need to reconsider it. The focus of the provisions can still be maintained with further clarity added. It is submitted that this clarity can take the form of a non-exhaustive list of factors evidenced by the use of such terms as ‘not limited to’ and ‘including.’ After all, the process will simply use principles developed and accepted in merger regulation. Additionally, the Zimbabwean statute is merely 34 pages long and as such adding a few provisions in a bid to provide clarity will not do any harm to the statute’s focus but will enhance effectiveness in merger regulation.

The lack of judicial decisions that normally interpret certain statutory provisions is another factor that adds weight to the need for statutory clarity on the failing firm doctrine.⁶³ As things stand, merging parties are left to second guess what the CTC will consider when determining their mergers involving failing firm claims. This is true given that the CTC does not even have visible administrative guidelines on how to apply certain fundamental aspects such as the failing firm doctrine that can be relied upon by merging parties. This aspect will be explored in detail when discussing the CTC’s approach to the failing firm doctrine. The lack of both judicial interpretation and administrative guidelines impacts not only on the jurisprudential development of the doctrine but also on clarity and certainty needed by the merging parties.

It has been shown that providing statutory clarity on the failing firm doctrine in the Act is not an impossible or impractical task. The need for clarity is ably supported primarily by the lack of judicial interpretation on the doctrine. The second scenario that requires investigation is the use of administrative guidelines to provide clarity.

⁶³ See page 229 above.

4.3.2 Administrative guidelines

This scenario envisages the CTC issuing administrative guidelines on how it will approach the failing firm doctrine in practice. This approach has been utilised successfully in many jurisdictions.⁶⁴ However, this does not necessarily mean that the same must be the case in Zimbabwe. This is because whereas the doctrine has been invoked in many cases in such jurisdictions, the same cannot be said of Zimbabwe. The fact that the doctrine has to date not been employed extensively in Zimbabwe might militate against issuing of administrative guidelines. However, there is still a possibility that firms might resort to rescue mergers in future hence requiring that the doctrine be employed more frequently. An effective merger control system is not only preoccupied with the present competitive market structure but the reality that markets are dynamic hence the need to adopt a forward looking approach. It follows that the prevailing business operating environment that might necessitate rescue mergers is enough to motivate an effective merger regulatory system. It may be asked when faced with mergers in which the failing firm doctrine is invoked, how the CTC will react and what and whose standards does it apply?

The question as to whether or not to issue administrative guidelines can however not only be confined to the necessity of such an approach but extends to the issue of the approach's desirability. In other words, the issue of flexibility versus legal certainty. That is, issuing administrative guidelines potentially results in two inherently conflicting positions namely, the potential to adopt a rigid approach in a bid to promote legal certainty on the one hand and the need to promote flexibility and the likelihood of legal certainty on the other hand.

Firstly, through issuing administrative guidelines, merging parties are afforded legal certainty as they are in a position to know what to expect from the regulatory authorities. This enables the parties to prepare the relevant documentation in order to present their cases to the regulatory authorities. It is accepted that an adequately prepared notification is essential to both the merging parties and the regulators as it enables the latter to quickly deal with the notification and saves the former much needed time.⁶⁵ This is critical in mergers where the

⁶⁴ See note 20 above.

⁶⁵ *Medicross Healthcare Group (Pty) Ltd v Commission* 55/CAC/Sep05 pars.33-34. See also Competition Commission of South Africa *Practitioner's Guide Issue 6; Complete Merger Filing Requirements*, (30 March

failing firm doctrine is invoked given that time is of the essence. A delay in deciding the fate of the merger might result in the alleged failing firm exiting the relevant market as a result of failure. This situation entails that even if the merger is eventually approved, the rationale therefore would have been defeated as there will be nothing left to rescue. It is thus important that the merging parties be provided with as much information as necessary not only for the purposes of mounting a meaningful failing firm claim but also to present a detailed and adequate basis for relying on the doctrine. However, there is a possibility that this legal certainty can be achieved at the expense of flexibility as the authorities can end up sticking rigidly to their guidelines in determining all cases in which failing firm claims are raised.

It is submitted that this risk of a rigid approach is real given the absence of judicial interpretation of the doctrine. Competition authorities are not restricted to their internal administrative guidelines where the judiciary plays an active role in jurisprudential development. This is because the judiciary will provide a useful buffer against any approach that stifles the dynamism of merger regulation as a response to the dynamic business operating environment. Jurisdictions that have successfully utilised guidelines have merely formulated these guidelines from judicial decisions.⁶⁶ It is thus submitted that even if guidelines are to be issued, the question at this point remains as to what will be contained therein? This can only be answered after considering the various approach adopted in comparative jurisdictions.

The second aspect regarding to the issuing of administrative guidelines is to what extent can flexibility be compromised in favour of legal certainty? The importance of legal certainty as discussed above as well as the need for flexibility in a dynamic business operating environment are undoubtedly two significant factors that need attention in formulating administrative guidelines. Given that the need for legal certainty can potentially compromise much needed flexibility, it may be asked how administrative guidelines can be formulated without sacrificing any of these crucial components.

2010) par. 2(c), available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Complete-filing-notice-Mch-2010.pdf>, (accessed 26 March 2012).

⁶⁶ See note 20 above.

The failing division doctrine which is a related but distinct doctrine in merger regulation in Zimbabwe is invoked when merging parties seek to obtain merger clearance on the basis that part of the business of the target firm is alleged to be failing as opposed to the failure of the entire firm. However, the courts have repeatedly failed to apply the failing division doctrine to cases that clearly exhibit a case of a failing division rather than a complete or whole failing firm.⁶⁷ This reluctance can only be attributed to the determination to stick to the established failing firm criteria in merger regulation.⁶⁸

The tendency to sacrifice flexibility for consistency is a reality. Although this may be necessary, it is not necessarily desirable. It is submitted that a flexible approach is most ideal. The latter can be achieved through reliance on judicial decisions to interpret the failing firm doctrine, a situation that is currently non-existent in Zimbabwe given the absence of reported cases. However, given the ability of a consistent approach to promote legal certainty, it is the lesser of the two evils in an environment where judicial interpretations of the failing firm doctrine are non-existent. However, whatever the merits or lack thereof regarding the use of administrative guidelines, the question remains what and whose criteria should constitute the guidelines? In a handful of decisions in which the CTC had considered the failing firm doctrine, one thing can be pointed out: no clear criteria can be deduced therefrom. The CTC approach will be explored below.

⁶⁷ See *Reed Roller Bit Co.* (note 14 above); *United States v Lever Brothers Co.* 216 F.Supp. 887 (1963); *United States v Blue Bell Inc.*, 395 F. Supp. 583, 550 (M.D.Tenn. 1975); *Federal Trade Commission v Great Lakes Chemical Corporation* 528 F.Supp. 84 (1981); *Bertelsmann/Kirch/Premiere* (note 12 above); *Rewe/ Meintl* (note 12 above); *Aerospatiale/ Alenia/de Havilland* (note 15 above); *NewsCorp/Telepiu* (note 19 above). See also Wait AL ‘Surviving the Shipwreck: A Proposal to Revive the Failing Division Defence’ (2003) 45 (1) *Will&Marry Law Review* 429.

⁶⁸ See *Great Lakes Chemical Corp.* (note 67 above) 96 (‘the failing firm defence applies to a failing business [...] whether or not such a failing business was a division of a large corporation which is successful in other areas’); *Reed Roller Bit Co.* (note 12 above) 584 where the court remarked albeit in a footnote, that the failure to satisfy the failing firm criteria entails that there is no need to consider the related failing division defence as the requirements are similar. See Further Wait (2003)(note 67 above) 447. The EU had not fared any better than the US in its treatment of the failing division doctrine. See *Bertelsmann/ Kirch/Première* (note 12 above) L 53/14 par. 71 where the Commission accepted the existence of the failing division doctrine but only laid that the standard for proving it is higher than that of the failing firm defence. This trend continued in *NewsCorp/Telepiu* (note 19 above) par. 211, 212 and *Rewe/Meintl* (note 12 above). See further Bavasso and Lindsay (2007)(note 12 above) 193 who questioned the employment of a different standard and argued that such an approach and the use of the lack of causality principle makes it difficult to meet the failing firm criteria in the EU.

4.4 The CTC approach to the failing firm doctrine: curing the statutory deficiencies?

It has been reiterated that despite the legislature providing for the applicability of the failing firm doctrine in the Act, there is nothing more to clarify what must be taken into account in appraising mergers involving failing firm claims. The Act does not provide any criteria neither are there any administrative guidelines to do so. The question is whether this can be taken to mean that there is a fundamental void in the merger regime. If so, how has this void being treated? And if there is a need to address the situation and by so doing improving the merger regulatory framework?

The point of departure in exploring the above questions is examining how the CTC had dealt with cases involving failing firm claims. It must be appreciated that these cases might not be as many as one would expect in a perennial economic crisis environment where corporate businesses are expected to implement survival oriented restructuring strategies mainly through mergers and acquisitions. However, as alluded to elsewhere in this Chapter,⁶⁹ the purpose of this study is to suggest a model that is able to provide for an effective merger regulatory framework and it is submitted that such a framework entails a system that addresses both the current and future regulatory concerns in the form of promoting benevolent corporate transactions without sacrificing the principles of merger regulation in particular and competition law in general. It follows that the fact that there are few cases on failing firm does not have to provide a disincentive for developing such a model for the business operating environment still motivates rescue mergers. This part will thus examine how the CTC approach to the doctrine had, in any way if at all, managed to address lack of statutory clarity.⁷⁰

⁶⁹ See 4.1.

⁷⁰ It must be pointed out due to the unavailability of properly reported decisions by the CTC; reliance will be placed on the executive summaries of the CTC as available in either the authority's studies or presentations based on its research. However, these sources are not meant to provide the basis for the arguments to be advanced by the writer but merely provide the facts of the transactions.

4.4.1 *Rothmans of Pall Mall (Zimbabwe)/British American Tobacco (Zimbabwe):*⁷¹ the lack of causality in the failing firm doctrine

The decisions followed the proposed acquisition of the entire shares of the British American Tobacco Company (Zimbabwe) (BAT) by Rothmans of Pall Mall (Zimbabwe) Limited (Rothmans).⁷² The application by Rothmans for the authorisation of the proposed transaction⁷³ followed the global merger of the businesses of BAT Plc of the United Kingdom and Rothmans International. The proposed merger in Zimbabwe was to result in the creation of BAT (Zimbabwe) Limited.⁷⁴

The proposed merger involved firms that were the only two cigarette manufacturers in Zimbabwe.⁷⁵ It was therefore inevitable that the transaction would have significantly lessened competition in the tobacco manufacturing market for it would have created a monopoly situation.⁷⁶ BAT and Rothmans were the only two players in the market.⁷⁷ However, the CTC accepted the merging parties' submissions that although the relevant market only had two players, the same market was failing to accommodate them hence the market was in decline.⁷⁸ The prevailing market conditions were not conducive for both firms to co-exist and viably operate.⁷⁹ As a result of this situation, BAT was facing closure and was thus a failing firm.⁸⁰

⁷¹*Merger of Rothmans of Pall Mall (Zimbabwe) and British American Tobacco (Zimbabwe)*, CTC/M&As/Sept99.

⁷² Competition and Tariff Commission of Zimbabwe (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part(1) Mergers and Acquisitions* (2006) 31-32, (unpublished, on file with the writer).

⁷³ Section 35 of the Competition Act of 1996 requires parties to any transaction, including a merger that might be in contravention of the statute, to seek authorisation from the CTC before taking any steps towards the implementation of the transaction.

⁷⁴ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

⁷⁵Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

The CTC accepted that even though the contemplated merger would have resulted in a monopoly situation in a market operated by only two players, such a situation would have ensued in any event for BAT was likely to close and exit the market.⁸¹ The effect of BAT's exit would be that Rothmans would emerge the only player in the tobacco manufacturing industry and hence would enjoy the monopoly in any case whether or not as a result of the merger.⁸² Thus with or without the merger, the market conditions would have deteriorated in any event.⁸³

An important consideration in determining the merger was whether, in addition to the creation of a monopoly situation the merger would have significantly lessened or prevented competition in the relevant market. In determining this question, the prevailing status of competition within the relevant market was a major factor.⁸⁴ It was found that the merging parties had a history of cooperation or collusion in the tobacco manufacturing market.⁸⁵ Accordingly, there was no competition loss post-merger as the merging parties were not effective competitors in the practical sense despite them falling within the same market.⁸⁶ This entailed that the proposed merger could not be taken to have the effects of significantly lessening or preventing effective competition within the relevant market as no effective competition existed between the parties. Two significant conclusions can be made regarding this observation. These relate to the current competition versus future competition on the one hand and the elimination of an effective competitor resulting in the significant reduction in competition on the other hand.

⁸¹ CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

⁸² Ibid.

⁸³ Ibid. This inevitable deterioration was a result of the fact the merging parties were the only two players in the relevant market and the exit of one of them as a result of failure would have seen the remaining firm assuming the dominant monopoly position.

⁸⁴ The prevailing competitive structure of the market is considered in section 32 (4a) (a) of the Competition Act of 1996 '(a) the actual and potential level of import competition in the market'; '(b) the ease of entry into the market including tariff and regulatory barriers'; '(c) the degree of countervailing power in the market', (f) the dynamic characteristics of the market including growth, innovation and product differentiation', (g) the nature and extent of vertical integration into the market.'

⁸⁵ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

⁸⁶ Ibid.

Firstly, it is significant that when determining the fate of a transaction, that is, whether or not to allow it, a competition authority must take cognisance not only of the current status of competition within the relevant market but also of the possibility of future competition. Markets are dynamic hence firms' competitive behaviour change. It follows that the assessment must not only be based on the past and current competitive behaviour of the merging parties but also on their likely future behaviour.⁸⁷ The fact that BAT and Rothmans had a history of cooperation and collusion, though relevant, should not have been the exclusive factor in assessing the merger. Even though the market was declining, it is submitted that future competition cannot be sacrificed in the absence of evidence suggesting that the circumstances were permanent. It was thus important for the CTC to have cautiously considered the failing firm arguments so as to avoid sacrificing the potential of future effective competition especially where the possibility of new entrants existed.

Secondly, where it is established that a party to a proposed merger is facing closure as a result of its weakening status on the market, for all purposes such a party ceases to be an effective competitor.⁸⁸ An effective competitor is one that is able to influence the competitive behaviour on the market, that is, capable of influencing product pricing as well as production and supply patterns.⁸⁹ It follows that a failing firm status renders it an ineffective competitor hence its elimination through a merger cannot be construed as an elimination of an effective competitor. A merger is deemed to have the likely effect of significantly impeding competition if as a result thereof, an effective competitor is removed from the relevant market. The fact that BAT was facing closure signified that it had lost its status of being an effective competitor hence its merger with Rothmans although it literally lessened the number of market participants, did not practically lessen effective competition. It is effective competition as opposed to mere competition as denoted by the number of competitors that is

⁸⁷ This factor is captured in section 32 (4)(4a) of the Act which requires the CTC to assess 'the level, trends of concentration and history of collusion in the market' in determining the likely effect of the merger on the competition. By assessing the trends and history of anti-competitive behaviour within the relevant market, a projection can be made of the future competitive behaviour of the merging firms especially if such firms have such a history.

⁸⁸ See note 15 above.

⁸⁹ See *Tiger Brands Ltd/Ashton Canning Co.* (note 15 above) par 80.

relevant.⁹⁰ Thus the fact that BAT was no longer an effective competitor coupled by the absence of effective competitors amongst the parties meant that prohibiting the merger would only have been an academic exercise.

The CTC also considered that the merger would have resulted in a number of significant public interest benefits.⁹¹ These benefits would not have been possible without the merger and in the event of BAT's inevitable failure. The benefits were *inter alia*, that the merger would help to prevent BAT's established cigarettes brands exiting the market to the detriment of its customers.⁹² It was also found that the market was not one characterised by any significant entry barriers hence even though the contemplated merger would have created a monopoly situation, the potential anti-competitive effects of such a situation could be neutralised by the likelihood of new entrants onto the market.⁹³

4.4.1.2 The significance of *BAT/Rothmans* merger on the development of the failing firm doctrine in Zimbabwe

Although it is difficult to conclusively state that the *BAT/Rothmans* merger was decided exclusively on the basis of the failing firm doctrine, the significance of the doctrine in influencing the CTC's decisions cannot be underestimated. The CTC applied the lack of causality principle⁹⁴ to justify the merger despite its potential to create a monopoly situation on a market were only the two merging parties operated. This principle is a realistic acceptance of the fact that even though a merger can result in a potentially anti-competitive situation such as the creation of a monopoly situation, the fact that one of the parties to the

⁹⁰ See generally Gal MS *Competition Policy for Small Market Economies* (2002) and Bishop S and Walker M *The economics of EC competition law: concepts, applications and measurement* 3rd Revised edition, (2010) in Chapter 2.

⁹¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

⁹² *Ibid.* See also *International Shoe Co.* (note 8 above) 302-303; *NewsCorp/Telepiu* (note 19 above) par. 211.

⁹³ Evidently, in 2000 after the merger was implemented and in line with the conditions imposed by the CTC, a new player on the production and manufacturing of both rag and cigarette tobacco, Cut Rag Processors (Pvt)Ltd was established. The CTC had approved the merger on conditions that, *inter alia*, the merged entity dispose of its excess cigarette making equipment to a third party at a fair and realistic price. See (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

⁹⁴ See notes 12 and 13 above. See also Kokkoris (2006)(note 7 above) 498.

merger is failing and facing exit from the relevant market means that the potential anti-competitive effects resulting from the post-merger situation could still have prevailed even in the absence of the merger.⁹⁵ Prohibiting the merger becomes a mere academic exercise for the merger cannot be deemed to be the cause of such a situation.⁹⁶

Besides the above contribution, there is nothing else in the decision to establish any sort of criteria that the CTC employed for the failing firm doctrine. This raises the question as to whether there is a need for any additional criteria besides the EU formulated lack of causality requirement.⁹⁷ In other words, is a showing that the merger is not the cause of the deterioration in the market conditions sufficient to establish a failing firm claim? *BAT/Rothmans* seem to answer the above question in the affirmative. However, it may be asked how the lack of causality test can be applied where no further clarity is given. Even in the EU where the test is central to assessing failing firm claims, the doctrine is still supported by a number of other criteria.⁹⁸

The CTC accepted that even though the contemplated merger would have the effect of creating a monopoly situation on the relevant market, such a situation was inevitable given that one of the only two players in the market was facing closure. The conditions on the markets as necessitated by the decline in the industry were no longer conducive to accommodate two big players. This creates two likely scenarios. The first being the merger and creation of a post-merger entity that results in a monopoly situation. The second being the closure of BAT and its inevitable exit from the relevant market. The first scenario clearly demonstrates deterioration in the competitive market structure given the potentially anti-competitive nature of a monopoly situation. The second scenario also denotes an equally deteriorating competitive market structure for the exit of a market participant creates a void

⁹⁵ See note 13 above.

⁹⁶ *Kali und Salz* (note 10 above) par. 71.

⁹⁷ See *Kali und Salz* (note 10 above) L186/46 pars.50 and 72; *Rewe/ Meinel* (note 12 above) L 274/1.par. 63; *Bertelsmann/Kirch/Premiere* (note 12 above) L 53/1, L53/14 par 69; *Blokker/ Toys 'r' Us* (note 12 above) L326/1 par. 111. See further Baccaro (2004)(note 12 above) and Bavasso and Lindsay (2007) (note 12 above).

⁹⁸Article 2 (2) of the *European Council Regulation 139/2004 on the control of concentrations between undertakings*, OJ [2004] 124/1 ('the ECMR.'),available at www.ec.europa.eu/comm/competition/mergers/legislation.html,(accessed 17 August 2012) and *Kali und Salz* (note 10 above) par. 71.see generally cases cited in notes 12 and 13 above.

that is then filled by the only other remaining firm, Rothmans. It follows that with or without the merger, the competitive structure of the market would have deteriorated. However, the decision makes reference to the declining industry.⁹⁹ This becomes more of a “failing industry” argument as opposed to a failing firm.

A “failing industry” is where the industrial conditions supporting the market in question are no longer conducive for a firm to viably operate thereby diminishing its competitive effectiveness.¹⁰⁰ It provides conditions for firm failure¹⁰¹ hence it is generally accepted as a relevant factor in assessing failing firm claims. This is particularly true given that less weight is given to claims in which firm failure is self-inflicted¹⁰² as compared to external factors such as a harsh macro-economic environment. It is thus submitted that even though the CTC blurred the failing firm doctrine and the failing industry concept, such an approach cannot be said to have had a material effect on the decision for the failing industry concept is only a significant factor in the assessment of a failing firm claim.

However, due to the scant analysis by the CTC available to the writer, it is difficult to establish beyond the lack of causality principle whether any other factors were considered in assessing the failing firm arguments. It suffices to say that the lack of causality requirement provided the basis upon which the CTC considered the failing firm claims in the *BAT/Rothmans* merger.

4.4.2 *Aykroyd Insurance Brokers/Hunt Adams and Associates*¹⁰³

This merger involved the application by the Commissioner of Insurance¹⁰⁴ to the CTC for consideration of a merger involving two firms in the short term insurance industry, Aykroyd

⁹⁹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 32.

¹⁰⁰ Kokkoris (2006)(note 7 above) 494.

¹⁰¹ Ibid.

¹⁰² See *Aerospatiale /Alenia/ de Havilland* (note 15 above) L334/51 par. 31; *Schuman Sasol/ Price's Daelite* (note 10 above) par. 62.

¹⁰³ *Merger of Aykroyd Insurance Brokers and Hunt Adams & Associates*, CTC/M&A/Jun01.

¹⁰⁴ The Commissioner of Insurance is the authority responsible for, inter alia, the regulation of mergers and acquisitions within the insurance sector and is established by the Insurance Act [Chapter 24:07]. However,

Insurance Brokers (Aykroyd) and Hunt Adams and Associates (Hunt Adams).¹⁰⁵ The Commissioner of Insurance sought the CTC's consideration because it, (The Commissioner of Insurance) regulates the merging parties and the CTC is the primary regulator of general mergers.¹⁰⁶

The transaction in question involved the acquisition by Hunt Adams of Aykroyd's book of clients.¹⁰⁷ It also included assets acquisition and was subject to the acquiring firm offering all of the target firm's employees employment.¹⁰⁸ Pursuant to the agreement, Aykroyd was to cease operations and its corporate identity was to terminate.¹⁰⁹ Thus the transaction constituted a legal merger within the ordinary sense in which the target firm is absorbed into the acquiring firm and the merged entity assumes a new identity.¹¹⁰

The CTC accepted, *inter alia*, submissions that the merger was necessary to avert the inevitable disappearance from the short term insurance market of Aykroyd which was wholly owned by a Mr Aykroyd.¹¹¹ Mr Aykroyd's health was deteriorating rendering him incapable of effectively running the business.¹¹² The only options available to Mr Aykroyd were to either close down the firm or sell it to a third party.¹¹³ The latter option was thus taken up hence the merger in question.

these regulatory responsibilities are exercised subject to the authority of the CTC who in terms of section 3(3) of the Competition Act of 1996, still have the final say in authorisation of mergers and acquisitions.

¹⁰⁵ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 80.

¹⁰⁶ Section 3(3) of the Competition Act of 1996.

¹⁰⁷ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 80.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ See UNCTAD 'Model Law on Competition' (2000) *UNCTAD Series on Issues in Competition Law and Policy: Substantive Possible Elements for a competition law, commentaries and alternative approaches in existing legislations* 29.

¹¹¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 80.

¹¹² *Ibid.*

¹¹³ *Ibid.*

In approving the merger, the CTC noted that although the transaction constituted a horizontal merger in that both Hunt Adams and Aykroyd were in short term insurance market, which would have reduced the number of competitors in that market, it raised no serious competition concerns.¹¹⁴ This was because of the small size of the merging parties whose combined market share was insignificant to materially affect competition.¹¹⁵ The potential removal of a market participant was further nullified by the market's low concentration due to the presence of many players on that market.¹¹⁶ Of significance was the fact that Hunt Adams had undertaken to absorb all of Aykroyd's employees hence no job losses were to be experienced as a direct result of the merger.¹¹⁷ In fact the merger was to save a failing firm as well as save an important public interest objective of averting job losses.¹¹⁸ The merger was thus unconditionally approved.

Although the decision did not explicitly turn on the failing firm doctrine, the merging parties had proffered as reasons for the merger the possibility of business closure of the target firm absent the merger.¹¹⁹ This was accepted by the CTC in conjunction with other considerations particularly the post-merger economic benefits,¹²⁰ the non-competitive concerns as well as the many public interest benefits that flowed from the merger. The failing firm doctrine was thus considered primarily within the public interest domain. However, two critical issues raised by this merger are: (a) whether the inability of a business owner to run his business renders a business a failing firm and, (b) whether the failing firm and the public interest consideration are one and the same.

The lack of a detailed analysis of the merger makes it difficult to ascertain how the CTC tackled the first issue. In other words, it is difficult to determine from this matter what constituted a failing firm for purposes of merger regulation. Is it the difficult financial

¹¹⁴ CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 80.

¹¹⁵ Ibid. The market shares of the individual firms were 1% apiece and combined to 2%.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ It was found that the post-merger entity would result in the reduction of the production costs thereby enhancing economies of scale. Economies of scale occurs where it is cheaper to produce two products together rather than to produce them separately. See Whish (2009) (note 42 above) 10.

operating position or any circumstances that might render continuation of a business difficult? The facts *in casu* evidenced a business whose survival depended on the personal health of the owner. As such Mr Aykroyd's ill health played a part in the envisaged discontinuation of his firm. This aspect might be related to the financial situation of the firm for if it was a solely owned entity, the failing health of the sole proprietor affects the continuation of the said entity. If this construction is accepted, it follows that the CTC adopted a broader approach to the failing firm doctrine by not only restricting business failure to financial difficulties¹²¹ but that it extends to other factors that might impact on business continuation. This wide interpretation denotes a flexible approach to the failing firm doctrine.

The second issue relates to the relationship between the failing firm doctrine and the public interest concept, in particular the exact extent to which the two are interrelated and the implications thereof. The implications of treating the failing firm within the public interest realm will be discussed in detail below.¹²² It suffices to state here that the CTC approached the failing firm doctrine within the public interest context.

4.4.3 *National Insurance Company of Zimbabwe (Nicoz)/ Diamond Insurance Company Limited (Diamond):*¹²³ failing or ailing?

In May 2002 the CTC received an application for the authorisation of a proposed merger between the National Insurance Company of Zimbabwe Limited (Nicoz) and Diamond

¹²¹ See for instance in the US where section 11 of the *Horizontal Merger Guidelines* (2010) clearly requires that the failing firm must be facing financial difficulties as 'it would be unable to meet its financial obligations in the near future.' See also par. 90 of the *EC Horizontal Merger Guidelines* (2004) requiring a showing that an alleged failing firm must be facing financial difficulties. In the US, a number of methods are employed in determining whether a firm is failing. These were summarised Scheffman, Coate and Silva (2002)(note 24 above) as (i) 'reviewing cash flow forecasts to determine whether financial obligations will be met in short time, (ii) analysing operating statements to render an opinion on what impact exiting a market has on corporation's cash flow and profitability post exit, (iii) evaluating cost allocation methods to assure appropriate costs have been allocated to failing assets, (iv) performing standard financial statement analyses of a firm or division which is anticipating exit, and (v) assessing alternative buyers or other financial opportunities.'

¹²² See 4.4.4 below.

¹²³ *Nicoz/Diamond merger* (note 39 above).

Insurance Company of Zimbabwe Limited (Diamond).¹²⁴ Nicoz was a wholly owned subsidiary of the Zimbabwe Reinsurance Company Limited (Zimre) and operated in the short term insurance business writing all classes of businesses.¹²⁵ Diamond was established following the 1992 Pearl Insurance Company's divestment in Zimbabwe and was also a short term insurance firm which wrote insurance policies in respect of all classes of business as Nicoz did.¹²⁶

During the 2001 financial year, Nicoz wrote business worth one and a half billion Zimbabwean dollars¹²⁷ through its seven networks countrywide consisting of insurance brokers as its primary business source augmented by agents, other insurance companies as well as direct clients.¹²⁸ However, despite this seemingly impressive statistics, the firm had a history of technical losses, being a situation where underwriting expenses exceeds earnings (gross premium income)¹²⁹ as evidenced by *inter alia*, retrenchment costs during the same period and at the time of the notification, it was technically insolvent with a deficit margin of 100 million dollars (old Zimbabwean currency).¹³⁰

Diamond wrote business worth one billion dollars (old Zimbabwean currency) during the 2001 financial year through its branches in the country's three largest cities, Harare, Bulawayo and Mutare as well as through agents scattered across Zimbabwe.¹³¹ However, as the case with Nicoz, the firm had a history of technical losses. At the time of notification,

¹²⁴ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ At the time of writing, the Zimbabwean dollars has since been abandoned and replaced by the United States dollar or the South African Rand as the official currency. Any reference to currency in this chapter will be to the currency as stated in the relevant part.

¹²⁸ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

¹²⁹ See generally Rubin H W *Dictionary of Insurance Terms* 4th ed., (2000).

¹³⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78. During the 2001 financial year, Nicoz's retrenchment costs amounted to Z\$68 million.

¹³¹ *Ibid.*, 78.

Diamond's deficit stood at 60 million dollars (old Zimbabwean currency).¹³² Its liabilities for the same period as evidenced from its balance sheet¹³³ portrayed an entity in a dire financial situation. Diamond was technically insolvent.¹³⁴

Zimre, the notifying party, submitted that the merger involved two failing entities hence sought approval of the merger on the basis of the failing firm doctrine.¹³⁵ This was meant to negate the potential anti-competitive effects of the proposed transaction given that both Nicoz and Diamond operated at the same level of production and was in the same line of business.¹³⁶ The proposed merger was thus a horizontal merger.¹³⁷

In accepting the submission and unconditionally approving the merger,¹³⁸ the CTC primarily considered the then harsh macro-economic environment in which the firms operated. This environment undoubtedly contributed to the technical losses experienced by the merging parties during the relevant periods.¹³⁹ These losses were mainly a result of escalating operating expenses.¹⁴⁰ It was therefore difficult to imagine either of the firms in their individual capacities overturning such deficits given their shrinking capacities that portray entities in difficult financial situations. The merger was thus considered as necessary in order

¹³² (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

¹³³ A balance sheet is an accounting term used to describe a statement of the assets, liabilities and capital of a business in any entity at a particular point in time. See <http://www.businessdictionary.com/definition/balancesheet.html>, (accessed 07 March 2013).

¹³⁴ An entity is deemed to be technically insolvent if its liabilities exceed its assets to such an extent that it will not be able to meet its debt obligations as and when they fall due. See *Venter v Volkskas* 1973 (3) SA 175 (T) 179 (insolvency denotes a situation where the debtor's liabilities, fairly estimated, exceeds his assets, fairly valued).

¹³⁵ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

¹³⁶ *Ibid.*

¹³⁷ See generally Gaughan PA *Mergers, Acquisitions and Corporate Restructuring* (4ed) (2007) 13.

¹³⁸ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 79.

¹³⁹ See notes 129 and 133 above.

¹⁴⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

to ensure survival of two equally ailing entities who, facing a harsh economic operating environment, were struggling to survive as separate viable entities.

Significantly, the CTC noted that the proposed merger was unlikely to substantially prevent or lessen competition in the short term insurance writing business.¹⁴¹ This was probably because neither entity was still a significant player on the said market as their ailing financial situations rendered them insignificant competitors. However, there existed a likelihood that the post-merger entity in Nicoz-Diamond could emerge as a dominant market force.¹⁴² This threat was nullified by the presence of a number of effective competitors on the relevant market.¹⁴³

4.4.3.1 Significance of the *Nicoz/Diamond* decision

The *Nicoz/Diamond* decision significantly provided an insight into the CTC's approach to the failing firm doctrine particularly on the factors that point to a failing firm. *In casu* both entities had a history of technical losses as evidenced from their solvency margins.¹⁴⁴ The CTC accepted evidence of technical insolvency as denoting failure and made no attempt to distinguish between firms experiencing financial losses (technical insolvency) and those who were merely ailing. An entity is deemed to be technically insolvent if its liabilities exceed its assets.¹⁴⁵ An ailing firm is one that is simply experiencing financial difficulties and not necessarily facing imminent closure.¹⁴⁶ A question may be posed as to whether these two situations, that is, technical insolvency and mere ailing, point to a failing firm for purposes of merger regulation.

¹⁴¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Solvency margin describes a firm's financial situation as defined as its net assets less 25 percentage points of its previous year's net premium income.

¹⁴⁵ See note 134 above.

¹⁴⁶ See Kokkoris (2006)(not 7 above) 509.

A technically insolvent firm can still be successfully restructured and return to viability.¹⁴⁷ Successful restructuring is regarded as even capable of producing a competitive entity.¹⁴⁸ It is submitted that an ailing firm can also be restructured and following a successful restructuring exercise, can return to viability. The question is whether the CTC should have considered the possibility that the two ailing firms could have been restructured so as to return to viability as opposed to resorting to the proposed merger? However, it is submitted two factors render this option unattainable. Firstly, relying on a possibility of successful restructuring places the fate of the ailing entity on results that can go either way. A firm can still fail to return to viability even post-restructuring. Secondly, the capacity shrinkage¹⁴⁹ occasioned by a harsh macro-economic environment diminishes the chances of individual revival in the absence of a merger. Given the uncertainties surrounding the ability of other restructuring mechanisms to ensure viability and ultimate survival of the ailing entities, it is submitted that *in casu*, it was clear that the merger was the only realistic way of saving the ailing firms. Furthermore, the proposed merger was not a threat to the competitive structure of the market hence there was no need to apply the failing firm doctrine strictly.

Although the CTC did not draw a distinction between a failing and an ailing firm, there are positives that can be deduced from such an approach. The CTC approach shows that it is not interested in theorising issues of merger regulation. Drawing a demarcation between the two could have been grossly unnecessary in the circumstances given that the proposed transaction primarily raised no competitive threats. A distinction could have only succeeded in an unnecessary strict application of the failing firm doctrine. *Nicoz/Diamond* shows that the CTC is willing to leniently apply the failing firm doctrine. However, this must not be taken to imply that the CTC is prepared to apply a lesser standard in determining mergers involving failing firm claims. The CTC's approach was based on the following reasons:¹⁵⁰

¹⁴⁷ In the US it is required to demonstrate that for purposes of failing firm claims, an alleged failing firm cannot be successfully restructured under the US bankruptcy laws. See section 11 of the US *Horizontal Merger Guidelines* (2010). See *International She Co.* (note 7 above) 302 and 303 (per Stone J dissenting).

¹⁴⁸ See 'Surviving the Slump: A Special Report on business in America' (2009) *The Economist* 30 May 2009.

¹⁴⁹ Due to persistent poor financial showings, the merging firms were no longer able to provide effective insurance services. They were failing to maintain the requisite capacity to meet the market demand.

¹⁵⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 78.

- (a) The prevailing macro-economic environment made it difficult for the two entities to operate as viable individual firms. Furthermore, the entities were in their individual capacities, facing financial challenges that affected their operational capabilities thereby diminishing their survival chances. It follows that in the absence of the proposed merger, the firms could have failed hence the merger was a matter of necessity.
- (b) The merger raised no competition concerns. It was thus unnecessary to concentrate on what the merger could not offer rather than on what might be gained as a result thereof. Adopting a strict approach to the failing firm doctrine in the hope of saving competition where competition was not threatened becomes an unnecessary agenda.

It can be concluded that it is in the interest of both corporate entities and merger regulatory authorities rather to focus on the possible benefits of a proposed merger than to try to apply tough standards to protect competition that is not threatened. This is done through, *inter alia*, avoiding theorising on the failing firm doctrine. This is the approach that the CTC adopted in *Nicoz/Diamond* where the focus was on the possible benefits of the merger.¹⁵¹

4.4.4 *Zimboard Products/PG Bison Mauritius*:¹⁵² failing firm doctrine within the public interest realm

In 2005 PG Industries (Zimbabwe) Limited notified the CTC of its intention to dispose of its subsidiary, *Zimboard Products (Zimboard)* to *PG Bison (Mauritius) Limited (PG)*.¹⁵³ PG Bison was not a participant on the local market and as such the proposed transaction would

¹⁵¹ See (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 80. The benefits of the merger were outlined as the rationalisation of expenses, increased access to technical skills, creation of local capacity in that *Nicoz-Diamond* emerged as the preferred corporate underwriter following the merger due to its enhanced balanced sheet and diluted foreign ownership of Santam (SA) from 13.4% to 8.5%. The merged entity also acquired a controlling interest in *FICO (Uganda)* and *Cavemont Capitol Insurance (Zambia)* in 2006 thereby expanding its business regionally.

¹⁵² *Acquisition of Zimboard Products by PG Bison Mauritius*, CTC/M&A/May05.

¹⁵³ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 55.

not have ordinarily affected the relevant competitive market structure.¹⁵⁴ However, the merger raised competition concerns as a result of PG's relationship with other local firms.¹⁵⁵

PG and Steinhoff Africa Limited of South Africa, a furniture manufacturer and distributor, had entered into a joint venture with a local firm, Tedco Industries Limited (Tedco) to manufacture furniture in Zimbabwe.¹⁵⁶ Zimboard is a supplier of furniture making material such as particleboard.¹⁵⁷ It is the PG/Steinhoff/Tedco joint venture that raised competition concerns. These concerns were primary on the supply of particleboard by Zimboard to the joint venture following the acquisition of the former.¹⁵⁸ The concerns were that the said product could then be supplied exclusively to the joint venture by Zimboard to the detriment of other furniture manufacturers in Zimbabwe.¹⁵⁹ However, in conditionally approving the merger,¹⁶⁰ the CTC noted that

[T]he failure of Zimboard and its exit from the market, would not only result in a substantial reduction and lessening of competition in the market but also would have serious public interest effects on employment and export earnings.¹⁶¹

Although the decision did not shed much light on the exact extent to which the CTC applies the failing firm doctrine in merger review, it drew an important link between the doctrine and both pure competition and public interest considerations. This link relates to the effects of firm failure on competition as well as on public interest.

In terms of competition assessment, it was noted that should a firm be allowed to fail, competition in the relevant market would be substantially reduced and lessened.¹⁶² This is because failure and subsequent exit of a market participant reduces the number of players in

¹⁵⁴ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 55.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid. the CTC approved the merger on condition that the merging parties would commit not to discriminate against local furniture manufacturing firms that were not associated with the PG Bison/Steinhoff Africa joint venture in the supply of particleboard or any material used in furniture manufacturing.

¹⁶¹ Ibid.(CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 55.

¹⁶² Ibid.

the relevant market.¹⁶³ It is also true that the few remaining market participants can engage in anti-competitive practices, particularly collusive practices.¹⁶⁴ Furthermore if the relevant market is characterised by few participants with high entry barriers, then the firms that remains following the failure and exit of the other player might also engage in such practices as price increases given that they will have no motivation to compete.¹⁶⁵ However, these negative competitive effects hinge more on the market status of the alleged failing firm prior to the anticipated exit. Competition is deemed to have been substantially lessened only if the alleged failing firm was an effective market participant prior to experiencing financial difficulties threatening its survival.¹⁶⁶ An effective market participant is one that is able to influence the competitive behaviour on the relevant market, that is, for instance, in a position to influence market powers.¹⁶⁷ It follows that the failure and exit of Zimboard can be said to have had the potential to significantly lessen competition on the relevant market as required by the Act,¹⁶⁸ only if it was an effective market participant. It is clear that Zimboard was a significant market participant as it exclusively supplied particleboard to furniture manufacturers. Accordingly, the failure and subsequent exit of Zimboard deprived the furniture manufacturing market of a significant supplier hence the lessening of competition.

As regards public interest, the failure and exit of Zimboard was viewed as a serious threat to employment as jobs would have been lost as a result thereof.¹⁶⁹ Given that competition policy and law was mooted as a possible solution to socio-economic problems including unemployment,¹⁷⁰ this places the failing firm doctrine within the realm of public interest. Saving a failing firm thus becomes a public interest issue. However, as the case in

¹⁶³ Although the number of participants on a given market is not indicative of the level of competition on such a market (as the said participants can either be acting in anti-competitive manner such as collusion or some of them might simply not have the power to effect any pro-competitive behavior of other firms on the market), it is submitted that it is a prima facie indicator of the likelihood of competition on the market. There are better chances that a market with more participants is pro-competitive that one characterized by few participants.

¹⁶⁴ Ibid.

¹⁶⁵ See Posner RA *Economic Analysis of Law* (8th ed) (2011) 361.

¹⁶⁶ See notes 14 and 15 above.

¹⁶⁷ See note 89 above.

¹⁶⁸ Section 32 (4) of the Competition Act.

¹⁶⁹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 64 above) 55.

¹⁷⁰ Ibid.

BAT/Rothmans merger,¹⁷¹ it is unclear as to whether the merger was determined on the basis of the failing firm doctrine or on public interest grounds. In other words, the distinction between the failing firm doctrine and public interest considerations is blurred. What makes the situation interesting is the fact that although the failing firm consideration is specifically provided for in the Act as a factor that needs to be taken into account in merger review,¹⁷² the public interest concept is largely undefined.¹⁷³ This makes it difficult to ascertain whether the two are separate from each other or whether they are part of the same consideration and as such cannot be distinguished. The CTC's approach *in casu* does not distinguish the two concepts raising the question as to whether this has an effect on the effectiveness of the merger regulatory framework.

Does blurring the distinction between the failing firm doctrine and public interest consideration affect the effectiveness of merger regulation? The European Commission Advocate General, pursuant to the decision in *Kali und Salz*, opined that

The specific nature of the framework within which concentrations must be viewed, which inevitably includes issues of industrial policy, as well as the objectives of strengthening economic and social cohesion[...], may very well justify appropriate account being taken of employment and, in general, social aspects in the appraisal of concentrations.¹⁷⁴

Similarly, the US Supreme Court in *International Shoe Co.* stated that

In light of the case thus disclosed of a corporation with resources so depleted and the prospects of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its stock by a competitor (there being no other prospective purchaser), not with the purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.¹⁷⁵

¹⁷¹ *Rothmans of Pall Mall/BAT merger* (note 71 above).

¹⁷² Section 32 (4a)(h) of the Competition Act of 1996.

¹⁷³ UNCTAD *A Tripartite Report* (2012) (note 46 above) 184.

¹⁷⁴ Opinion of Advocate General Tesouro in *France and Others v Commission* (note 10 above) (delivered on 6 February 1997) 1-1405 par. 56.

¹⁷⁵ *International Shoe Co.* (note 8 above) 302-303 per Sutherland J. see also *General Dynamics* ((note 14 above) 507 (on employment); Kokkoris (2006)(note 7 above) 506 (although allowing mergers can result in job losses, if a merger is not allowed and the firm is allowed to exit, jobs might be lost as a result of plant closure).

However, the South African Competition Tribunal in *Iscor/Saldanha Steel*¹⁷⁶ pointed out that the failing firm doctrine and the public interest consideration were separately and adequately provided for under the South African Competition Act hence there was no need to blur the distinction.¹⁷⁷ The rationale for treating the two concepts separately was given as, firstly, the fact that the two are separately and adequately provided for under the relevant statute¹⁷⁸ and secondly, that blurring the distinction would compromise the visibility of the failing firm doctrine thereby weakening its utility.¹⁷⁹

Given that the Zimbabwean statute does not clearly provide for a separation of the two concepts, it is submitted that the approach adopted in *Zimboard/PG Bison* is not alien for it allows the consideration of a broader policy objective in merger regulation in general and those in which the failing firm doctrine is invoked in particular.¹⁸⁰ Although it is submitted that the South African approach would have been more appropriate, it is only fair to consider that the *Zimboard/PG Bison* approach was developed in line with the statute giving effect to the two concepts. Separating the failing firm doctrine from the public interest consideration would have ensured that parties seeking to rely on either of the concepts could not ‘miss the tree because of the bush.’ In other words, the visibility of the failing firm doctrine would not be compromised by other considerations thereby potentially weakening the utility of the doctrine. However, as stated above, the major problem lies in the largely undefined public interest concept within the Zimbabwean statute. Maybe if the concept was clearly defined then one could argue that the failing firm doctrine and the public interest concept need to be

¹⁷⁶ *Iscor/Saldanha Steel* (note 10 above).

¹⁷⁷ *Ibid*, par. 110(1).

¹⁷⁸ *Ibid*, pars. 98-99. See sections 12A(1)(a)(i) of the South African Competition Act of 1998 (efficiency considerations); 12A(1)(a)(ii) read with subsection (3) (substantial public interest justifications).

¹⁷⁹ It must be pointed out that the South African authorities still valued the significance of saving a genuine failing firm to the best of the greater public interest as was demonstrated in *Tiger Brands Ltd/ Ashton Canning Co.* (note 15 above) pars 71 -79 where it was stated that although the parties did not intend to rely on the failing firm doctrine, the evidence lead in respect to public interest exhibit a failing firm argument. However, the criteria for the failing firm doctrine was not met but the Tribunal still assessed the public interest benefits associated with saving the firm in financial difficulties.

¹⁸⁰ See generally on the consideration of public interests in failing firms, Kokkoris (2006)(note 7 above)494,498, 506; Posner RA and Easterbrook FH *Antitrust: Cases, economic notes and other materials* (2ed) (1981) 472 (the failing firm defence is ‘one of the clearest examples in antitrust law of a desire to subordinate competition to other values’);Correia E ‘The Failing Company Defense’ (1995), available at <http://www.ftc.gov/opp/global/194817.htm> (accessed 21 March 2011).

treated as separate doctrines. However, for practical purposes, it is submitted that it is acceptable to consider the failing firm doctrine within the realm of public interest without unnecessarily compromising the effectiveness of the merger regulatory framework.

Even though the wisdom of treating the failing firm doctrine within the public interest context may be questioned, the real issue remains what the exact contents are of the failing firm consideration that is employed by the CTC. The *Zimboard/PG Bison* decision provides nothing for merging parties seeking to rely on the failing firm doctrine to properly structure their arguments. If the statutory provisions giving effect to the failing firm doctrine can be described as being too general, then it is submitted that the CTC approach can be described as being scant.

4.4.5 *Shashi Private Hospitals/Premier Services Medical Investments (PSMI)*: ¹⁸¹saving an essential service provider

In February 2005, Premier Services Medical Investments (Pvt) Ltd (PSMI), a wholly owned investment arm of the Premier Services Medical Aid Society (PSMAS), notified the CTC on the proposed acquisition of Shashi Private Hospital, a private hospital in Bandura, a town in Mashonaland Central Province of Zimbabwe.¹⁸²

The target entity, Shashi Private Hospital, provided mainly hospital services.¹⁸³ The acquiring concern PSMI provided both hospital services and through its parent company PSMAS, health insurance services.¹⁸⁴ The hospital services market was highly competitive with low concentration levels.¹⁸⁵ The health insurance services market was found to be highly concentrated and lowly competitive.¹⁸⁶ The market structure in the health insurance was mainly a result of the dominance of the parent company of the acquiring firm.¹⁸⁷ The

¹⁸¹ *Acquisition of Shashi Private Hospitals by Premier Services Medical Investments*, CTC/M&A/Feb05.

¹⁸² (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 60-61.

¹⁸³ *Ibid*, 61.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*. HHI of 890 and a CR4 of 45%. See on concentration ratios, Chapter 2 in 2.5.2.1 notes 170 and 171.

¹⁸⁶(CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 64 above) 61. The health insurance market had a concentration level of HHI of 4056.

¹⁸⁷ *Ibid*.

proposed transaction thus constituted a vertical merger between a health care provider, Shashi, and a health insurer, PSMI.¹⁸⁸

However, it is submitted that the fact that the market structure was potentially anti-competitive due to the dominance of the acquiring firm implies that the proposed merger was potentially anti-competitive. The failing firm doctrine was thus invoked in a bid to justify the potentially anti-competitive merger.¹⁸⁹ It was argued that the competitive structure of the market would not have been altered as a result of the proposed merger for with or without the merger the anti-competitive structure would remain.¹⁹⁰ PSMAS would continue to be the dominant entity and the concentration levels would remain high.¹⁹¹ Thus the prohibition of the merger would only serve an academic purpose as the anti-competitive market structure would have persisted in any event.¹⁹²

Crucially, the merger (which saw PSMAS investing in the failing Shashi hospital) was justified on the grounds that saving Shashi through its acquisition by PSMAS would prevent the exit from the market of an essential service provider.¹⁹³ In approving the merger, the CTC required PSMAS to give an undertaking that it would not abuse its dominant position in the health insurance services market.¹⁹⁴ These conditions were meant to ensure that PSMAS would not engage in restrictive practices of an exclusionary and or exploitative nature.¹⁹⁵ These would have taken the form of PSMAS directing its health insurance holders to Shashi

¹⁸⁸ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 61.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² This formulation hinges more on the EU lack of causality principle. However, the lack of causality principle states that a merger is not the cause of the deterioration in the competitive market structure if the said market structure would deteriorate in any case with or without the merger. In other words, the deterioration in the competitive market structure would happen even if the alleged failing firm was to exit the relevant market. See on EU lack of causality principle. See notes 12, 13 and 97 above.

¹⁹³ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 61.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

Private Hospital and preferentially treating the said hospital in processing member's claims.¹⁹⁶

4.4.5.1 Significance of the *PSMI/Shashi* decision

The conditional approval of the vertical merger which is potentially anti-competitive on the basis of the failing firm doctrine confirms that the CTC is not *per se* concerned with the strengthening of a dominant position but rather the likelihood of the abuse of such a position. Although it is not clear whether the failing firm consideration was the primary factor in determining the merger,¹⁹⁷ one thing is clear: the CTC did not distinguish between the failing firm doctrine and public interest considerations.¹⁹⁸ *In casu*, the lack of causality principle played a critical role in the application of the failing firm doctrine.¹⁹⁹ However, the most significant aspect of the decision in as far as the failing firm doctrine is concerned is the link between the doctrine and saving an essential service provider from failure. Again this turns on blurring the relationship between the failing firm doctrine and public interest consideration for saving an essential service provider from failure is in the public interest.

4.4.6 *Innscor Appliances Manufacturing /World Radio Systems Group (WRS)* ²⁰⁰

In 2005 the CTC received a notification from Innscor Appliances Manufacturing (Pvt) Limited (Innscor) in terms of which it intended to acquire the entities within the World Radio Systems Group (WRS) namely World Radio Systems (Pvt) Limited, World Radio Systems

¹⁹⁶ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 61.

¹⁹⁷ Public interest consideration also played a critical role in determining the merger. These public interest benefits included reduced medical care costs and improved provision of medical care. See (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 61.

¹⁹⁸ See on the implications of blurring the distinction between the failing firm doctrine and public interest consideration, 4.4.4 above.

¹⁹⁹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 61 ('the merger would not change the structures of the relevant market'), that is, with or without the merger, and even if Shashi was to fail, the dominant position of PSMAS would continue.

²⁰⁰ *Acquisition by Innscor Appliances Manufacturing of World Radio Systems (WRS) Electronics and Hi-tech Electronic Industries*, CTC/M&A/Jul05.

Electronics (Pvt) Limited and Hi-tech Electronics Industries (Pvt) Limited.²⁰¹ Innscor is one of Zimbabwe's leading manufacturers and distributors of electrical appliances such as refrigerators, deep freezers, washing machines and steel kitchen cabinets.²⁰² The WRS Group specialises in the production of colour television sets, Hi-Fidelity radio systems and television cabinets²⁰³ as well importation of washing machines, refrigerators, air conditioners, telecommunication equipment and computers.²⁰⁴ In addition to manufacturing and distributing of electrical appliances, Innscor owns retail outlets namely TV Sales and Hire and Kunzwana Lobels.²⁰⁵ It is this operation that raised competition concerns.

Innscor manufactured and distributed electrical equipment and operated some retail outlets specialising in the sale of electrical equipment.²⁰⁶ The WRS Group manufactured and distributed similar equipment.²⁰⁷ The proposed transaction would not only have potentially eliminated an effective competitor but also established a vertical relationship between a supplier and a retailer.²⁰⁸ The potential effect of this transaction and relationship is that the retailer would have engaged in restrictive practices of an exclusionary and or exploitative nature, particularly in dealing in products supplied by the said supplier only.²⁰⁹ This situation was found to give WRS an unfair advantage²¹⁰ over other suppliers of electrical products as WRS's products could have easily founded marketing platforms to the detriment of other competing suppliers of similar products.

²⁰¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 64-65.

²⁰² Ibid, 65.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ This concern was raised by Phillips (Pvt) Limited, the largest supplier of television sets to Innscor's TV Sales and Hire. The concern was that the merger would create an entity that was both a producer and a retailer of television sets. See (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 65.

²¹⁰ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 65.

However, despite these concerns, the merger was conditionally approved on the strength of WRS's diminished competitive ability. It was established that WRS had been making losses since 2002, a situation compounded by a rising debt.²¹¹ These factors are relevant to the finding of a failing firm. However, there is no further information to ascertain the exact extent to which WRS's financial situation rendered it a failing firm except that WRS's losses combined with its rising debt left it at the brink of failure.²¹² It follows that without the potentially anti-competitive merger, WRS would have failed and exited the relevant market. This entails that the merger was crucial in saving a failing firm. It is thus submitted that rescuing a failing firm became a paramount consideration in reviewing the merger. The question is whether this consideration addressed the competition concerns raised by the transaction. This was answered by imposing conditions for approving the merger. These conditions were particularly aimed at addressing concerns that the proposed merger would create an entity that could discriminate against other retailers of electrical goods.²¹³

4.4.7 Preventing the exit of a major market player

Another critical issue that the CTC had considered in determining mergers with failing firm claims is whether a party to the merger is a major market player who absent the merger will exit the said market as a result of failure.²¹⁴ This is important in that a proper application of the said principle ensures the maintenance of the competitive structure of the market.

4.5 The CTC approach: curing the statutory deficiencies?

The statutory provisions relating to the failing firm doctrine begs more questions than it provides answers. Besides providing that it has to be considered in merger assessment, is it not clear what exactly needs to be considered in determining failing firm claims. In other words, apart from stating that the failing firm doctrine has to be considered, the statute does nothing more to shed light on what needs to be taken into account in determining the

²¹¹ (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 65.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ *Acquisition of West End Hospital by Premier Service Medical Investments*, CTC/M&A/Jan05. See also *Acquisition of Otis Zimbabwe by Elevator and Lifting Equipment of Zambia*, CTC/M&A/Feb04.

applicability of the doctrine. The situation is further compounded by the lack of judicial decisions to interpret the doctrine. The approach of the CTC as the primary merger regulatory authority thus becomes crucial in shedding light on the doctrine. The question however arises whether the CTC approach to the failing firm doctrine cures the statutory deficiencies?

The discussion above focused on some of the decisions where selective aspects of the doctrine were invoked. Accordingly, it is submitted the following principles can be extracted from these decisions, namely:

(a) *The lack of causality principle*

The CTC had approved mergers that raised competition concerns where the failing firm was invoked in such mergers and it was satisfied that absent the merger, the alleged failing firm would exit the relevant market with two possible effects. Firstly, it is submitted that the exit of the failing firm as a result of failure would create a market void. This constitutes a net competitive loss.²¹⁵ Secondly, the concerned merger would create a dominant entity that has the capacity to engage in anti-competitive practices.²¹⁶ Both situations amount to a deterioration in the competitive structure of the relevant market. The merger would thus be approved on the basis that it could not be regarded as the cause of the deterioration in the competitive market structure for this could occur in any event.²¹⁷

(b) *Saving a failing firm in the public interest*

The CTC does not distinguish between the failing firm doctrine and the public interest concept. The effect of such an approach appears to be that the failing firm doctrine is treated as a public interest consideration. It follows that saving a failing firm from failing and exiting the market would be in the public interest.²¹⁸ This entails that the CTC, in a bid to advance a broader public interest concept, adopts a broader and more flexible approach to the failing firm doctrine. The doctrine is not only limited to a traditional competition analysis but also takes into account a host of non-competition factors such as effect of the merger on

²¹⁵ See *Kali und Salz* (note 10 above) par.72; *Rewe/Meinl* (note 12 above) par. 63; *Blokker/Toys 'R' Us* (note 12 above) par.111.

²¹⁶ See *Rothmans of Pall Mall (Zimbabwe) and British American Tobacco (Zimbabwe)* (note 71 above) discussed at (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe* (2006) (note 72 above) 33 and note 12 above.

²¹⁷ *Ibid.*

²¹⁸ See discussion in 4.4.4. above.

employment, ability of indigenous owned business to participate on the market, generation of foreign exchange and promotion of local products on external markets, that traditionally fall within the realm of public interest.²¹⁹ The consequences of such an approach are that the CTC leniently reviews mergers involving failing firms. However, this leniency does not necessarily mean lowering of merger review standards although it is indisputable that it has the effect of further clouding the largely undefined public interest concept.

(c) Preventing the exit of an essential market player or an essential service provider

A merger involving a failing firm is approved if it is to the CTC's satisfaction that absent the merger and in the event of failure, either an essential competitor or service provider would exit the relevant market. This situation amounts to a loss to the competitive market structure or a deprivation of the customers and consumers of a provider. Thus the failing firm doctrine has played both a competition saving role and fulfilled a public interest function.

(d) A holistic approach

It is not clear from any of the known decisions by the CTC discussed above, whether the failing firm consideration constituted the primary determinant in merger review. In other words, there is nothing to conclusively suggest that the doctrine exclusively determined the fate of a transaction in which the failing firm argument was raised. What is however clear is that the CTC adopts a holistic approach to merger assessment. This approach focuses on all relevant aspects in determining whether or not to approve any given merger. It entails considering the likely implications of firm failure absent the merger on both the competitive market structure as well as on substantial public interest matters.

(e) Case-by-case basis

Probably the most significant aspect of the CTC's approach to the failing firm doctrine is the lack of clear cut criteria in determining the applicability thereof. There is no uniformity in merger decision making as each case is decided upon its own merits. The CTC does not adopt a blanket approach to all mergers in which the doctrine is invoked.

²¹⁹ See for instance section 12A(3) of the South African Competition Act.

It is submitted that there are broadly two main implications of the case-by-case approach to the failing firm doctrine in merger review. These are promotion of flexibility on the one hand and the perpetration of legal uncertainty on the other hand. The first and positive implication of the case-by-case approach is that it constitutes an acceptable principle in judicial decision making in which each matter is supposed to be determined upon its own merits taking into account its peculiar circumstance. This avoids adopting a legally formalistic approach to merger regulation in general and the failing firm doctrine in particular. A commendably flexible approach is thus advanced. This approach allows the CTC to treat each case separately and make determinations accordingly.

The second aspect which constitutes the slope slide of the case-by-case approach relates to its potential to result in legal uncertainty thereby weakening the effectiveness of the merger regulatory system. By not sticking to a particular criterion, the merging parties are left at the mercy of the CTC because they are left to second guess what the CTC would consider as relevant in determining their transaction. In an ideal situation, an approach in which each case is decided upon its merits would greatly enhance flexibility. However, the current merger regulatory framework in Zimbabwe presents a host of challenges that neutralises this benefit. Principal is the fact that the doctrine is not supported by judicial decisions as well as the lack of administrative guidelines to provide any meaningful insight thereon. This situation is compounded by the largely undefined public interest concept given its undeniable central role in merger regulation in general and the failing firm doctrine in particular. The merging parties have nothing to consider as guidelines given that there are no known criteria for reviewing mergers involving failing firm claims in Zimbabwe.

(f) The silent failing division doctrine

Section 2(1) defines a merger as including transactions in which a part of a business is acquired by another.²²⁰ In addition to this definition, section 32(4a)(h) provides that in determining any given merger, the CTC must assess whether a part of a business is likely to fail.²²¹ These two statutory provisions acknowledge the reality that a business is divisible and as such a part of a business can also fail. This means that a merger can be justified on the basis that it is not the entire business that faces the risk of failure absent the merger but only a part thereof. This constitutes a “failing division” consideration as opposed to the failing firm

²²⁰ Section 2(1) of the Competition Act of 1996.

²²¹ Section 32 (4a)(h) of the Competition Act of 1996.

doctrine.²²² However, there is nothing in the CTC's decisions to shed any light on this equally important doctrine. It is submitted that the lack of decisions on the failing division doctrine not only hampers jurisprudential development but also potentially presents a nightmare to merging parties who seek to rely on the failing division doctrine rather than the more established failing firm doctrine. This challenge is compounded by the fact that the failing firm doctrine in Zimbabwe still requires further development. It can therefore be asked how these two doctrines can be developed in the context of improving the entire Zimbabwean merger regulatory framework in general and the regulation of corporate mergers involving firms facing challenges in particular? This question can only be meaningfully decided after considering how comparable jurisdictions have dealt with these doctrines.

4.6 Conclusion

The merger regulatory framework is critical for the survival of corporations in a financially harsh operating environment. To this end, an effective merger regulatory framework must promote beneficial corporate transactions implemented through corporate mergers and acquisitions. However, such an approach must not disregard the established and acceptable principles of merger regulation such as the application of the failing firm doctrine in a manner that ensures the protection of the competitive market structure. This doctrine entails that a merger involving a firm facing viability challenges is justified on the basis that absent such a merger, the allegedly failing firm will fail and exit the relevant market. Such a failure and subsequent exit constitutes both a competition loss as much as it is detrimental to broader public interests. The challenge is how to apply the doctrine.

The Competition Act provides for the doctrine as a factor that must be taken into account in determining a given merger. However, the Act does not elaborate on the criteria that must be considered in applying the doctrine. In other jurisdictions where the doctrine has been applied, the regulatory authorities had developed from judicial decisions, administrative guidelines that are an analytical framework of the doctrine.²²³ Merging parties can thus rely on these guidelines to structure their transactions and argue their cases in a bid to justify their otherwise anti-competitive transactions. These guidelines are absent in Zimbabwe neither are

²²² See note 18 above.

²²³ See note 19 above.

there any judicial decisions to interpret the failing firm doctrine. There is thus a statutory void that the CTC as the primary merger regulator is expected to deal with. It can however be asked whether through its approach to the doctrine, the CTC had managed to cure the void.

In a number of decisions in which the CTC had dealt with the failing firm doctrine, it is clear that there are no particular criteria that it had followed. Each case was determined upon its own merits. Although this approach promotes flexibility it potentially creates legal uncertainty as merging parties are left to second guess on the factors that the CTC will consider relevant in reviewing mergers involving failing firms. It has been shown that the public interest consideration had influenced the application of the failing firm doctrine in Zimbabwe. The CTC does however not distinguish between the failing firm doctrine and the public interest concept. This approach results in the failing firm doctrine being treated as a public interest consideration: an approach that places the Zimbabwean system sharply in contrast to its South African counterpart.²²⁴ Blurring this distinction between the failing firm doctrine and the public interest concept broadens the doctrine. However, this does not cure the statutory deficiencies as the public interest concept remains largely undefined thereby weakening the effectiveness of the entire merger regulatory framework. A critical stakeholder in merger regulation, merging parties, remain in the dark as to what to expect from the CTC in general and what factors are taken into account in reviewing mergers involving failing firm claims. There is thus a need to refine and improve upon these aspects of merger regulation in Zimbabwe.

In order to decide how the Zimbabwean merger regulatory framework be improved, there is a need to consider improving how other jurisdictions had dealt with aspects of merger regulation such as the promotion of a broader policy mandate in which the public interest concept is central, the effective utilisation of the lack of causality principle as well as the treatment of mergers involving failing divisional assets. These will be addressed in the next comparative Part of the study.

²²⁴ See Part 4.4.4 above.

PART II

Chapter 5: Merger regulation, public interest and the failing firm doctrine: the South African experience

The Tribunal's job in merger control is not to make the world a better place, *but* only to prevent it becoming worse as a result of a specific transaction.¹

In vigorously competitive markets, mergers involving failing firms may often enhance genuine welfare either through increasing the efficiency of existing capacity, redeploying that capacity to socially more valuable use, or preserving jobs and having other socially beneficial advantages.²

5.1 Introduction

In 1998 South Africa adopted a new comprehensive competition statute, the Competition Act.³ However, prior thereto, a host of statutes had existed which were all effectively repealed on the basis of either material deficiencies or not being in sync with the changing socio-economic and political environment.⁴

¹ Manoim N, Presiding Member of the Panel of the Competition Tribunal of South Africa in *Wal-Mart Stores Inc./Massmart Holdings Limited* 73/LM/Nov 10 par 32 (*Wal-Mart/Massmart* merger Tribunal decision).

² Hewit G 'The Failing Firm Defence' (1995) (2) *OECD Journal of Competition Law and Policy* 113,115.

³ Competition Act 89 of 1998 as amended (herein after referred to as 'the Competition Act' or 'the Act.'). There are other statutes which govern selected aspects of competition outside the competition statute. These includes These statutes include the Banks Act 94 of 1996 and the Long-Term Insurance Act 52 of 1998. However, section 1A of the Competition Act which was added by section 2 (b) of the Competition Second Amendment Act 39 of 2000 replaced the old proviso in the now replaced subsection 3(1) (d) that ousted the jurisdiction of the Competition Act from applying to acts authorized by other public regulators. See also *Standard Bank Investment Corporation Ltd. v Competition Commission and Others; Liberty Life Association of Africa Ltd. v Competition Commission and Others* 2000 (2) SA 797 (SCA) (*Nedcor/Stanbic*) and in *South African Raisings (Pty) Ltd. and Another. v SAD Holdings Ltd and Another* 2001(2) SA 877 (SCA) par 16 here the Supreme Court ruled that the Marketing of Agricultural Products Act 47 of 1996 does not oust the competition authorities' jurisdiction in matters relating to prohibited practices provided under section 44 of the Competition Act. The Act now enjoys concurrent jurisdiction with such regulators thus remains the principal source of competition law in South Africa.

⁴ The pre-1998 statutes included the Regulation of Monopolistic Conditions Act 24 of 1955 (the 1955 Act) and the Maintenance and Promotion Act 96 of 1979 (the 1979 Act). For criticism and shortcomings of the previous statutes, see Government of South Africa *Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955 RP64/1977* ('The Mouton Commission') pars. 47,126-129,223 (weaknesses of the enforcement mechanisms); Naude SJ 'South African Competition Policy: Challenges and pitfalls' (1986) *Modern Business Law* 76,77; Bekker EM 'Monopolies and the role of the Competition Board' (1992) *Tydskrif vir die Suid-Afrikaanse* 618,629 (weakness of the competition regulatory authority); Kemp K & Sutherland P

The Competition Act aims at establishing an effective competition regulatory system that reflects the country's socio-economic needs.⁵ The Act's stated objectives go beyond the traditional goal of promoting and maintaining competition through the regulation of anti-competitive market behaviour to encompass broader policy considerations in the form of so-called non-competition factors.⁶ This feature mirrors the country's social and economic historical development and is an acknowledgement of the notion that the law derives its credibility from the environment in which it operates hence it must not ignore the practical realities existing in such an environment.⁷ It must be noted that this characteristic is not alien to South Africa as it is common in many developing countries' competition statutes which statutes have been adopted as part of a broader economic reform programme.⁸ However, what sets the South African system apart from these other jurisdictions is its demonstrated effectiveness in the application of these public interest considerations in competition matters, especially in merger regulation. The Act clearly defines the public interest concept and how it is applied in merger regulation.⁹ Furthermore, the institutions mandated with merger regulation are well structured to support an effective system.¹⁰

Competition Law of South Africa (Service Issue 12 Lose leaflet) (2009) 3-30 (influence of the Minister and lack of independent on the regulatory authority) 3-39 (lack of political commitment) ; Chetty V 'The Place of Public Interest in South Africa's Competition Legislation : Some Implications for International Antitrust Convergence' *American Bar Association Section of Antitrust Law 53rd Meeting*, Washington D.C.(March 30-April 1, 2005) 4. Lewis D 'South African Competition Law: Origins, Content and Impact' (2007) in Dhall V (ed.), *Competition Law Today: Concepts, Issues, and the Law in Practice* 340-363, 343.

⁵ See generally the Preamble to the Competition Act 1998 and section 2 of the Act; South Africa, Department of Trade and Industry *Explanatory Memorandum; Competition Bill*, 1998 in Government Gazette No. 18913 (395) of 22 May 1998; South Africa, Department of Trade and Industry *Competition Bill*, 1998 in *Government Gazette* No.18913(395) of 22 May 1998. See also Kemp and Sutherland (2009)(note 4 above) 4-3. The Preamble to the Act reaffirms the statute's socio-economic objectives as well as its economic goals.

⁶ The Preamble makes reference to the need to 'regulate the transfer of economic ownership in keeping with the public interest.' Section 2 (c)-(f) provide the purpose of the Act, employment promotion (subs(c)), expansion of opportunities for South African participation in the external market economy (subs (d)), ensuring equal opportunities for economic participation to small and medium sized enterprises (subs (e))), and widening ownership base of historically disadvantaged persons (subs (f)).

⁷ Lewis (2007)(note 4 above)359.

⁸ See for instance section 31 read with section 32 the Zimbabwe Competition Act 7 of 1996 which employs the public interest standard in determining competition matters.

⁹ Section 12A (3) of the Competition Act.

¹⁰ Lewis (2007) (note 4 above) 345.

In conformity to contemporary practices, the Act is principally concerned with merger regulation¹¹ and prohibition of anti-competitive conduct.¹² It is the regulation of corporate mergers and acquisitions¹³ that is of interest to this study for two main reasons. Firstly, merger control is central to the South African competition law and policy.¹⁴ Secondly, the impact of public interest considerations on the South African competition system is more defined in merger regulation.

The system employs compulsory pre-merger notification requiring all mergers at or above a specified threshold to be notified to the authorities before implementation.¹⁵ Non-compliance with this requirement attracts sanctions.¹⁶ Upon notification, the relevant merger regulatory

¹¹ See generally Chapter 3 of the Act titled 'Merger Control.'

¹² Chapter 2 of the Act.

¹³ The terms merger and acquisition will be used here interchangeably to denote any situations where two or more business entities combine through the establishment or acquisition by direct or indirect means, of a controlling interest in the whole or part of the business of another entity. See for statutory definition, section 12 (1) (a) read with subsection (b) of the Competition Act.

¹⁴ Competition policy generally refers to the legal and policy instruments designed to regulate firm behaviour in order to primarily protect the competitive structure of the market and to advance other policy objectives including consumer welfare, economic development, industrial policy and other social considerations. Competition law is the mechanisms used to enforce competition policy. It is thus a component of competition policy. For the significance of merger control in the South African competition law and policy, see generally, Lewis (2007)(note 4 above) 345; Fox EA 'Economic Development, Poverty and Antitrust: The Other Path' (2007) 13 *South-western Journal of Law and Trade in the Americas* 211, 223 (SA competition policy is 'merger policy.') and Lewis D 'The Competition Act 1998-Merger Regulation,' (1999) 2. Speech delivered by the then Chairperson of the South African Competition Tribunal David Lewis to the *ICM Mergers and Acquisition Conference* (24 November 1999), available at <http://www.comtrib.co.za/assets/Uploads/Speeches/lewis9.pdf>, (accessed 30 October 2010).

¹⁵ Sections 11(5)(a),(b) and(c) classifies mergers as being small, intermediate or large. Section 13A (1).(2) and(3) provides for the notification of notification of intermediate and large mergers. Section 13(2) and (3) for circumstances under which small mergers may be notified. For classification of merger as small, intermediate or large, see section 11(5) (a), (b) and (c) respectively. For threshold levels, section 11 (1) of the Act and the Department of Trade and Industry *Determination of Merger Thresholds and Methods of Calculation General Notice 216/2009* in *Government Gazette* 31957 of 6 March 2009.

¹⁶ Section 60 (1) empowers the Tribunal to order divestiture as a remedy for implementing a merger without notification, section 59(1)(d)(iv) read with 13A(3) (imposition of administrative penalties in case of implementing a large or intermediate merger without notification) and section 59(1)(d)(i) read with 13(3) (penalties related to implementing a small merger requiring notification). See *Caxton & CTP Publishers & Printers Ltd v Naspers Ltd* 16/FN/Mar04; *Blumer SA (Proprietary) Ltd/Seagram Africa (Proprietary) Ltd and*

authority¹⁷ is required to review the merger and determine the fate of the merger within the prescribed timeframes.¹⁸ This process mainly involves scrutinising and analysing a notified merger in order to determine whether to approve or prohibit it.¹⁹

The Act provides for a three-pronged substantive assessment test as a standard for merger review. This test entails (a) a determination of whether or not the merger is likely to substantially lessen or prevent competition,²⁰ (b) if it raises competition concerns, to assess whether the merger is likely to result in any benefits, be they efficiency gains or public interests that could outweigh the anticompetitive effects,²¹ and (c) regardless of the results of the first two test legs, to decide whether the merger can or cannot be justified under substantial specified public interest grounds.²²

In assessing the first leg of the test, the Act enjoins the competition authorities to consider a non-exhaustive list of factors²³ provided under the Act.²⁴ One of these considerations is assessing ‘whether the business or part of the business of a party to the merger or proposed

Distillers Corp. (SA) Ltd / Stellenbosch Farmers’ Winery Group (PTY) Ltd/ Competition Commission 94/FN/Nov00 (parties ordered to file notification); *Competition Commission v Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group (RAG) 95/FN /Dec05* (fine of R1.00 imposed for non-compliance). However, cf. *Competition Commission v Tiso Consortium 82/FN/Oct04* par.11 (where the Tribunal adopted a skeptic view) and *Commission v Structa Technology (Pty) Ltd 83/LM/Nov02*; *Competition Commission v Citibank NA South Africa Branch/Mercantile Bank Ltd 91/LM/Nov04* and *Competition Commission and Another v Dorbyl Engineering Management Co. (Pty) Ltd/Fastpulse Trading 26 (Pty) Ltd 83/LM/Nov02*. See also *Competition Tribunal Rules for the Conduct of Proceedings in the Tribunal* of 2000 pars.42 and 43 and Kemp & Sutherland (2009)(note 4 above) in Chapter 12.

¹⁷ These are the Competition Commission established in terms of section 19 and the Competition Tribunal in terms of section 26. Although the Competition Appeals Court established in terms of section 36 is part of the competition authority, no merger notification can be made to it.

¹⁸ See 5.3.3. below.

¹⁹ See Goldberg AH ‘Merger Control’ (2007) in Dhall (ed.,) (note 4 above) 93.

²⁰ Section 12 A(1).

²¹ Section 12 A(1)(a) (i) and (ii).

²² Section 12A(1)(b).

²³ *Industrial Development Corporation of South Africa v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital (Pty) Ltd/ Anglovaal Mining Ltd 45/LM/Jan02* and *46/LM/Jun02*; *Santam Ltd/Emerald Insurance Co.Ltd and Emerald Risk Transfer (Pty) Ltd 57/LM/Aug02* para.52; *Schuman Sasol/Price’s Daelite (Pty) Ltd 10/CAC/Aug01* at 5.

²⁴ Section 12A (2).

merger has failed or is likely to fail.’²⁵ This consideration is commonly known as the ‘failing firm’ or ‘failing company doctrine’ in merger analysis and its establishment is regarded as an absolute defence to justify the approval of an otherwise anti-competitive merger in other jurisdictions like the US and the EU.²⁶ However, in South Africa, largely as a result of the three-pronged standard for merger assessment encompassing the public interest limb, establishing the doctrine does not justify the approval of an otherwise anti-competitive merger.²⁷ Establishing that a firm or part of a firm is failing is merely one of the many factors in determining only one leg of the test.²⁸ The fact that merging parties establish that the target firm or part thereof is failing does not necessarily mean that the merger in question will get approval. It is still expected to go through the other legs of the test and it is only after passing through the public interest limb that it can be approved.

Subjecting a merger to further scrutiny even after thorough assessment of the claim that one of the parties to the merger is a failing firm raises the question as to what the implications are of the inclusion of public interest provisions on the South African merger regulatory system in general and on the interpretation and application of the failing firm doctrine in particular. In other words, it may be asked whether the public interest limb of the substantive test has the effect of either having an otherwise anti-competitive merger being approved if it can provide substantial public interest benefits or resulting in the blocking of a merger that raises no competition concerns if it is not compatible with public interest.

The entire exercise of merger regulation in competition law is designed to ensure that corporate transactions do not negatively alter the competitive structure of the market thereby protecting the competitive market structure.²⁹ It is submitted that this goal is achieved where the failing firm doctrine is interpreted as a defence by applying a narrow and strict approach

²⁵ Section 12 A(2)(g).

²⁶ US Department of Justice (DOJ) and the Federal Trade Commission (FTC) *Horizontal Merger Guidelines* (2010) (issued on 19 August 2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>. (accessed 11 February 2013) in section 11 and the European Commission *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* OJ C31/2004 of 2004 in par.89. See further Chapters 6 and 7 on the EU and US respectively.

²⁷ See note 28 below.

²⁸ *Schuman Sasol* supra (note 23 above) par. 52; *Iscor Limited/Saldanha Steel* (Pty) Ltd 67/LM/Dec01.para.101 and *Phodoclinics and Other/Protector Group Medical Services and Others* 122/LM/Dec05.

²⁹ See Goldberg (2007) (note 20 above) 93.

to establish it. However, the effects of adopting a narrow and strict approach to the doctrine are that it becomes increasingly difficult though not impossible to successfully invoke the defence.³⁰ The rationale for a strict approach cannot be overemphasised given that meeting the criteria means an anti-competitive merger is given the green light. It is thus required to protect the competitive market structure. However, the question is whether this same goal cannot be achieved by interpreting the doctrine merely as a factor in a three-pronged substantive assessment test?

By providing a further scrutiny of mergers involving failing firms even after the competition assessment, do the test provide an even sterner test for mergers involving failing firm or does it offer a second chance to mergers involving failed failing firm claims? This Chapter primarily places the interpretation and application of the failing firm doctrine within the broader public interest concept and argues in the main that the inclusion of public interest considerations in the South African merger regulatory framework in general does nothing to hamper the effectiveness of the merger regulatory system. As such even if the doctrine is interpreted differently from other jurisdictions that is, as a factor as opposed to a defence, it is submitted that there are sufficient mechanisms in place to ensure that the same desired goal of protecting the competitive structure of the market is achieved. Accordingly, it will be demonstrated that the inclusion of public interest does not result in the approval of anti-competitive mergers even though it can be, in principle, a reprieve for failed failing firm arguments. This provides some valuable lessons for Zimbabwe where the public interest concept is also central to merger regulation.

In order to advance the above thesis and later explore the extent to which Zimbabwe can learn from the South African approach, the Chapter will firstly give a historical background to the development of the public interest concept in South African competition law in general and merger regulation in general. This is meant to provide a fundamental understanding of the place of public interest within the South African merger regulatory framework. This historical overview will be followed by a brief discussion and analysis of the current merger regulation regime under the Competition Act 89 of 1998. Here focus will be on public

³⁰ See Valentine DA 'Horizontal Issues: What's Happening and what's on the Horizon?' (1995), available at <http://www.ftc.gov/speeches/other/dvhorizontalissues.shtm>. (accessed 22 March 2012) ; Webber Wenzel 'The failing firm defence: A bridge too far?' (2001), Available at <http://www.webberwenzel.com/wwb/view/en/page1874?oxl=2974&Sn=Detail&pid=1874> (accessed 26 October 2011).

interest provisions, that is, both the procedural and substantive aspects thereof. The third Part this Chapter is devoted to an analysis of the impact of public interest provisions on procedural and substantive aspects of merger regulation in South Africa. This will lead to the assessment of the impact of public interest consideration on the interpretation and application of the failing firm doctrine in South Africa.

It must be highlighted that the purpose of this Chapter is neither to attempt to provide an exhaustive critique of the application of the public interest concept within the South African merger regulatory system nor to exhaust all the aspects of the South African merger regulatory framework. This contribution is aimed at exploring a single but crucial aspect of merger regulation, the failing firm doctrine. As such the writer intends to use this doctrine to assess the impact of public interest consideration on merger regulation using the South African experience as a model. The ultimate goal is to explore the extent to which the South African approach can be adopted and if necessary, adapted to develop a suitable model for Zimbabwe.

It will be argued that although there are still problematic issues regarding the role of the public interest concept within the South African merger regulation regime, the system is largely ideal for promoting the core objectives of the competition system, namely, promotion and maintenance of competition on the one hand and advancing the country's wider policy objectives on the other. Furthermore, it will be demonstrated why Zimbabwe needs to learn from South Africa by arguing that the latter's approach in dealing with the failing firm doctrine promotes flexibility and maintains the competitive structure of the market in line with internationally acceptable standards.

5.2 The origins of the broad-based competition system in South Africa

This part will provide a brief overview of the historical developments of the South African competition system. The aim thereof is to provide an appreciation of the roots of a broad-based competition system encompassing public interest considerations in merger review. Accordingly, the section will discuss the evolution of the current competition legislation and the origins of public interest considerations in South African merger review.

5.2.1 The roots of the Competition Act 89 of 1998

The current South African competition legislation is a result of critical political and economic events.³¹ The dismantling of an apartheid South Africa in 1994 was followed by radical transformation of the socio-economic and political landscape which ushered in an era of constitutional democracy.³² The new democratic society required various economic and political policies necessary to transform the country and address a number of issues that were brought about by the apartheid system. The Competition Act is one of the various pieces of legislation enacted with a goal of achieving socio-economic transformation.³³

The 1998 legislation was not the first attempt to address competition issues in South Africa. As early as 1907 South Africa had some legislation aimed at regulating specific aspects of competition.³⁴ Various laws existed prior to 1998 that were aimed at regulating selective aspects of competition in South Africa.³⁵ In essence, the current legislation is an attempt to deal with the shortcomings of these successive laws and address a raft of competition challenges that the laws failed to effectively deal with.³⁶ Chief among these challenges were the high levels of economic and ownership concentration that were largely a result of monopolies enjoyed by dominant mining financial houses, economic inequality due to apartheid policies and international isolation leading to capital divestment.³⁷

Successive ineffective competition legislation not only militated against economic growth through; *inter alia*, promotion of entry barriers against small independent businesses but also perpetrated socio-economic inequalities that were a major concern for the negotiators of the current legislation.³⁸ Some of the aspects of these laws will be briefly highlighted below.

³¹ Kemp and Sutherland (2009) (note 4 above) 3-45. See also Chetty (note 4 above) 5 and See also OECD 'Competition Law and Policy in South Africa' *OECD Global Forum on Competition Peer Review* (Paris 11 February 2003)7.

³² OECD (2003) (note 31 above) 11.

³³ Chetty (2005) (note 4 above) 4; OECD (2003)(note 31 above) 7. Other notable legislation incorporating an economic transformation strategy includes the Constitution of the Republic of South Africa of 1996; the Broad Based Black Economic Empowerment Act 53 of 2003; the Labour Relations Act 102 of 1996 and the Co-Operatives Act 14 of 2005.

³⁴ OECD (2003) (note 31 above) 12.

³⁵ See note 4 above.

³⁶ See 5.2.2 below.

³⁷ Chetty (2005) (note 4 above) 4.

³⁸ *Ibid.*

5.2.2 The shortcomings of previous competition legislation

This section presents a brief discussion on some of the previous legislative measures that were aimed at regulating some aspects of competition law in South Africa. Focus will be on the two most significant statutes, the Regulation of Monopolistic Conditions Act of 1955 and the Maintenance and Promotion of Competition Act of 1979 and how they contributed to the development of the current merger regulation regime in South Africa in general and the concept of public interest in particular.

5.2.2.1 The Regulation of Monopolistic Conditions Act of 1955

The Regulation of Monopolistic Conditions Act of 1955 (herein after ‘the 1955 Act’) was the first comprehensive piece of legislation that was dedicated to regulating competition matters in South Africa.³⁹ This legislation defined and regulated a number of monopolistic conditions as being potentially anti-competitive practices.⁴⁰ The 1955 Act largely adopted a cautious and permissive approach as it failed to treat any of the defined practices as practices prohibited *per se*.⁴¹

The 1955 Act provided for administrative process as the main enforcement mechanism.⁴² This law established the Board of Trade and Industry as the administrative authority.⁴³ The Board thus used the administrative process to examine and investigate particular cases after which it made recommendations to the Minister of Trade and Industry regarding remedies and actions.⁴⁴ The Board was also empowered to supervise compliance with any orders made

³⁹ *The Mouton Commission Report* (1977) par.22. The 1955 Act became effective on 1 January 1956 and was amended by Act 14 of 1956 before undergoing further legislative amendments in the form of Act 48 of 1975. This Act replaced the Undue Restriction of Competition Act 59 of 1949. The Board of Trade and Industry (BTI) *BTI Report 327 on the Regulation of Monopolistic Conditions 1951*, 17 April 1951 (herein after ‘*the BTI Report 327*.’) The latter report recommended the repeal of the 1949 Act and its replacement by the 1955 Act.

⁴⁰ Section 2(1) of 1955 Act. See also OECD (2003) (note 31 above) 12.

⁴¹ OECD (2003) (note 31 above) 12.

⁴² Section 6 of the 1955 Act. See also OECD (2003) (note 31 above) 12.

⁴³ The Long Title to the 1955 Act prescribes as the aim of the statute, the establishment of the Board. Section 1 defines the ‘Board’ as the Board of Trade and Industries established under section 2 of the Board of Trade and Industries Act 19 of 1944.

⁴⁴ Section 3 (1) read with subsection (2) of the 1955 Act. These steps included recommendations to suspend any duty that protected goods or services affected by monopolistic conditions (s6(1)(a)), issuing a notice to any party to such a monopolistic condition to cease to be a party thereto or refrain from continuing with any such

by the Minister.⁴⁵ This reduced the Board to perform almost a mere oversight role on a handful of directives that were mainly negotiated.⁴⁶ Any decision to exercise such mandate was appealable to a special court established under the Act.⁴⁷

Although the Board was given some enforcement mandate, the exercise thereof was hugely dependent upon the Minister.⁴⁸ The Minister was vested with the real power to decide who and what conduct was to be investigated and if so, the nature of relief to be offered.⁴⁹ In practice, the Board was reduced to merely making recommendations to the Minister who was however, not compelled to accept them.⁵⁰ It is submitted that the Board's dependence upon the Minister for the enforcement of the statute was a major handicap of the entire system. A feature of the apartheid economy was the prominent role played by the state in the economy.⁵¹ The State, through the Industrial Development Corporation, actively participated in the economy.⁵² Although State activities were not expressly excluded from the application of the law, it was difficult in practice to imagine the Minister ordering any form of

arrangement, agreement or undertaking that resulted in a monopolistic condition(s6(1)(b)(i); issuing a declaration of illegality and ordering parties to implement steps aimed at remedying the monopolistic condition(s6(1)(b)(ii). In theory the law provided that the minister could take in terms of this section. However, in practice, these provisions were rarely invoked. See OECD (2003) (note 31 above) 13.

⁴⁵ Section 3 (4) of the 1955 Act.

⁴⁶ OECD (2003) (note 31 above) 13.

⁴⁷ Section 7(1) provided for the right of appeal to a special court. Further matter relating to the composition of such a court were elaborated under subsection (2) and (3) of the 1955 Act. See also OECD (2003) (note 22 above) 12. However, there is no record of any decision by the Special Court hence it did nothing towards the development of any jurisprudence in South Africa during its tenure.

⁴⁸ Section 3(2) and (3) expressly provided that the Board's investigation mandate was to be exercised subject to the direction of the Minister. See also *Mouton Commission Report* par 29.

⁴⁹ Section 6 of the 1955 Act. See also OECD (2003) (note 31 above) 12.

⁵⁰ See OECD (2003)(note 31 above) 12.

⁵¹ See generally Kemp and Sutherland (2009)(note 4 above)3-30 and Naude (1986) note 4 above).

⁵² The Industrial Development Corporation (IDC) was established in 140 by the Industrial Development Act 22 of 1940. The mandate of this statutory intuition are provided for under section 3 of the 1940 Act and had been amended by section 1 of Act 49 of 2001.The IDC remains an important and strategic commercial arm of the government up to the present day.

investigation into these activities.⁵³ This was further aggravated by the absence of civil action that could have come in handy were the public enforcement mechanism failed.⁵⁴

It is submitted that the effectiveness of any remedies provided to cure any harm to the competition process is a crucial component of an effective system. Although the 1955 Act provided for some remedial action, the prospective nature of these remedies and accompanying sanctions affected their usefulness.⁵⁵ For instance, the law provided by administrative measures meant to persuade parties to discontinue the anti-competitive practices that might have been found to be contrary to public interest.⁵⁶ Violation of such orders was subject to criminal sanctions.⁵⁷

It is submitted that if the law's enforcement mechanisms were flawed, its scope of application was equally limited. There were no express provisions to deal with mergers and acquisitions.⁵⁸ This omission, deliberate or otherwise, hampered the law's effectiveness in maintaining competition within the economy given the central role merger regulation plays in promoting and maintaining a competitive market structure.⁵⁹ The acquisition of one firm by another has serious implications on the competitive structure of the market. Firstly and importantly it has the potential of creating a monopoly situation by eliminating an effective competitor.⁶⁰ Secondly the newly created monopoly has the potential to abuse its dominant market position by engaging in anti-competitive practises such as price fixing and hiking.⁶¹ Lastly, the market is deprived of a competitor to the detriment of consumers who are

⁵³ Kemp and Sutherland (2009)(note 4 above) 3-30; OECD (2003) (note 31 above) 12. The Minister rarely invoked the legislative provisions in order to order investigations. Over a 20 year period, statistics show that only 18 investigations were ordered. And of those found to be contrary to public interests, all were settled through negotiations. See OECD (2003) (note 31 above) 13.

⁵⁴ *Mouton Commission Report* pars 47, 126-129, 223.

⁵⁵ OECD (2003) (note 31 above) 12.

⁵⁶ Section 3 (2) of the 1955 Act.

⁵⁷ Section 8 (1) and (2) of the 1955 Act. See also OECD (2003) (note 31 above) 12.

⁵⁸ Kemp and Sutherland (2009) (note 4 above) 3-29. See also OECD (2003) (note 31 above) 12.

⁵⁹ See Lewis (1999)(note 14 above)2 ('merger regulation occupies a special place in antitrust enforcement because whereas all other antitrust enforcement is directed at behavior , merger regulation is concerned with structure, with preventing the sort of structure that is unlikely to lead to anti-competitive behavior.')

⁶⁰ See *Federal Trade Commission v H.J Heinz Inc.*, 246 FJD 708 (D.C.Cir.2001); 2001-2 CCH Trade CS.73, 441(D.C.2001).

⁶¹ See Whish R *Competition Law* 6th ed. (2009) 806-08.

deprived of choices.⁶² The closest the 1955 Act came to merger regulation was providing that it applied to ‘every agreement, arrangement or understanding, between two or more persons’ which directly or indirectly results in the restriction of competition.’⁶³ Only a broader interpretation of this provision would have enabled it to apply to mergers for such an interpretation would have extended the provision to consider the effects of such transaction on competition.

The determination of whether action was to be taken under the Act was made using the public interest as the standard of analysis.⁶⁴ If upon investigation, a practice was found to be contrary to public interest, the Minister would take appropriate measures to deal with the practice if he was of the opinion that the existence of the monopolistic condition was not in the public interest.⁶⁵ However, irrespective of the clear role that public interest played in the enforcement of the statute, the concept remained a mystery as no attempt was made to clarify it.

It is submitted that the 1955 Act was gravely inadequate and ineffective in regulating competition matters. The law’s scope of application was limited and the regulatory institutions established under it were mere oversight bodies that performed more of a tariff function than a competition regulation mandate.⁶⁶ This was aggravated by their lack of independence as they depended on the Minister to initiate proceedings hence were susceptible to political interferences.⁶⁷ It is thus no fallacy to conclude that although the 1955 Act was the first real attempt at regulating certain aspects of competition in South Africa, the legislature lacked real conviction in coming up with an effective regulatory framework.⁶⁸

⁶² See generally on the competitive concerns of mergers and acquisitions, Goldberg (2007)(note 20 above) 93-94; Whish (2009) (note 61 above) 799-800.

⁶³ Section 2 (1) (a) of the 1955 Act. See also Kemp and Sutherland (2009) (note 4 above) 3-29 and *Mouton Commission Report* par 21.

⁶⁴ Section 3 (2) provided that the Board could only take make recommendation to the Minister to take action upon investigations if the investigation reveals the existence of a monopolistic condition that was not in the public interest. See also OECD (2003) (note 31 above) 12.

⁶⁵ Section 6(1) of 1955 Act. See *Mouton Commission Report* par 24.

⁶⁶ Bekker (1992) (note 4 above) 629. See also *Mouton Commission Report* par 143 and Kemp and Sutherland (2009) (note 4 above) 3-30. The weakness of the Board was compounded by the fact that it was under-resourced.

⁶⁷ See note 49 above.

⁶⁸ Kemp and Sutherland (2009) (note 4 above) 3-39. See also Naude (1986) (note 4 above) 77.

The disappointing performance of the 1955 Act led to the appointment of a commission to investigate the status of competition law and policy in South Africa.⁶⁹ This commission produced its report on its findings in 1977 where it highlighted the many shortcomings of the 1955 Act and crucially stressed the need for a comprehensive revamp of the legislation.⁷⁰ The report also emphasised the desirability of competition law within the economy and hence recommended the enactment of a new statute.⁷¹ The legislature responded by enacting the Maintenance and Promotion of Competition Act in 1979.⁷²

5.2.2.2 The Maintenance and Promotion of Competition Act of 1979

The Maintenance and Promotion of Competition Act which came into effect on 1 January 1980,⁷³ was intended to address the shortcomings of the 1955 Act. Thus the Act was amended on numerous occasions in order to fill in the gaps that were characteristic of the 1955 Act.⁷⁴ Notable features of the new legislation were that it extended its scope of application to acquisitions and created a somewhat new regulatory institution.⁷⁵

⁶⁹ Kemp and Sutherland (2009) (note 4 above) 3-30. During its entire reign, the 1955 Act only resulted in 18 investigations being ordered by the Minister and for two periods of five years there were no single investigations. The conviction rate for illegal anti-competitive practices was equally poor with only four convictions relating to retail price maintenance under specific regulations. However, no convictions relating to flouting competition rules were ever secured under the Act. See *Mouton Commission Report* pars 47, 51-55, 142-148; Legh R (2002) in Brassey M, Campbell J, Legh R, Simkins C, Unterhalter D and Wilson J *Competition Law* 66 and also Beachman A 'Competition policy in Britain and South Africa' (1974) *South African Journal of Economics* 121-122.

⁷⁰ *The Mouton Commission Report* (1977) (note 4 above). See also Spandau A 'Towards a new South African Competition policy' (1977) *South African Journal of Economics* 322,329.

⁷¹ *Mouton Commission Report* pars 105 and 196. See also OECD (2003) (note 31 above) 13.

⁷² The Maintenance and Promotion of Competition Act 96 of 1979 (herein after 'the 1979 Act.').

⁷³ *Hansard* 2 May 1979. The Maintenance and Promotion of Competition Act 96 of 1979 was published in the *Government Gazette* No.6545 vol. 169 of 4 July 1979.

⁷⁴ Some of the notable legislative amendments included the following; Acts 58 of 1980, 62 of 1983, 12 of 1985, 5 of 1986, 96 of 1987 and 88 of 1990. References to these amendments will only be made here as and when necessary.

⁷⁵ The long title to the 1979 Act provided as one of its aims; to provide for the regulation of acquisitions of controlling interests in business. See also section 1(i) defining an 'acquisition.' Section 3 established a Competition Board as the competition regulatory authority. As such the definition of 'board' in the 1979 statute was to refer to the Competition Board not the Board of Trade and Industry associated with the 1955 Act. See section 1(ii) of the 1979 Act.

The Act replaced the Trade and Industry Board with the Competition Board.⁷⁶ Although the Competition Board was appointed largely by the Minister,⁷⁷ it could initiate investigations into anti-competitive practices on its own thereby exercising a notable degree of independence from the former.⁷⁸ The Act further expressly provided that the Competition Board could investigate activities of state controlled enterprises.⁷⁹ However, this mandate was to be exercised subject to the Minister's directions.⁸⁰ This was militated by its flawed composition. The majority of its members were either white male academics or civil servants who were patronised by the state.⁸¹ Furthermore, the Minister continued to play an active role in the enforcement process.⁸²

The 1979 Act introduced provisions relating to the regulation of acquisitions.⁸³ The Competition Board was mandated to continuously conduct research into economic concentration trends so as to investigate acquisitions that might appear to be contrary to public interest.⁸⁴ Importantly, the board was obliged to rule on the public interest compatibility of applications on proposed acquisitions.⁸⁵ However, there was no legal obligation upon parties to a proposed acquisition to notify the board.⁸⁶ The Competition

⁷⁶ Section 3(1) of the 1979 Act. See also *Mouton Commission Report* pars 206,215-222; Mouton DJ and Lambrechts JA 'Competition policy in the Republic of South Africa' (1982) *Modern Business Law* 58, 61 and OECD (2003)(note 31 above)13.

⁷⁷ See section 3(2)-(8) of the 1979 Act.

⁷⁸ Section 10(1) of the 1979 Act. See OECD (2003) (note 31 above) 13. See also Kemp and Sutherland (2009)(note 4 above) 3-34.

⁷⁹ Section 6(1) (a) (i) of the 1979 Act.

⁸⁰ See section 6(1) (a) (ii) of the 1979 Act.

⁸¹ Legh (2002) (note 69 above) 78.

⁸² See note 80 above.

⁸³ These provisions were scattered throughout the act. See for instance, section 1(i) defines an acquisition; section 6(1)(b) made reference to the board's statutory functions as including conducting some studies relating to industrial concentrations resulting from acquisitions; section 6(2)(a) provides for the board's obligation to make rulings on applications relating to proposed acquisitions and section 10(1)(a),(b)(i) and(ii) provided for investigative powers to ascertain whether an acquisition had occurred and if, the nature and extent of the controlling interest acquired, being held or proposed to be acquired. See also Mouton and Lambrechts (1982) (note 76 above) 61 and 64.

⁸⁴ Section 6(1) (b) of the 1979 Act.

⁸⁵ Section 6(2)(a) of the 1979 Act. See also Kemp and Sutherland (2009)(note 4 above) 3-35

⁸⁶ Section 6(3) of the 1979 Act. Although this provision expressly discarded of this obligation, an amendment made in terms of Act 88 of 1990 changed this position. The 1990 Act repealed section 6(3) of the 1979 Act. The

Board thus relied mostly on voluntary notifications or other sources and it is submitted that this situation meant a great number of harmful acquisitions went unnoticed thereby effectively hampering the effectiveness of the law.

The 1979 Act retained the public interest standard in determining whether acquisitions and other practices could be justified.⁸⁷ However, this public interest standard was not defined by statute and neither was it developed through any judicial jurisprudence.⁸⁸ This vagueness further compounded the shortcomings of this law. Although the 1979 Act authorised action against anti-competitive acquisitions, there were no provisions prohibiting such practices.⁸⁹ The Minister's opinion remained the only yardstick to determine the enforceability of the law for ultimately he could determine the fate of the proposed acquisition.⁹⁰

The 1979 Act was a welcome development in as far as merger regulation was concerned in South Africa. This is because, unlike the 1955 Act, the 1979 statute provided for the regulation of corporate mergers and acquisitions. However, it is submitted that the Act, just like its predecessor, was plagued with numerous shortcomings that rendered it largely ineffective. The merger provisions were vague and their effectiveness to deal with anti-competitive acquisitions stems from the absence of a compulsory notification procedure.⁹¹ The Competition Board established to perform the regulatory function was largely a functionary of the Minister who continued to wield the final say.⁹² This gravely weakened its

effect of the removal was that the Act became silent on the issue. This could still be construed to mean that parties were not obliged to notify the board.

⁸⁷ Sections 6(2) (a) and 13(2) of the 1979 Act. The latter sections related to the minister's powers to make determinations upon considering recommendations by the board. These determinations were guided by public interest considerations, that is, whether the acquisition can be justified on public interest grounds. See also OECD (2003) (note 30 above) 13.

⁸⁸ Ibid. The lack of jurisprudential development can be attributed to the inactivity of the special court that was retained as the appellate court. See section 15 of the 1979 Act.

⁸⁹ Ibid.

⁹⁰ Ibid. See also Kemp and Sutherland (2009) (note 4 above) 3-37. The Minister determined the any further action following the Board's investigations. For instance, in the event of the Board failing to secure any agreement as contemplated under section 11(1), it had to make recommendations to the minister. The minister would then decide whether or not to abide by such recommendations. The minister was not bound by such recommendations. In the event that he decides to take any further action, sections 10(5), (6) and (7) of the 1979 Act provides for such actions.

⁹¹ See note 86 above.

⁹² See note 90 above.

effectiveness. Furthermore, the board lacked real authority to deal with anti-competitive acquisitions.⁹³ The only enforcement measures that it relied on were to resort to some scary tactics including issuing of administrative notices of investigations.⁹⁴ The only action that the Competition Board could employ after issuing such a notice was to solicit an arrangement by agreement with the concerned parties.⁹⁵ The aim thereof was to try to reach an agreement aimed at removing aspects of the transaction that raised competition concerns.⁹⁶ However, even these actions were subject to the Minister's powers.⁹⁷

It has been shown that a succession of legislation aimed at regulating competition matters in South Africa one way or the other failed to create a satisfactory competitive environment as required. This was attributed partly to a lack of serious commitment on the part of the pre-1994 regime.⁹⁸ This position dramatically changed following the coming into power of a democratically elected government in 1994. This government, led by the African National Congress (ANC)'s policies advocated for a competitive economy as a means of advancing various socio-economic policies. These policies found themselves at the heart of the current competition system as a component of the broad-based competition system in general and public interest consideration especially in merger regulation in particular. Accordingly, the following section of this part will present an exposition of the role played by various policy considerations in the development of the current competition system in South Africa.

5.2.3 The influence of the post-1994 policy considerations

This Part discusses some of the policy instruments that significantly influenced the development of competition law in post-apartheid South Africa. Focus will be on the role and impact of the ANC's *Reconstruction and Development Programme* of 1994, the

⁹³ Ibid.

⁹⁴ Section 10(4) of the 1979 Act.

⁹⁵ Section 11 of the 1979 Act.

⁹⁶ Section 11(1) of the 1979 Act. This means of enforcement was similar to the one in the 1955 Act. See section 3 of the 1955 Act.

⁹⁷ In terms of section 13(1) (a) of the 1979 Act, the minister could order the Board to undertake negotiations with the concerned parties. Similarly, he also wields the power to revoke any agreement or arrangement reached by the Board if he deems it not to be in the public interest (section 14 (1) (c)). Alternatively, he could confirm such agreement or arrangement with or without modification if he deems it to be in the public interest. See Kemp and Sutherland (2009) (note 4 above) 3-37.

⁹⁸ Kemp and Sutherland (2009) (note 4 above) 3-39. See also Naude (1986) (note 4 above) 77.

government's *White Paper on Reconstruction and Development* of 1994, the macroeconomic blue print the *Growth, Employment and Redistribution* (GEAR) of 1996 and the *Proposed Guidelines for Competition Policy* of 1997.

5.2.3.1 The ANC's *Reconstruction and Development Programme* (RDP)

The ANC's 1994 socio-economic policy framework was contained in the party's policy document, the *Reconstruction and Development Programme* (RDP).⁹⁹ The RDP played a very crucial role in directing competition policy in post-1994 South Africa. In particular, the document singled out 'excessive concentration of economic power' as a major contributor to the socio-economic challenges that the country was facing.¹⁰⁰ This concentration of economic power was a characteristic of the economy where a small number of large conglomerates dominated economic activity through systematic control of a network of subsidiaries.¹⁰¹ The document pointed to the existence of monopolies as a contributory factor to the 'blatant anti-competitive tendencies' that were detrimental to the country's socio-economic environment.¹⁰² The detrimental effects of the latter were highlighted as including predatory pricing due to abuse of dominant positions and subsequent lack of effective regulation.¹⁰³

The idea of a more strict competition regime was considered as a realistic solution to the problems associated with a highly concentrated economy and the weaknesses inherent in the regulatory system. The document pointed to the numerous regulations that were put in place by the apartheid regime as repressive and hence created entry barriers for small to medium enterprises.¹⁰⁴ This situation was aggravated by the dominant role played by large conglomerates within the mining sector. There was thus a need to introduce measures to

⁹⁹ The African National Congress *Reconstruction and Development Programme* (RDP) (1994). This policy document spelt out the party's major economic programmers aimed at addressing the serious socio-economic problems resulting from numerous apartheid policies. See Mandela NR (1994) *Preface: The Reconstruction and Development Programme* (1994), available at <http://www.anc.org.za/show.php?id=235>, (accessed 21 March 2011).

¹⁰⁰ *Reconstruction and Development Programme* (1994) par. 4.1.5.

¹⁰¹ Ibid.

¹⁰² *Reconstruction and Development Programme* (RDP) (1994) par 4.1.5.

¹⁰³ *Reconstruction and Development Programme* (RDP) (1994) par 4.1.5.

¹⁰⁴ Ibid, par.4.1.6.

promote entrance into these previously protected sectors including a strict competition regime.¹⁰⁵

Critically, the document proposed a strict competition law to address problems associated with economic concentration and interlocking directorships that promoted concentration of economic power and control.¹⁰⁶ The legislation was also to deal with anti-competitive practices, amongst them market domination and its abuse.¹⁰⁷ The need to review the existing regulatory institutions to align them with the new policies was also stressed.¹⁰⁸ The document thus advocated for more effective legislative and institutional measures to regulate competition matters in a bid to deal with socio-economic challenges flowing from a highly concentrated but loosely regulated economy as well as promoting a more competitive and dynamic business environment.¹⁰⁹

The RDP also dealt with various aspects of public interest. The envisaged programmes aimed at promoting economic growth in order to benefit the impoverished majority.¹¹⁰ Employees' rights were highlighted as deserving attention.¹¹¹ Affirmative action was also included in the envisaged programmes in order to address socio-economic disparities.¹¹² Finally, the document made reference to the need to promote and develop small to medium sized business enterprises.¹¹³ Although these aspects were not expressly provided for as competition matters, it is submitted that the fact that they feature regularly in the policy document largely confirms their importance to the ANC and hence explains to an extent their continued influence on the current competition system.

5.2.3.2 The White Paper on Reconstruction and Development of 1994

In November 1994, the national legislative assembly tabled a policy document on the government's transformation strategy. The *White Paper on Reconstruction and*

¹⁰⁵ Ibid, par 4.5.1.8.

¹⁰⁶ Ibid, par 4.4.6.2. See also Legh (2002) (note 69 above) 82-83.

¹⁰⁷ *Reconstruction and Development Programme (RDP) (1994)* par 4.4.6.2.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. See also OECD (2003) (note 31 above) 15.

¹¹⁰ *Reconstruction and Development Programme (RDP) (1994)* pars 1.4.12 -1.4.13.

¹¹¹ Ibid, par 1.4.14.

¹¹² Ibid, par 4.8.13.

¹¹³ *Reconstruction and Development Programme (RDP) (1994)* par 1.2.3.

*Development*¹¹⁴ was adopted as the official government's policy document and published in the Government Gazette on 23 November 1994.¹¹⁵ This policy document which became the official government's transformation strategy mirrored the ANC's *RDP* position.¹¹⁶ Importantly, the policy statement provided a detailed proposal on competition policy.¹¹⁷ The policy document proposed a strict and effective competition system that would be able to deal with the ills of the erstwhile regime and address the numerous shortcomings of previous legislative and other measures.¹¹⁸

It is submitted that the public interest dimension of the envisaged competition policy was apparent from the policy document. It was stated that competition policy was to be used to promote broader economic participation by efficient small-sized business entities, enhanced competitiveness of domestic producers on the regional and international markets, protect employees' rights from undesirable corporate practices and finally protecting consumers from exploitative business practices.¹¹⁹

5.2.3.3 *The Growth, Employment and Redistribution Strategy (GEAR) of 1996*

The government's redistribution and development programme was expanded by the macro-economic strategy in 1996. This macro-economic strategy was contained in the Department of Finance's *Growth, Employment and Redistribution: A Macroeconomic Strategy*.¹²⁰ GEAR, which refined the macroeconomic components of the 1994 *Reconstruction and Development Programme*, aimed at enhancing economic growth through strategies that would promote equitable income redistribution through job creation.¹²¹ The strategy targeted various economic policies including those related to trade, industrial and small to medium sized

¹¹⁴ South Africa *White Paper on Reconstruction and Development Government* (1994) Notice 1954 in *Government Gazette* 16085 of 23 November 1994 (herein after 'the *White Paper on Reconstruction and Development*.')

¹¹⁵ Government Notice 1954 of 1994 in *Government Gazette* 16085 of 23 November 1994.

¹¹⁶ Kemp and Sutherland (2009) (note 4 above) 3-39.

¹¹⁷ See *White Paper on Reconstruction and Development* (1994) par 3.8.

¹¹⁸ *Ibid*, pars 3.8.1, 3.8.2 and 3.8.3. The document stressed that competition policy was to be aimed mainly at promoting broader economic participation through removing entry barriers.

¹¹⁹ *Ibid*.

¹²⁰ South Africa, Department of Finance *Growth, Employment and Redistribution: A Macroeconomic Strategy* (1994) (herein after 'GEAR'.)

¹²¹ *Ibid*, par 1.2.

enterprises.¹²² GEAR stressed the need for a competitive economy in order to promote these various strategies and achieve the growth and redistribution objective.¹²³ A review of the then existing competition policy with a view of improving it was acknowledged as an important component in achieving economic growth and employment creation necessary for income redistribution.¹²⁴ The strategy thus gave a further impetus to the need for effective competition policy that would promote economic growth and job creation. However, it is submitted that GEAR was too generalised and lacked real substance upon which an effective competition system was to be founded. Nonetheless, its emphasis on redistribution through competition promotion can be said to have influenced the current system's public interest dimension.

5.2.3.4 *The Proposed Guidelines for Competition Policy of 1998*

The ANC's RDP and the Department of Finance's GEAR both set out a general competition policy framework thereby establishing a foundation upon which to build an effective competition policy.¹²⁵ The process of implementing these policy frameworks was completed by the Department of Trade and Industry's three year research and consultative and engagement project starting in 1994.¹²⁶ This project, which built upon several government policy documents, was aimed at developing an effective and suitable competition policy framework for South Africa.¹²⁷ The project culminated in a set of detailed guidelines released in November 1997, the *Proposed Guidelines for Competition Policy*.

¹²² Ibid, par 5.

¹²³ Ibid, par 1.1. See also Kemp and Sutherland (2009) (note 4 above) 3-40.

¹²⁴ Ibid.

¹²⁵ South Africa, Department of Trade and Industry *Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development* (27 November 1997) (herein after the 'Proposed Guidelines for Competition Policy.') par 2.1. These guidelines were tabled by the Minister of Trade and Industry at a Trade and Policy Session on 27 November 1997. See the National Economic Development and Labour Council (NEDLAC) *Report on Competition Policy* (4 May 1998) (Herein after 'the Nedlac Report on Competition Policy.') par 2.1.

¹²⁶ *Proposed Guidelines for Competition Policy* (1997) par 1.1.2. The guidelines were a result of widespread research and consultation involving several stakeholders.

¹²⁷ OECD (2003) (note 31 above) 16.

The guidelines encompassed fundamental principles underpinning an effective competition policy.¹²⁸ These principles were meant to provide legislative guidelines for the formulation of appropriate legislation that would deal with South Africa's unique situation.¹²⁹ As such, the concept of public interest within the proposed guidelines was given prominence. It was proposed that the contemplated legislation must clearly define this concept in order to achieve the desired competitive and developmental objective.¹³⁰ It was further proposed that public interest was to be defined in terms of both competitive and developmental aspects of competition policy.¹³¹

The need for competition policy that would enhance competitiveness through increasing production and distribution efficiency both on the domestic international markets was emphasised.¹³² Furthermore, there was a need for ensuring that competition policy performs a complementary rather than a contradictory function to other government policies.¹³³ Thus competition policy became an integral part of the country's wider policy framework.¹³⁴ The latter is crucial in understanding and appreciating the current status of public interest considerations within the broader-context of competition policy in South Africa and merger regulation in particular.

An important feature of the guidelines is that they proposed a broad-based competition regime whose overriding objectives envisaged not only the traditional competition issues but also other policy considerations.¹³⁵ Although these policy considerations necessitate a rather broad interpretation of the public interest concept, it was stressed that the notion of competition policy as devised for achieving national policy goals, requires complementarity and consistency.¹³⁶ It is submitted that this observation can mean any of the following: firstly, that the law must clearly spell out public interest provisions and secondly, in considering mergers raising public interest concerns, the authorities must strive to ensure that

¹²⁸ *Proposed Guidelines for Competition Policy* (1997) par 2.4. For details of these guidelines see pars 2.4.1 to 2.4.14.

¹²⁹ *Ibid*, par 2.4.

¹³⁰ *Ibid*, par 2.4.1, 2.4.2 and 2.4.3. See also OECD (2003) (note 31 above) 14.

¹³¹ *Proposed Guidelines for Competition Policy* (1997) pars 1.3, 1.3.1, 1.3.2 and 1.3.3.

¹³² *Ibid*, pars 1.3.2 and 2.4.2.

¹³³ *Ibid*, pars 1.3.3 and 2.4.3.

¹³⁴ *Ibid*, par 2.4.4.

¹³⁵ *Proposed Guidelines for Competition Policy* (1997) par 1.1.3.

¹³⁶ *Ibid*, par 1.2.3.

the outcome is not detrimental to other national policy considerations such as enhancing competitiveness through increased efficiency and promotion of entrepreneurial activities. The practicability or lack thereof of this balancing exercise will be explored in later parts of this chapter. Suffice to state that the guidelines proposed a system that must take into account both the competition and non-competition factors.

Finally, the Guidelines highlighted the many shortcomings of the previous regulatory mechanisms¹³⁷ and proposed new comprehensive and more effective legislation and regulatory institutions.¹³⁸ The intended new legislation had to deal with any conduct that amounted to an anti-competitive practice, abuse of dominant market positions and mergers which were adjudged not to be in the public interest and ownership concentration that resulted in excessive control of economic activities.¹³⁹ Importantly, it had to provide for a clear public interest concept as well as effective enforcement mechanisms and regulatory institutions.¹⁴⁰

The publication of the *Proposed Guidelines for Competition Policy* in 1997 was aimed at stimulating public debate leading to the formulation of new comprehensive competition legislation in South Africa.¹⁴¹ The guidelines thus assisted in drawing various policy positions into a working agenda towards a new legislation.¹⁴² The public interest debate was central to the NEDLAC process following the publication of a draft competition law.¹⁴³ This

¹³⁷ For an in-depth assessment of the flaws, see *Proposed Guidelines for Competition Policy* (1997) Chapter 3 in particular paras 3.3 and 3.4. See also OECD (2003) (note 31 above) 16.

¹³⁸ *Proposed Guidelines for Competition Policy* (1997) pars 1.2.4 and 10.2.1.2.

¹³⁹ *Ibid*, pars 2.4.5, 8.2.1-8.2.3.

¹⁴⁰ See *Proposed Guidelines for Competition Policy* (1997) pars 2.4. and Chapter 8 in particular par 8.2, Chapter 9, par 9.2. OECD (2003) (note 31 above) 16.

¹⁴¹ *Proposed Guidelines for Competition Policy* (1997) par 2.2.6

¹⁴² *Proposed Guidelines for Competition Policy* (1997) par 2.2.6.

¹⁴³ The National Economic Development and Labour Council (NEDLAC) is a statutory body established in terms of the National Economic Development and Labour Council Act 35 of 1994 (herein after 'the NEDLAC Act.') NEDLAC is a forum whereby government, labour, business and community organisations interact with a view of solving problems and negotiate on economic, labour and developmental issues and any related challenges facing South Africa. The NEDLAC process was thus an attempt to iron out some policy differences between these players relating to the proposed competition policy and legislation. See *NEDLAC Report on Competition Policy* (1998) par 2.3.

process discussed and debated the contents of the Draft Competition Bill which by then, had been simultaneously submitted to Cabinet.¹⁴⁴

The NEDLAC report dealt with several aspects of the draft legislation including the substantive, procedural and institutional matters.¹⁴⁵ Importantly, it reaffirmed the broad-based objectives of the proposed legislation as being the promotion of competition in order to achieve both economic and social goals.¹⁴⁶ The influence of special interests within the current competition system was apparent during this process. Labour pushed for the exclusion from the ambit of competition law of certain labour practices that were governed by labour statutes.¹⁴⁷ Business also campaigned for clear rules that would protect its economic interests.¹⁴⁸

One of the areas that received wide attention related to the procedural aspects regarding reviewing of mergers on public interest grounds. The government had proposed that the Minister of Trade and Industry have the ultimate jurisdiction over applications to review merger decisions of the competition authorities on public interest grounds.¹⁴⁹ However, business rejected this proposal arguing that entrusting such powers upon the Minister would result in an undesirable dichotomy of principle and institution.¹⁵⁰ Labour supported

¹⁴⁴ NEDLAC *Report on Competition Policy* (1998) par 2.8.

¹⁴⁵ NEDLAC *Report on Competition Policy* (1998) paras 3.1 (overriding objectives of proposed competition policy); 3.2.1 (restrictive practices); 3.2.2 (horizontal restrictive practices); 3.2.3 (vertical restrictive practices); 3.2.5 (abuse of dominance); 3.2.7 (mergers); 3.4 (right to appeal) and 4(a discussion on some procedural aspects).

¹⁴⁶ NEDLAC *Report on Competition Policy* (1998) par 3.1.

¹⁴⁷ NEDLAC *Report on Competition Policy* (1998) par 3.5. These practices included collective bargaining agreements recognised under section 23 of the Labour Relations Act 66 of 1995 and collective agreements in terms of section 213 of the same law. These exclusions have found their way into the current competition legislation. See section 3 of the Competition Act 89 of 1998.

¹⁴⁸ *Ibid*, par 4.1.2.

¹⁴⁹ NEDLAC *Report on Competition Policy* (1998) par 4.1.1. The grounds for such review were proposed as follows;

- (i) The effect of the merger on a particular industrial sector or region;
- (ii) The effects of the proposed merger on employment;
- (iii) The effects of the proposed merger on the ability of small business or firms owned by previously disadvantaged persons to become competitive; and
- (iv) Domestic industries' ability to compete in regional and international markets.

¹⁵⁰ *Ibid*, par 4.1.2.

government's proposal with some modifications.¹⁵¹ These modifications sought to have the Minister's powers limited to initiating the process of public interest review of merger decisions only on grounds consistent with national government's industrial and developmental policies.¹⁵² With respect to employment issues, labour proposed that government's proposal be modified so as to focus expressly on minimising and avoiding job losses.¹⁵³ Labour also proposed mechanisms to effectively involve employees or trade unions to participate in the merger proceedings including notifying them of any proposed merger.¹⁵⁴ These issues have found their way into the current legislation albeit in different forms. The Minister's proposed powers never saw the light of the day.

The final step towards the formulation of the existing competition system in South Africa was the publication of the *Competition Bill* in 1998.¹⁵⁵ The basic principles of competition policy that were envisaged by the Guidelines were reduced to a legislative form by the Bill.¹⁵⁶ The proposed legislation was founded on the need to address the inadequacy of the previous legislation aimed at regulating economic concentration and competition matters in South Africa.¹⁵⁷ Except for a few instances which are not especially relevant to this thesis, the fundamental provisions of the Bill did not differ from the current legislation. Consequently, the Bill will not be discussed as it would only amount to unnecessary duplication.

5.2.3.5 Some remarks

Various policy documents embraced effective competition as an essential requirement for achieving the country's policy objectives. These documents influenced the development of competition law in South Africa as they laid the foundation for the formulation of legal rules and principles. The development of the current competition legislation must thus be understood as a component of a wider policy agenda embracing both competition and developmental objectives. This implies that the law was formulated with both economic and social objectives in mind. This scenario lays the foundation for the inclusion of non-

¹⁵¹ Ibid, par 4.1.3.

¹⁵² Ibid, par 4.1.3.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ *Competition Bill*, 1998.

¹⁵⁶ Kemp and Sutherland (2009) (note 4 above) 3-43.

¹⁵⁷ See *Explanatory Memorandum; Competition Bill* of 1998.

competition factors as part of the broader-concept of public interest in merger assessment procedures. It raises the question as to what extent these public interest considerations have impacted on the current merger assessment process in South Africa and whether they have had any influence on the development of the jurisdiction's merger regime.

The following parts of the chapter will explore this question and related issues. Accordingly, the immediate section will present a brief overview of salient aspects relating to merger regulation in South Africa as provided for by the Competition Act and regulations made under it. Focus will then turn to an analysis of two critical elements of the merger regulation provisions, namely, the public interest provisions and the interpretation and application of the failing firm doctrine. The ultimate objective thereof is to draw lessons for Zimbabwe where similar provisions exist but where there is little or no jurisprudential development.

5.3 Merger regulation under the Competition Act of 1998

The Competition Act of 1998 is the current primary merger statute in South Africa.¹⁵⁸ Merger regulation is an integral component of the entire competition system as it is crucial to the attainment of the set objectives of the legislation as well as promoting the overall objectives of the competition policy in South Africa.¹⁵⁹ These overriding objectives embraces both economic and social goals¹⁶⁰ hence merger regulation provisions take note of the same. It is thus no surprise that non-competition issues in the form of public interest considerations are a prominent feature of the merger regulation process. These features will be explored below.

¹⁵⁸ There are other statutes that regulate various aspects of mergers relating to specified sectors. Notably the Banks Act 94 of 1996 regulates banks mergers; the Long-Term Insurance Act 52 of 1998 regulates mergers involving insurance companies. These statutes establish sectorial regulators who perform a complimentary role to the competition authorities. See section 82(1) of the Competition Act acknowledges the need for competition authorities to work with these sectorial regulators. See Competition Commission of South Africa *Media Release 30 of 2001 New African Investment Ltd/Kagiso Media Ltd*. See also note 3 above.

¹⁵⁹ See Lewis (1999)(note 14 above) 2.

¹⁶⁰ Long Title to the Competition Act 89 of 1998; Preamble to the Competition Act 89 of 1998 and Section 2 of the Competition Act 89 of 1998; *Explanatory Memorandum: Competition Bill*, 2008. See further Kemp and Sutherland (2009) (note 4 above) 4-3 and Hatzenberg T 'Competition Policy in SADC' (2002) *Trade and Industrial Policy Strategies Annual Forum*, Glenburn Lodge, Muldersdrift, available at <http://www.tips.org.za/files/594.pdf>, (accessed 23 March 2012).

5.3.1 General provisions relating to merger regulation

The Competition Act requires that *any* transaction that qualifies as a merger as defined and meet the set criteria must be notified before it is implemented.¹⁶¹ This provision is central to both the substantive and procedural aspects of merger regulation in South Africa. Firstly, a transaction must be a merger as defined for it to be notified. Secondly if it is a merger and meet the set criteria then parties thereto need to notify the competition authorities before implementing it. The system thus follows a compulsory merger notification procedure.¹⁶² Failure to comply with this notification attracts serious sanctions.¹⁶³

As indicated, corporate transactions implemented through mergers and acquisitions can be beneficial to the economy and in the process improve the social aspect of the country.¹⁶⁴ This is achieved through enhancing production and distribution efficiency, lowering prices, promoting expansion, promoting competitiveness on the market and ultimately creation of employment.¹⁶⁵ Equally, these corporate transactions can potentially have anti-competitive effects on the market that are socially undesirable. Mergers can result in monopolistic situations as a result of the acquisition of dominant market power.¹⁶⁶ Although the law's intention is not to prohibit such situations, dominant market power can be abused through

¹⁶¹ Section 12 (1) (a) defines a merger. Sections 11 (5) classifies mergers. Mergers that are classified as either intermediate or large require notification before they are implemented in terms of sections 13A (1) read with subsection (3) of the Competition Act 89 of 1998. This compulsory requirement does not apply to small mergers. Section 13(1) (a) exempts small mergers from notification in the ordinary course of events unless the parties voluntary file notification or the Commission requires them to do so. See also section 13(2) (voluntary notification of a small merger) and subsection (3) (Commission requiring small mergers to be notified under certain circumstances).

¹⁶² Lewis (1999)(note 14 above) 2.

¹⁶³ There are a variety of measures that the competition authorities can implement in cases where parties failed to comply with the notification requirement and proceed to implement a merger. These remedies are an acknowledgement that implementing a merger without approval can seriously damage the competitive structure of the market. These remedies range from interdicts, divestures to administrative fines. For the application of these measures, see decisions cited in note 16 above and on competition remedies in general see Cavanagh E 'Antitrust Remedies Revisited' (2005) 84 *Oregon Law Review* 147.

¹⁶⁴ For a detailed discussion of the benefits of corporate merger transaction, see DePamphilis D *Mergers, Acquisitions, and other restructuring activities: An Integrated Approach to Process, Tools, Cases and Solutions* (2001) 17-27.

¹⁶⁵ Ibid.

¹⁶⁶ See note 29 above.

engaging in anti-competitive practices such as price fixing and hiking, restricting output and discriminatory distribution which are socially undesirable as they cause hardships to the consumers.¹⁶⁷ Accordingly, the Act provides for mechanisms to regulate mergers in order to avoid the potential anti-competitive effects and promote the potential benefits. It is submitted that this principle forms the basis of the South African merger regime.

5.3.2 Substantive issues

The Act provides that parties to a notifiable merger must seek clearance from the competition authorities before implementation.¹⁶⁸ The question is then what constitutes a notifiable merger. This question can be answered in parts. Firstly, a transaction constitutes a notifiable merger if it meets the statutory definition. Secondly, a transaction is notifiable if it meets the prescribed categories. The first part relates to the substantive aspects of merger regulation that will be discussed here.

5.3.2.1 Defining a merger

The question whether a transaction amounts to a merger that is subject to notification depends on whether it meets the statutory definition. Section 12(1)(a) defines a merger as any transaction that results in a direct or indirect acquisition or establishment of control either directly or indirectly over the whole or part of a business of another firm by one or more firms.¹⁶⁹ The Act sets out ways in which mergers may occur.¹⁷⁰ The legislature did not intend

¹⁶⁷ The claim that mergers creates dominant firms with market power hence able to determine significant market dynamics notably the pricing and supply pattern of the market is at the centre of merger regulation. Largely explains the rationale behind regulating mergers so as to prevent unnecessary market concentrations that are socially undesirable mainly due to the negative implications on consumer welfare. See also Fox EM and Sullivan LA ‘Antitrust- Retrospective and Perspective: Where are we coming from? Where are we going?’ (1987) 62 *New York University Law Review* 936,985.

¹⁶⁸ Section 13 A (1) read with subsection (3) of the Competition Act 89 of 1998. See also discussion 3.3.1 above in particular note 155.

¹⁶⁹ Section 12(1) (a) of the Competition Act 89 of 1998. It must be appreciated that this definition is only for purposes of this statute as mergers can be defined in various ways depending on the purpose of such definition. See for instance section 1 (3) of the Companies Act 71 of 2008 defines a merger in a composite definition that also includes an amalgamation as a transaction or a series thereof, pursuant to an agreement between two or more companies which transaction culminates in either (a) the formation of one or more new entities vested with the entire assets and liabilities previously held by the merging parties immediately before the implementation of the agreement and the dissolution of the merging parties, or (b) the survival of at least one of the merging entities with or without a new company being formed. In this case the entire assets and liabilities of

this list to be exhaustive. The provision states that mergers ‘may be achieved in any manner including’ those set out.¹⁷¹ This is an acknowledgement of the reality that in a consistently changing business environment, mergers can be a result from various other means besides those expressly stated by the statute.

The definition of a merger requires an acquisition or establishment of control over the whole or part of a business of another.¹⁷² The Act simply refers to the control being acquired or established in respect of ‘the business of another firm.’ It is thus not a requirement that the business being acquired must be that of a competitor, supplier or customer.¹⁷³ The definition applies to all the known types of mergers, that is, horizontal, vertical and conglomerate mergers.¹⁷⁴

The definition makes it clear that one or more firms can acquire or establish control over the business of another. Additionally, control can be established or acquired ‘over the whole or part of the business of another.’ This means that first and foremost there must be a business.¹⁷⁵ The definition is fulfilled by either an acquisition of the entire or part of the

the merging parties will be held by surviving entity. See for an in-depth discussion of the definition of mergers and acquisition for purposes of corporate law in South Africa, Davids E, Norwitz T and Yuill D ‘A Microscopic Analysis of the New Merger and Amalgamation Provision in the new Companies Act 71 of 2008’ (2008) *Modern Company Law for a Competitive South African Economy* 337,341-343; Mashabane B ‘Mergers and Takeovers under the Companies Act’ (2011) *De Rebus* (September 2011) 30-31.

¹⁷⁰ Section 12(1)(b) (i) and (ii) of the Competition Act 89 of 1998. These means includes purchase or lease of shares, purchase of interest, asset purchase, amalgamations or other corporate combinations.

¹⁷¹ Section 12(1) (b) of the Competition Act 89 of 1998.

¹⁷² Section 12(1)(a).

¹⁷³Section 12(1) (a) as amended by the Competition Second Amendment Act 39 of 2009. This amendment deleted the phrase ‘competitor, supplier or customer or another person’ and replaced it with ‘another firm.’ Cf. Section 2(1) of Zimbabwe Competition Act 7 of 1998 as amended by section 2 (a) of the Amendment Act 29 of 2001 which still includes such phrases.

¹⁷⁴ A horizontal merger occurs between parties in the same line of business, that is, direct competitors. A vertical merger involves parties with a supplier-customer relationship and a conglomerate merger denotes a situation whereby the parties have no economic relationship and are in different lines of businesses. See generally Von Kalinowski J ‘Business Organizations’ in *Antitrust Laws and Trade Regulations* (1979) section 19.02(1) (vertical merger) and *FTC v Procter and Gamble Co.*, 386 US 568, 577 (1967) (conglomerate merger).

¹⁷⁵ The Act does not define a business. This deliberate omission by the legislature is meant to give the statute wide application to as many transactions as possible as long as they exhibit some of the elements of the definition, notably, meet the control aspect thereof. However, the Tribunal in *Competition Commission v Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group (RAG)* (note 16 above)par 24 cautioned that ‘too

business. The concept of ‘business’ is not limited to the core activities of the target firm but includes any part thereof.¹⁷⁶

The legislature acknowledges the fact that a business is divisible and as such a merger can involve not the entire business but a part thereof hence the phrase ‘part of a business of another.’¹⁷⁷ Although the law does not intend transactions that involve mere sales of assets to be notified, the same can fall within the statutory ambit if such an acquisition entails the acquisition of certain rights that confers the acquiring party control over the business of the target.¹⁷⁸ A transaction involving the acquisition of an asset can thus only constitute a merger for purpose of the statute if it results in the acquisition of part of an entire or part of business capable of conferring control over the acquired firm.¹⁷⁹ The concept of control thus plays a crucial role in determining whether a transaction constitutes a merger for the purposes of the Act and for merger regulation.¹⁸⁰

A merger only occurs when control is established or acquired either directly or indirectly over the business of another firm. The provision makes no attempt to qualify control but merely

wide an interpretation of the notion of business would result in too many transactions being notified and at the same time a too narrow construction would create a regulatory avoidance.’ See also Brassy et al (2002)(note 61 above) 236.

¹⁷⁶ See *Foodcorp (Pty) Ltd/ Uniliver SA’s Boksburg Oil Mill (an asset of Uniliver South Africa) 56/LM/Aug02*. The merger involved an acquisition by Foodcorp of Boksburg oil mill, an asset owned by Uniliver South Africa. Although the oil mill was no longer part of Uniliver’s core business, it still forms part of its business hence the transaction was a notifiable merger for purposes of the Act. It is not material whether the part of the business being acquired is core or not. See *Two Rivers Platinum Ltd/ Assmong Ltd 54/LM/Sep01* where Two Rivers acquired certain mining rights of Assmong in PGM. Assmong did not mine PGM. The Tribunal held that PGM still constitute part of Assmong’s business hence its acquisition amounted to an acquisition of part of its business as contemplated under the statute.

¹⁷⁷ *Competition Commission v Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group (RAG)* (note 16 above) par 53.

¹⁷⁸ *Competition Commission v Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group (RAG)* (note 16 above) par 22. See also the approach in the European Union in *Case IV/M.890 Blokker v Toys ‘R’ Us* OJ L326/1 par 13 and generally Hovenkamp H *Federal Antitrust Policy; The Law of Competition and its Practice: Hornbook Series Student Edition* (3ed) (2005) 498.

¹⁷⁹ *Competition Commission v Edgars Consolidated Stores Ltd and Retail Apparel Group (RAG)* (note 16 above) par 75.

¹⁸⁰ See 5.3.2.1 (a) below. For significance of control in merger regulation, see generally the European Commission decision in *Blokker/Toys ‘R’ Us* (note 178 above) L326/1 par 13.

refers to ‘control.’¹⁸¹ It may thus be asked what constitutes ‘control’? Section 12(2) sets out forms of control, namely when the transaction involves the following;

- (a) beneficially owns more than half of the issued share capital of the firm;
- (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority through a controlled entity of that person;
- (c) is able to appoint or veto the appointment of a majority of directors of the firm;
- (d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act no. 61 of 1973);¹⁸²
- (e) in the case of a *firm* that 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) in the case of a close corporation, owns the majority of members’ *interest* or controls directly or has the right to control the majority of members’ votes in the close corporation; or
- (g) has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).¹⁸³

This list merely illustrates the situations where a party is deemed to have acquired control over the business of another firm. The list thus denotes either the acquisition or establishment of formal or functional control.¹⁸⁴ Formal control in the ordinary sense of the word encompasses all forms of control in which a person establishes or acquires a beneficial interest over another firm.¹⁸⁵ Functional control relates to the ability to influence decision making in another firm.¹⁸⁶ Subsection 12 (2) (g) provides that a person is in control of a firm

¹⁸¹ Cf. section 2 (1) Zimbabwean Competition Act 7 of 1996 where reference is made to acquisition of a ‘controlling interest.’ The Competition Appeals Court in *Distillers Corporation (South Africa) Ltd and Stellenbosch Farmers Winery Group Limited v Blumer (SA) (Proprietary) Ltd and Seagram Africa (Proprietary) Ltd* 08/CAC/May01 (herein after ‘*Distillers Corporation (SA/ Stellenbosch Farmers’ Winery)*’) par 19 stated that section 12 (2) merely constitutes circumstances of control and does not define it .

¹⁸² The definition of a subsidiary in relation to a company is now contained in section 3 of the new Companies Act 71 of 2008. It follows that section 12 (2) (d) will have to be read so as to make reference to section 3 of the new Companies Act.

¹⁸³ Section 12 (2).

¹⁸⁴ OECD (2003) (note 31 above) 28.

¹⁸⁵ Formal control is illustrated by sections 12(2) (a), (d) and (e) of the Competition Act 89 of 1998.

¹⁸⁶ The ability to influence decision making involves the ability to influence the voting pattern of the target firm, that is, to appoint or cause the appointment of the majority of company directors in case of a company or

if that person has the ability to materially influence the policy of the firm. This is a catch-all provision designed to ensure that the Act applies to any form of control that might be captured under those listed in subsections 12(2)(a) to (f).¹⁸⁷

The determination of whether a person has acquired or established control is a matter of fact.¹⁸⁸ When making this determination, the competition authorities have adopted an expansive approach that holistically and purposively interprets the Act in general and the merger provision in particular. This approach was adopted by the Competition Appeals Court in the *Distillers Corporation (South Africa) Ltd and another-merger*¹⁸⁹ in upholding the decision of the Tribunal.¹⁹⁰

(a) The *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* decision and the concept of control

In this case the parties concluded an agreement in terms of which Distillers was to acquire the entire business of Stellenbosch Farmers Winery (SFW).¹⁹¹ Both Distillers and SFW had common shareholding in that 90 per cent of their shares capital was held by Rembrandt, KWV and SAB with each holding 30 per cent.¹⁹² The remaining 10 per cent was held by the public.¹⁹³

The Competition Commission had found that the transaction in terms of which Distillers was to acquire the entire business of SFW was not a merger as defined by the Act.¹⁹⁴ The parties

trustees in case of a trust, or member's interest in case of a close corporation and to vote such appointments. These are illustrated by sections 12(2) (b), (c), (d), (e) and (f) of the Competition Act 89 of 1998.

¹⁸⁷ *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above) par 19 .See also Neuhoff M, Govender M, Versfeld M and Dingley D A *Practical Guide to the South African Competition Act* (2006) 207.

¹⁸⁸ In the *Edcon* decision (note 16 above) par 68 the Tribunal noted that the question as to whether acquisition of an asset constitutes acquisition of a business or part thereof of another firm for purpose of the Act is a matter of fact. Similarly, it can be said that since the law requires acquisition of a business or part thereof to enable the acquiring firm to exercise control over the target, such a determination is also a matter of fact. See also OECD (2003) (note 29 above) 28.

¹⁸⁹ *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above).

¹⁹⁰ *Blumer/Seagram Africa v Distillers Corporation and Stellenbosch Farmers Winery* (note 16 above) 94.

¹⁹¹ *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above) 1.

¹⁹² *Ibid*, 2.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*, 3.

followed this approach and implemented the transaction.¹⁹⁵ However, this approach was disputed by the merging parties' two competitors, Bulmer and Seagram, before the Tribunal.¹⁹⁶ The Tribunal held that the transaction constituted a merger as defined and ordered that the merging parties notify the merger within 10 days of the order.¹⁹⁷ Distillers and SFW then appealed the Tribunal's decision to the Competition Appeal Court.

The issue before the Competition Appeal Court was whether a transaction that involves internal corporate restructuring amounted to a merger that requires notification as defined by section 12(1) of the Act.¹⁹⁸ The Appellants argued that such transactions were not notifiable as they merely constituted internal restructuring without any ultimate change of control.¹⁹⁹ They contended that the Tribunal had erred in finding that such a transaction constituted a merger requiring notification.²⁰⁰ The crux of their argument was that the intention of the legislature was not to expand the burden of notification to parties engaged in internal group restructurings where there was no change in ultimate control.²⁰¹ They vigorously argued for what they called an 'objective test of change of ultimate control' that can only be achieved by a narrow construction of the provision.²⁰²

In dismissing the Appellants' arguments, Davis JP noted that the purpose of the merger provisions was to ensure that the authorities are able to carefully scrutinise any transaction that might impact on the competitive structure of the market in line with the purpose of the

¹⁹⁵ *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above) 3.

¹⁹⁶ Blumer and Seagram applied to the Tribunal contending that the transaction was a merger as defined by the statute hence required notification. See *Blumer/Seagram Africa v Distillers Corporation and Stellenbosch Farmers Winery* (note 16 above) 25; *Distillers Corporation (SA) /Stellenbosch Famers' Winery* (note 181 above) 3.

¹⁹⁷ *Blumer/Seagram Africa v Distillers Corporation and Stellenbosch Farmers Winery* (note 16 above) 25.

¹⁹⁸ *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above) 10.

¹⁹⁹ *Ibid*, 13-14.

²⁰⁰ *Ibid*, 14.

²⁰¹ At 14. The Counsel for the Appellants contended that the tribunal had erred in adopting an overly literistic interpretation to section 12 (1) that disregarded the fact that there was no change of ultimate control hence extending the ambit of the provision to cases not intended by the legislature.

²⁰² See arguments by Kuper, Counsel for the Appellants in *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181above) 15

Act.²⁰³ It was held that a wider interpretation of the provision was necessary to give effect not only to the merger regulation provisions, but also to the statute as a whole.²⁰⁴ A wider construction was thus found to be suitable in the circumstances in order to ensure that ‘competition authorities examine the widest range of potential merger transactions...’²⁰⁵ Accordingly, even where no change in ultimate control results from the merger, it held that an acquisition can still constitute a merger as contemplated by the statutory definition.²⁰⁶ Internal group restructurings are not expressly excluded from the application of the Act.²⁰⁷

The decision in *Distillers Corporation /Stellenbosch Famers’ Winery* has been subjected to criticism. It has been argued that the bid to bring internal group restructurings under the merger provisions extends the notification burden to parties involved in such transactions.²⁰⁸ However, it is important to treat such criticism as well as the decision itself with some caution. Bearing in mind that the fundamental rule in judicial decision-making is to treat each case upon its merit,²⁰⁹ adopting a blanket approach might result in some absurd outcomes that are not only undesired but also defeat the very intention of the legislature. It is thus submitted that *Distillers* needs to be treated on its own merits. Equally, there is nothing amiss with the Appeal Court’s approach as it promotes the purpose of the merger provisions and the Act as a whole, that is, the promotion and maintenance of competition. This can be achieved through, *inter alia*, casting the regulatory net to capture and scrutinise as many transactions as can be feasibly possible and necessary. A narrow construction will only leave the system at the mercy of transactions that, though harmful to competition, will simply by-pass the regulatory net undetected.

²⁰³ *Distillers Corporation (SA)/ Stellenbosch Famers’ Winery* (note 181 above)24 and 25.

²⁰⁴ *Ibid*, 24.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*, 25.

²⁰⁷ *Ibid*.

²⁰⁸ Legh R and Dini T ‘South Africa Merger Control’ (2011) in Davies J (ed.,) *Merger Control: The International regulation of mergers and joint ventures in 65 jurisdictions worldwide* 347,348.

²⁰⁹ See *Schuman Sasol/ Price’s Daelite* (note 22 above) par. 59 in relation to the application of the failing firm doctrine in South Africa where it was noted that the failing firm is ‘ a term of art’ hence each case will be determined by its facts rather than by a set criteria.

The concept of acquisition or establishment of control contemplates a change in control.²¹⁰ A transaction thus constitutes a merger for purposes of section 12(1) if it involves a change of control from joint to sole control.²¹¹ However, this change of control does not extend to a change in the quality of control.²¹² This means that a firm that already has control over another cannot acquire or establish control over that same firm (acquired firm) even where the quality of such control changes.²¹³ Change in the quality of control is irrelevant for purposes of the definition²¹⁴ as it does not have a bearing on the firm's behaviour to significantly alter competition.²¹⁵

5.3.3 Merger classification and related procedural aspects

Besides meeting the statutory definition of a merger, a transaction must be notifiable. A transaction is notifiable if it is categorised as such. The Act establishes an upper and lower threshold for notification and adjudication purposes.²¹⁶ These thresholds are based on the parties' combined annual turnover or assets in or into South Africa.²¹⁷ The classification is necessary for it impacts on fundamental procedural aspects relating to timelines for determining proposed mergers and jurisdictions of different arms of the competition authority. Accordingly, mergers are categorised as small, intermediate or large.²¹⁸

²¹⁰ See for instance, *Ethos Private Equity Fund IV/ Tsebo Outsourcing Group (Pty) Ltd* 30/LM/Jun 03 pars 25-30; *Iscor/ Saldanha Steel* (note 28 above) par 39.

²¹¹ Ibid.

²¹² Kemp and Sutherland (2009) (note 4 above) 8-34.

²¹³ In *Ethos Private Equity Fund* (note 210 above) par 36-37 it was held that 'change in control is a once off affair.'

²¹⁴ See *Caxton and CTP Publishers & Printers Ltd* (note 16 above) pars. 44-45.

²¹⁵ See *Distillers Corporation (SA)/ Stellenbosch Famers' Winery* (note 181 above) 25. However, this construction that change in the quality of control must not be considered as relevant has been criticized as potentially limiting the application of the provision. See Kemp and Sutherland (2009) (note 4 above) 8-35.

²¹⁶ Section 11(1) (a) of the Competition Act 89 of 1998. See Kemp and Sutherland (2009) (note 4 above) 9-12.

²¹⁷ Section 11(1) (a) of the Competition Act 89 of 1998. These thresholds are published by the Minister in consultation with the Competition Commission and the Competition Tribunal in terms of section 11 (1) (a). Currently, these thresholds are determined under the Department of Trade and Industry (DTI) *Determination of Merger Thresholds and Methods of Calculation* General Notice 216/2009 in Government Gazette 31957 of 6 March 2009 ('the *Threshold Regulation*.') The Threshold Regulation came into force on 1 April 2009 and replaced those established under the 2001 regulations.

²¹⁸ Section 11(5) of the Competition Act 89 of 1998.

A small merger is defined as a transaction or proposed transaction valued at or below the lower threshold.²¹⁹ Parties to a small merger are ordinarily not obliged to file a notification.²²⁰ They may implement it without approval from the Competition Commission.²²¹ However, there are exceptions to this rule. The Competition Commission may give notice requiring the parties²²² to a small merger to file a notification if it considers that the merger might substantially prevent or lessen competition and cannot be justified on public interest grounds.²²³ The Commission can also require notification of a small merger if the parties thereto are subject to investigation orders for prohibited practices.²²⁴

If a small merger is properly notified, the Competition Commission must consider it, which entails making an evaluation and adjudication thereof by unconditionally approving it, or approving it with conditions or prohibiting it.²²⁵ This must be done within 20 business days

²¹⁹ Section 11(5) (a) read with subsection 11(1) (a) of the Competition Act 89 of 1998. A merger falls within this category at present if meets the values prescribed in terms of par 2 of the Threshold Regulations as follows;

Either has ; ‘2 (1) (a) the combined annual turnover in, into or from the Republic of acquiring firms and the transferred firms of valued below R 560 million; or

(b) the combined assets in the Republic of the acquiring firms and the transferred firms are valued at less than R560 million; or

(c) the annual turnover in, into or from the Republic of the acquiring firms plus the assets in the Republic of the transferred firms are valued at less than R 560 million; or

(d) the annual turnover in, into or from the Republic of the transferred firms plus the assets in the Republic of the Acquiring firms are valued at less than R 560 million

(2) Either- (a) the annual turnover in, into or from the Republic, of the transferred firms is less than R 80 million; or

(b) the asset value of the transferred firm is less than R 80 million.’ See also *Commission v Edward Snell & Co. Ltd* 112/FN/Nov 05.

²²⁰ Section 13(1)(a) of the Competition Act 89 of 1998.

²²¹ Section 13(1) (b) of the Competition Act 89 of 1998. Parties can voluntarily notify the Commission of the proposed small merger. See section 13(2).

²²² Rule 25 of Competition Commission: *Rules for the Conduct of Proceedings* also known as *Competition Commission Rules* (CCR). This notice is given on form CC9. If the parties had already implemented the small merger, the notice is sent only to the primary acquiring firm in terms of rule 25(3) of the Competition Commission Rules.

²²³ Section 13(3) (a) and (b) read with section 12A (1) and (3) of the Competition Act 89 of 1998. See *Healthbridge (Pty) Ltd/Digital Healthcare Solutions (Pty) Ltd* 41/AM/Jun02 par18.

²²⁴ Competition Commission of South Africa *General Notice 386/2009* of 17April 2009.

²²⁵ Section 13 (5) (b) of the Competition Act 89 of 1998.

of notification.²²⁶ Provision is made for a single extension of the period by up to 40 business days.²²⁷ After its determination, the Commission may issue a certificate of approval with or without conditions,²²⁸ or prohibit and declare the proposed merger prohibited.²²⁹ The Act creates a presumption that a small merger is approved if the Competition Commission fails to make a determination within the prescribed period of time.²³⁰ This presumption ensures that timelines are adhered to and is also a vindication of the fact that small mergers are normally less harmful to the goals of competition.

A merger is classified as intermediate if its threshold values are between the prescribed lower and higher levels.²³¹ A proposed intermediate merger must be notified before it is implemented.²³² The law requires both the primary acquiring and target firms to file the notification.²³³ This provision was interpreted by the Competition Appeal Court in the *Gold Fields Ltd/Harmony Gold Mining Co.Ltd*²³⁴ as imposing upon the merging parties to either an intermediate or a large merger, a statutory duty to notify the competition authorities.²³⁵

²²⁶ Ibid.

²²⁷ Section 13 (5) (a) of the Competition Act 89 of 1998 read with rule 24 of the Competition Commission Rules.

²²⁸Section 13(5) (b) (i) and (ii) of the Competition Act 89 of 1998. The conditions that may be attached to a merger are aimed at lessening the effects of the proposed transaction on competition or addressing some public interest concerns. See generally note 16 above for a discussion on remedies.

²²⁹ Section 13 (5) (b) (iii) and (iv) of the Competition Act 89 of 1998.

²³⁰ Section 13(6) of the Competition Act 89 of 1998.

²³¹ Section 11 (5) (b) of the Competition Act 89 of 1998. This means that a merger whose thresholds falls between R 560 million but not exceeding R 6.6 billion will be categorized as an intermediate merger. See par 3 of the Threshold Regulations. The lower threshold for the turnover or assets of the transferred firms in the Republic is equal to or below R 80 million whereas the higher threshold is equal to or exceeding R 190 million. In this respect, an intermediate merger will have values between R 80 million and R 190 m.

²³² Section 13 A (1) read with subsection (3) of the Competition Act 89 of 1998.

²³³ Section 13A (2) of the Competition Act 89 of 1998. However, it is accepted that requiring merging parties to file separate notifications might not be practical hence rule 27 read with rule 26(1) of the Competition Commission Rules prescribes that parties make a joint notification unless separate filings are specifically required in terms of rule 28 read with rule 26(1). The Act does not make any mention of who should pay the notification and filing fees as required by the Act. It makes sense to assume that any of the parties to the proposed transaction can make the payment in an agreement with the other.

²³⁴ *Gold Fields Ltd/ Harmony Gold Mining Co. Ltd* 43/CAC/Nov 04 (the *Gold Fields/Harmony Gold.*)

²³⁵ Ibid, par 15. However, see *Jonnic Holdings Ltd / Hosken Consolidated Investment Ltd* 65 /FN/Jul05 par 102 and Kemp and Sutherland (2009) (note 4 above) 9-13 for a criticism of this approach.

Considering that the Act defines a merger to include a proposed merger, the parties are obliged to notify the merger as soon as the transaction is proposed.²³⁶ These parties are further required to serve such notice upon any recognised trade union representing a substantial number of its employees.²³⁷ If there are no such organised labour organisations, such a notice is served upon the employees themselves or their representative.²³⁸ These provisions are one of the many influences that labour interest has had on the merger regulation procedure as part of the broader public interest objective.²³⁹

The Competition Commission must consider an intermediate merger within 20 business days of notification.²⁴⁰ This period may be extended once to 40 business days.²⁴¹ The Commission having considered the proposed transaction can either approve it with or without conditions or prohibit it.²⁴² As the case with small mergers, the merger is presumed to have been approved should the Commission fail to make such determination within the prescribed period.²⁴³

Parties to a large merger²⁴⁴ must seek regulatory approval before they implement it.²⁴⁵ The notification must be done in a prescribed manner and form and if required, be accompanied

²³⁶ *Gold Fields/Harmony Gold* (note 234 above).

²³⁷ Section 13A (2) (A) of the Competition Act 89 of 1998.

²³⁸ Section 13A (2)(b) of the Competition Act 89 of 1998. See *Comparex Holdings Ltd/ Persetel Q Data Africa (Pty) Ltd* 30/ LM/May01; *Fujitsu Siemens Computers (Holdings) BV/Siemens Services Newco (Pty) Ltd* 26/LM/Mar 06 par 35.

²³⁹ This provision can be traced to the proposals made by labour during the NEDLAC process. See NEDLAC *Report on Competition Policy* (1998) par 3.5 and note 139 above.

²⁴⁰ Section 14 (1) of the Competition Act 89 of 1998. This is similar to the small merger if required to notify the Commission in terms of section 13.

²⁴¹ Section 14 (1) (a) of the Competition Act 89 of 1998 read with rule 24 of the Competition Commission Rules.

²⁴² Section 14 (1) (b) (i), (ii) and (iii) of the Competition Act 89 of 1998.

²⁴³ Section 14 (2) of the Competition Act 89 of 1998.

²⁴⁴ Section 11(5)(c) defines a large merger as a merger or a proposed merger whose value is equal to or exceeds the higher thresholds. Since the higher threshold in respect to the merging parties' combined turnover or assets is R 6.6 billion, a merger exceeding such is a large merger. Similarly, a merger or proposed merger with a turnover or asset value of the target firms equal to or is above R 190 m in the Republic is a large merger. See par 3 of the Threshold Regulations.

by prescribed filing fees.²⁴⁶ The Competition Rules largely determine what documents and information must be included in the notification.²⁴⁷ Notification is made on a standard Competition Commission form²⁴⁸ and in particular on Merger Notice CC4 (1).²⁴⁹ Schedule 1 to the Merger Notice requires parties to provide their particulars. Schedule 2 requires a summary of the effects of the proposed merger on employment. Form CC4 (2) is a Statement of the Merger Information. This includes details of the transaction²⁵⁰ and general competition conditions of the market in which the proposing parties operates. Parties must also complete a statement of accuracy.²⁵¹ The filing must be done in terms of the Commission rules and parties must attach all documents required in terms thereof.²⁵²

Although the statute does not prescribe the level of detail required in these documents, it is clear that the level of detail required is not as complicated as in most mature jurisdictions.²⁵³

²⁴⁵ Section 13A (1) read with subsection (3) of the Competition Act 89 of 1998. Similar requirements regarding notifying registered trade unions and employees as required of intermediate mergers also apply. See section 13A (2).

²⁴⁶ Section 13A (1) of the Competition Act 89 of 1998. The basic merger notification form is set out in rule 27 of the Competition Commission Rules titled 'Joint merger Notifications.' This rule prescribes how all mergers must be notified. However, if it is required those firms file notifications separately; rule 28 prescribes when such notifications can be made. A notification for an intermediate merger must be accompanied by a filing fee of R100 000 whereas for a large merger it is R 350 000. There are no fees applicable for filing a small merger. See Competition Commission of South Africa 'Notification Fees,' available at <http://www.compcom.co.za/notification-fees/>, (accessed 26 March 2012).

²⁴⁷ Rules 26-28 of the Competition Commission Rules. Although the Act does not require voluntary notifications to take any form, rule 24(4) requires voluntary notifications of small mergers to comply with the same rules as those applicable to mandatory notifications.

²⁴⁸ Section 21 (4) (a) provides that the Minister may, through notice in the *Government Gazette*, prescribe regulations for matters relating to the functions of the Commission including forms. The Competition Commission Forms are thus made in terms of such notices.

²⁴⁹ The Merger Notice form is provided for in terms of rule 27(1) (a) of the Competition Commission Rules.

²⁵⁰ See *Anglo-American Holdings Ltd/ Kumba Resources Ltd (with Industrial Development Corporation intervening)* 46/LM/Jun02 par 30.

²⁵¹ *Anglo-American Holdings Ltd/ Kumba Resources Ltd (with Industrial Development Corporation intervening)* (note 250 above) par 30. See also Legh (2002) (note 69 above) 250-251.

²⁵² Section 21 (4) of the Competition Act.

²⁵³ See Legh & Dini (2011) (note 208 above) 350. See also Competition Commission of South Africa *Practitioners' Guide Issue 6: Complete Merger Filing Requirements*, 30 March 2010, available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Complete-filing-notice-Mch-2010.pdf>, (accessed 26 March 2012).

The Tribunal's approach shows that the authorities are flexible in this regard.²⁵⁴ However, it is imperative upon parties to provide as much information as necessary. Complete filing will not only speed-up the process but also provides the competition authorities with sufficient detail to make a decision since a reasonable merger decision is made with reference to the totality of the information presented before the competition authority.²⁵⁵

The purpose of this compulsory notification procedure is to enable the competition authorities to scrutinise every proposed transaction in order to assess the likely impact thereof on the competitive structure of the market.²⁵⁶ This innovation which forms part of most modern merger control systems²⁵⁷ is crucial to the effectiveness of the regulatory system. Prior to the introduction of the pre-merger notification regime, it was possible that many transactions that were potentially and actually harmful to competition went unchecked. The notification requirement thus not only became a useful tool in protecting the competitive structure of the market but also provides a practical solution to merger enforcement given the difficulties inherent in 'unscrambling' a merger once it has been implemented.²⁵⁸

²⁵⁴ Ibid.

²⁵⁵ See *Medicross Healthcare Group (Pty) Ltd v Commission 55/CAC/Sep05* pars.33-34. See also Legh & Dini (2011) (note 203 above) 350. In its Practitioners' Guide, the Competition Commission have also stressed the need for complete filing by advising that initial period of consideration will not commence until the merging parties have satisfied all the notification requirements. See par. 2(c) of the *Practitioners' Guide* (2010) (note 253 above).

²⁵⁶ See *Bromor Foods (Pty) Ltd/ National Brands Ltd 19/LM/Feb00* pars 35-36. The Tribunal noted that it is normally difficult to try and correct the anti-competitive effects of a merger once it has been implemented. In particular, the structural remedies might not be adequate or suitable enough to deal with such situations hence the need for a pre-merger notification. See also *Duan et Cien AG/Kolosus Holdings Ltd 10/LM/Mar03* par 136. See also Kovacic WE 'Merger Enforcement in Transition: Antitrust Controls on Acquisition in Emerging Economies' (1998) 66(4) *University of Cincinnati Law Review* 1075 ('pre-merger notification mechanisms are a common element of modern antitrust practices in Western economies, and they reflect a consensus that , in principle, meaningful remedies frequently will be unattainable if antitrust intervention occurs after a transaction is completed and the operations of the merging parties are combined'); Warner MAA 'International Aspects of Competition Policy-Possible Directions for the FTAA'(1999) 22(1) *World Competition: Law and Economics Review* 1 (it is difficult to unscramble the egg once the merger has been consummated).

²⁵⁷ See also Article 4 of the EU Council Regulation on the control of concentrations between undertakings (ECMR) [2004] OJ.L24/1; Section 114 of the Canadian Competition Act C-34 of 1985 and Section 7A of the US Clayton Act 15.u.s.c S18 of 1914. The Zimbabwean merger regulatory system also follows a compulsory pre-merger system as provided in Part IVA of the Competition Act 7 of 1996.

²⁵⁸ *Bromor Foods / National Brands* (note 256 above) par 36.

Unlike small and intermediate mergers, large mergers are determined by the Competition Tribunal.²⁵⁹ The parties file their notification with the Commission who in turn make recommendations to the Tribunal as to whether the latter should approve or prohibit the transaction.²⁶⁰ The Commission must make these recommendations within 40 business days.²⁶¹ The Tribunal can extend this period to enable the Commission to make the recommendations.²⁶² However, considering the scale of potential implications that large mergers might have on both competition and public interest issues, there is no presumption that a large merger is deemed approved if the Commission fails to make such recommendations.²⁶³ Rather, a party to the proposed merger can apply to the Tribunal to commence the consideration without the Commission's recommendations.²⁶⁴

Parties to a proposed merger must comply with the filing and notification requirements. Failure to comply therewith may render them liable to both administrative and in exceptional circumstances, criminal sanctions.²⁶⁵ Implementing a merger without acquiring the relevant authorities' approval can attract a fine of up to 10 per cent of the parties' turnover as well as facing injunctions on implementation.²⁶⁶ Similarly, supplying false and misleading information can render parties criminally liable.²⁶⁷

Having ascertained that a transaction is a notifiable merger, the merger itself must then be considered. This consideration to determine whether or not a notified merger must be authorised is done in terms of a statutory substantive assessment which is set out in section 12A of the Competition Act. As indicated, the test is three-pronged²⁶⁸ consisting of (a) a

²⁵⁹ Section 14 A (1) of the Competition Act 89 of 1998.

²⁶⁰ Section 14A (1) (a) and (b).

²⁶¹ Section 14A (1) (b).

²⁶² Section 14A(2).

²⁶³ Section 14A (3) of the Competition Act.

²⁶⁴ Section 14A (4).

²⁶⁵ See section 60 (1). See further note 16 above.

²⁶⁶ See part 3.3.1 above and note 16 above.

²⁶⁷ Section 73(2)(d) of the Competition Act 89 of 1998. See also Competition Commission of South Africa 'Competition Commission lays perjury charges against a Vodacom Executive' Press Statement 24 July 2008. Supplying false information can result in a decision to approve a merger being revoked. See *Mercanto Investments (Pty) Ltd/ Johnic Holdings 78/LM/Aug 05* par 43.

²⁶⁸ *IDC (SA) v Anglo-American Holdings Ltd* (note 23 above) par 22.

‘pure competition’ criterion for assessing the likely impact of the merger on competition,²⁶⁹ (b) a balancing act to determine whether the anti-competitive effects of the merger can be offset or outweighed by any efficiency, technology or pro-competition gains²⁷⁰ and (c) the public interest leg.²⁷¹

The last section of this Part aims at presenting an overview of the substantive assessment test provided by the Act. It must be pointed out that the aim of this part will be to lay a foundation for the assessment of the impact of the third leg of the test, namely, the public interest test, on general merger regulation and on the interpretation and application of the failing firm doctrine in South Africa by placing the doctrine within the context of the general merger provisions and the substantive assessment test in particular.

5.3.4 The substantive assessment test for merger clearance

As indicated above, the Act provides for a three-pronged substantive test for merger assessment. This test is employed to determine whether a proposed transaction must be cleared or blocked. The test is essentially an inquiry into the effects of the proposed merger on competition and public interest.

5.3.4.1 The first leg: the ‘pure competition’ test

Section 12 (1) requires the competition authorities to make a preliminary determination of ‘whether or not a merger is likely to substantially prevent or lessen competition.’ In order to make such a determination, a non-exhaustive list of factors that must be assessed are provided in subsection (2). These are

- (a) the actual and potential level of import competition in the market;
- (b) the ease of entry into the market, including tariff and regulatory barriers;
- (c) the level and trends of concentration, and history of collusion, in the market;

²⁶⁹ Section 12A (1) read with subsection (2). See also *IDC (SA) v Anglo-American Holdings* (note 23 above) par 22.

²⁷⁰ Section 12A (1) (a) (ii) of the Competition Act 89 of 1998. This second leg of the defence is commonly referred to as the ‘efficiency defence’ since an establishment that the merger is pro-efficiency to an extent that outweighs any anti-competitive effects can result in it being approved. See also *IDC (SA) v Anglo-American Holdings* (note 23 above) par 22.

²⁷¹ Section 12A(1)(a) and subsection (2) provides that the authorities when considering a merger, must determine whether such merger can or cannot be justified under substantial public interest grounds.

- (d) the degree of countervailing power in the market;
- (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- (f) the nature and extent of vertical integration in the market;
- (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- (h) whether the merger will result in the removal of an effective competitor.²⁷²

The above stated factors are merely guidelines²⁷³ that the authorities must employ to evaluate the likely effect of the merger on competition.²⁷⁴

The point of departure in assessing this leg of the test is firstly ascertaining the pre-merger level of competition in the relevant market and secondly predicting the post-merger competitive structure of the market and then assessing whether and how the post-merger firm behaviour is likely to impact upon such structure. This assumption is supported by a closer look at all the listed factors. The removal of an effective competitor and the failing firm doctrine can be used to illustrate this point.

Section 12(2)(h) provides that the authorities must have regard to ‘whether the merger will result in the removal of an effective competitor’ as one of the factors to assess the competition effects of the merger. Thus if prior to the merger, one of the parties thereto was an effective competitor, and if such firm is merged into a new entity as a result of the merger, competition is deemed to have been substantially lessened. Likewise, competition is

²⁷² In *IDC (SA) v Anglo-American Holdings* (note 23 above) par 35 the Tribunal noted that although these considerations are listed, this must not be taken as meaning that the list is closed. The use of the word ‘including’ is an indication of the fact that the legislature never intended to create a closed list. For a detailed illustration and application of these factors see, *Anglo-American Holdings/ Kumba Resources (with IDC intervening)* (note 250 above).

²⁷³ *Distillers Corporation (SA)/ Stellenbosch Famers’ Winery* (note 181 above) 23 referring to the old section 16 (2) which is now section 12 A (2) of the Competition Act 89 of 1998.

²⁷⁴ This evaluation basically entails a theoretical and practical analysis of the pre-and post-merger market structure in order to predict the likely effect of the merger on the competitive structure of the market. See, *Anglo-American Holdings/ Kumba Resources (with IDC intervening)* (note 250 above) pars 108-109. In *Schuman Sasol/Price’s Daelite* (note 23 above)⁵ the Competition Appeal Court noted that this initial inquiry is aimed at predicting whether the merger will have a material effect on competition. However, in *Mondi Ltd and Kohler Cores and Tubes v Competition Tribunal* [2003] 1 CPLR 25 (CAC) 33c the Court clarified that although the authorities must make a prediction, such must not amount to an unsubstantiated speculation.

substantially prevented if the merger creates a dominant firm that can potentially dictate to the market on aspects including production and supply patterns thereby creating entry barriers. It is submitted that this explains why ‘the easy of entry into the market’ is one of these factors.²⁷⁵

The authorities must also consider whether the business or part thereof of a party to the merger has failed or is likely to fail.²⁷⁶ This provision enjoins the authorities to consider the applicability of the failing firm doctrine in South African merger regulation. However, unlike in the US and the EU where the doctrine is an absolute defence to an otherwise anti-competitive merger,²⁷⁷ in terms of section 12A(2) (g) it is merely one of the factors that must be assessed in order to determine the effects of the merger on competition.²⁷⁸ The significance of this difference in approach will be discussed later. The failing firm doctrine as employed in section 12A can be used to determine whether the merger will result in the removal of an effective competitor. In *Santam Ltd/ Emerald Insurance Co.* it was noted that a truly failing firm cannot qualify as an effective competitor.²⁷⁹

²⁷⁵ Section 12 A (2)(b) of the Competition Act 89 of 1998. Entry barriers are traditionally difficult to define. The definition thereof has also sucked in the Chicago- Realist debate. The former group view barriers to entry as the cost that the new entrants must pay which costs were not incurred by the incumbents. See Armentano D *Antitrust Policy* (1986) 31-44; Stigler G *The Organization of Industry* (1968) 67-70; Demstetz ‘Barriers to Entry’ (1982 72 *American Economic Review* 47 and generally Bork R *The Antitrust Paradox: A Policy at War with itself (with a new introduction and epilogue)* (1993) 310-329. The Realists broadly describes barriers to entry as any ‘instrumental concept that determine the nature and extent of forces outside the market that may increase the reaction of the incumbents to consumer wants and needs’. See for the latter view, Fox and Sullivan (1987)(note 152 above) 974; Bain J *Barriers to New Competition :Their Character and Consequences in Manufacturing Industries* (1956) (barriers to entry are factors that allow incumbents to raise prices that are above cost without attracting entry). However, this writer prefers a mid-way house whereby the phrase is defined to include any hindrance to entry, be it a result of actions of the incumbents or due to some policy measures. See for the latter approach,

²⁷⁶ Section 12 A (2) (g) of the Competition Act 89 of 1998.

²⁷⁷ See note 26 above.

²⁷⁸ The South African competition authorities have emphasized this statutory position is almost all the cases in which the failing firm doctrine has been considered. See *Iscor Limited/ Saldanha Steel* (note 28 above) par 101; *Santam Ltd/ Emerald Insurance Co* (note 23 above) par 52.

²⁷⁹ *Santam Ltd/ Emerald Insurance Co.Ltd* (note 23 above) par 82. In This case, the Tribunal found that the target was not a failing firm as it fails to demonstrate that it was a failing firm hence still regarded as an effective competitor (par 84).

The South African competition authorities adopt a wider interpretation than the US and the EU approach in determining the factors listed in section 12A. This approach is meant to ensure that the statute is able to restrain anti-competitive practices including anti-competitive mergers.²⁸⁰

The legislature realised that the fact that an assessment made in terms of section 12A(1) of the Act can reveal some competition concerns of the proposed merger and that at the same time the merger might exhibit some competition benefits. Hence the second leg of the substantive assessment test is provided in section 12A(1)(a)(ii). This leg is an assessment of whether there are any pro-competition grounds that outweigh or offset these anti-competitive effects.²⁸¹

5.3.4.2 The second leg: the ‘efficiency or substantial benefit defence’

Section 12A(1)(a)(i) provides that if a merger is found to substantially prevent or lessen competition in terms of section 12A(1) after assessing the factors set out in subsection (2), the authorities must assess whether the proposed merger will;

‘[...]result in technological, efficiency or other pro-competitive gains which will be greater than, and off-set, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be achieved if the merger is prevented.’²⁸²

This second leg of the test is an attempt to create a broad-based workable merger regulation regime through acknowledging that although a merger can raise competition concerns, it can also result in some benefits. The leg is thus essentially a balancing act between ‘pure competition’ and efficiency or other substantial benefits.

It must be noted that the Act does not only limit this leg of the test to pure efficiency but also extends these benefits to ‘any other pro-competitive gains’ in section 12A(1)(a)(i). If the

²⁸⁰ Preamble to the Competition Act 89 of 1998. See *IDC (SA) v Anglo-American Holdings* (note 23 above) par 37. See further on purposive interpretation through the preamble, *Stopforth v Minister of Justice and Others* (1) SA 113 (SCA) 122 (interpreting the Promotion of National Unity and Reconciliation Act 34 of 1995); *Thoroughbreeders’ Association v Price Waterhouse* 2001 (1) SA 551 (SCA) 623-624 (in interpreting the Apportionment of Damage Act 34 of 1956). See generally Kellaway EA *Principles of Legal Interpretation Statutes, Contracts and Wills* (1995) 69.

²⁸¹ See *IDC (SA) v Anglo-American Holdings* (note 23 above) par 22.

²⁸² Section 12A (1)(a)(i) of the Competition Act 89 of 1998.

parties can establish that the merger is likely to result in efficiency or any benefits that might outweigh or set off the anti-competitive effects thereof, the authorities might approve an otherwise anti-competitive merger.²⁸³ However, this is not the case since the test is three-pronged meaning that regardless of the outcome, the merger must further be scrutinised under the public interest leg of the test in terms of subsection (1)(a)(ii) and (2) before final approval. This public interest test and its implications on merger assessment will be explored in detail below.

5.3.4.3 The final leg: the public interest compatibility test

Section 12(1)(a)(ii) provides that if the merger appears to negatively impact on competition, the authorities must consider ‘whether the merger can or cannot be justified on substantial public interest grounds.’ Paragraph (b) of section 12(1) is almost similarly worded except that it enjoins the authorities to ‘otherwise’ have regard to specified public interest grounds in order to determine whether or not a merger can be justified under the same after making a determination on its competition effects. The Act provides for the closed list of these public interest grounds as (a) the assessment of the effects of the merger on a particular industrial sector or region,²⁸⁴ (b) the effects of employment,²⁸⁵ (c) effect on the ability of small sized–businesses or firms previously owned or controlled by historically disadvantaged groups to compete²⁸⁶ and (d) ability of national industries to compete internationally.²⁸⁷

²⁸³ In *Tiger Brands Ltd / Ashton Canning Co.(Pty) Ltd Newco and Langeberg Foods International* 46 LM/May 05 paras 112 and 113 , it was held that the parties must not merely allege that the merger will result in efficiency gains but they must prove that such gains will outweigh the anti-competitive effects of the merger and further that the benefit can only be achieved through the merger. The merging parties bear the onus of proving the above. See also *Trident Steel (Pty) Ltd/ Dorbyl Ltd* 89/LM/oct00. Although the statute does not make any distinctions regarding types of efficiency, the authorities normally require that a higher evidentiary burden where the claimed efficiency cannot be passed to consumers. This entails that in dynamic efficiency claims, the burden is stricter compared to where the claims are for pure pecuniary gains.

²⁸⁴ Section 12A(3) (a) of the Competition Act 89 of 1998. See *Nasionale Pers Ltd/ Education Investment Corporation Ltd* 24/ LM/ May 03 par 23 (effect of the merger on the education sector); *PSG Investment Bank Holdings Ltd/ Real Africa Durolink Holdings Ltd* 31/ LM/ May 01 (effect of bank exit on that particular sector).

²⁸⁵ Section 12 A (3) (b).

²⁸⁶ Section 12 A (3) (c).

²⁸⁷ Section 12 A (3) (d).

In *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings*²⁸⁸ it was stated that the public interest test is the ultimate test in determining whether or not the merger should be approved.²⁸⁹ This observation is significant for a number of reasons. Firstly, regardless of the results of the first two legs of the test, the merger still needs to be scrutinized for public interest compatibility. Secondly, this aspect can either contribute towards approval of a merger that otherwise fails to pass the first two legs of the test or can result in the prohibition of a merger regardless of the fact that it might have cleared the first two hurdles.²⁹⁰ The former reality was described as conferring upon the test a ‘Janus-faced’ quality.²⁹¹ This raises the question as to what extent this ‘Janus-faced’ element of the public interest test impacts on the interpretation and application of the failing firm doctrine. This issue will be explored further in later parts of this chapter suffice to reiterate that public interest considerations as a whole have a bearing on merger regulation in South Africa. The exact extent to which they impact on the system might not be numerically determinable but their influence on decision making can show how they continue to impact on the system.

In determining the extent to which these public interest grounds must be considered, the competition authorities, not surprisingly, have once again adopted a broader interpretative approach to supposedly give effect to the purpose and objects of the statute. This approach is found in the statute itself where such phrases as ‘a particular industrial sector or region’ are used instead of the traditional ‘relevant market.’²⁹²

The remaining parts of this chapter will present an analysis and discussion of the implications of public interest provisions on merger regulation in general and on the interpretation and application of the failing firm doctrine in particular. This doctrine is singled out because it is also provided for in Zimbabwe in an almost verbatim version of the South African provision.²⁹³ However, besides the statutory recognition, the doctrine is not given any further clarity in Zimbabwe. This factor necessitates a comparative study in order to develop a model provision in Zimbabwe hence the South African choice.

²⁸⁸ *IDC (SA) v Anglo-American Holdings* (note 23 above).

²⁸⁹ *Ibid*, par.22.

²⁹⁰ *Ibid*, par 22.

²⁹¹ *Ibid*. See also Kemp and Sutherland (2009) (note 4 above) 10-93.

²⁹² See *IDC (SA) v Anglo-American Holdings* (note 23 above) par 43.

²⁹³ Section 34 (4a) (h) of the Zimbabwean Competition Act [*Chapter 14:28*] (Act 7 of 1996).

5.4 Public interest provisions in merger assessment

The inclusion of public interest considerations in merger regulation in South Africa impacts on two main aspects. Firstly, they are a component of merger procedure.²⁹⁴ Secondly they are an integral element of the substantive assessment test.²⁹⁵ These issues have played a crucial role in the development of merger regulation in South Africa. Equally, they have also had a profound impact on the South African merger regulatory system. Accordingly, this Part presents an analysis and discussion of these issues with emphasis on the impact thereof on the interpretation and application of the failing firm doctrine in merger assessment. On the first aspect, focus will be on the notification and intervention processes whereas regarding the second aspect, the implications on the three-pronged substantive assessment test with public interest as a component will be explored.

5.4.1 Public interest and procedural aspects of merger regulation: implications for failing firms

As indicated, a transaction that qualifies as a merger must be notified to the Competition authorities before it is implemented.²⁹⁶ In addition, the primary acquiring firm and target firms must both provide a copy of the notification to ‘any registered trade union that represents a substantial number of its employees.’²⁹⁷ Where no such trade unions exist, the notice should be served on the concerned employees themselves or their representatives.²⁹⁸ The rationale behind the notification process primarily is to allow the competition authorities to assess the proposed merger before it is implemented in order to determine whether or not it raises any competition concerns.²⁹⁹ However, by providing that a copy of the notice must be

²⁹⁴ Considerations of public interest are central in such merger procedures as notification requirements, and intervention proceedings. Section 18 (1) allows the Minister of Trade and Industry to participate in merger proceedings on public interest grounds. Section 13 A (2) obliges a party to an intermediate or large merger to provide a copy of the merger notification to employees, their representative or a recognized trade union.

²⁹⁵ Section 12A (1) (b) read with (3) of the Competition Act 89 of 1998.

²⁹⁶ Section 13A (1) of the Competition Act 89 of 1998 relating to intermediate and large mergers. Cf. section 13(2) and (3) providing that a small merger need not be notified unless if parties thereto voluntarily do so or the authorities request such notification.

²⁹⁷ Section 13A (2) (a).

²⁹⁸ Section 13A (2)(b).

²⁹⁹ See *Duan et Cien AG/Kolosus Holdings Ltd* (note 256 above) par 136; *Bromor Foods /National Brands Ltd* (note 256 above) pars 35-36.

served upon the trade unions or the employees or their representative, the legislature intended to give labour an opportunity to consider the effects of the merger on their interests and to take steps to protect them accordingly.³⁰⁰ The noble rationale behind this additional requirement is not disputed in a system that caters for broader objectives. However, the crunch question relevant to this study is what implications, if any, does this have on merger regulation in general and those involving failing firms in particular?

The provision that merging parties ‘must’ serve a copy of the merger notification upon labour has been criticised as imposing an additional burden upon the merging parties.³⁰¹ If the merger involves a failing firm or one likely to fail, this statutory burden potentially compounds the woes of such a party. It is submitted that an effective merger system is one that is *inter alia*, capable of dispensing with a notified transaction as efficiently as possible. Additional notification requirements potentially lengthen the proceedings. One can argue that the additional notices can be served simultaneously with the notification to the competition authorities. However, it must be borne in mind that the purpose of notifying employees or their representatives is not merely to comply with statutory requirements but to give practical effect to the broader-policy objectives of the legislation.³⁰² In this regard, the notification requirement in question serves a broader public interest purpose in ensuring the protection of labour interests. Upon receiving such notification, it is conceivable that employees or their representatives are likely to participate in the follow up proceedings. Experience shows that labour interests have featured more in many merger proceedings than any other public interests.³⁰³

³⁰⁰ *Distillers Corporation (SA)/ Stellenbosch Famers’ Winery* (note 181 above)

³⁰¹ Legh and Dini (2011) (note 208 above).

³⁰² NEDLAC *Report on Competition Policy* (1998) par 4.1.3. This position was also confirmed in *Duan et Cien AG/Kolosus Holdings Ltd* (note 256 above) par 136 and in *Uniliver plc, a division of Uniliver South Africa (Pty) Ltd/Hudson & Knight, a division of Uniliver South Africa (Pty) Ltd/Robertsons Foods (Pty) Ltd/ Robertsons Foods Services (Pty) Ltd v The Competition Commission of South Africa/CEPPWAWU 55/LM/Sep01(Uniliver plc. v Commission)* pars 40 where the Tribunal stated that the purpose notifying labour was to ensure that that employees ‘are provided with the necessary information to enable them to make representations to the competition authorities if they so wish’ and 43 that the right to timeous information regarding the potential impact of a merger is the most important right provided for labour under the Act. However, any information requested by the trade unions must be relevant for them to assess the impact of the merger on employment, see *Telkom SA Ltd/TPI Investments (Pty) Ltd v Praysa Trade 1062 (Pty) Ltd 81/LM/Aug00* pars 21 and 23;

³⁰³ Lewis (2007) (note 4 above) 360.

Labour participation is purportedly to protect employees' interests. In a failing firm scenario, this will potentially have two implications. Firstly, the possibility that if a failing firm is allowed to fail and exit the market, jobs will be lost.³⁰⁴ Alternatively, if the failing firm is rescued through the proposed merger, jobs can be conserved.³⁰⁵ The question then is whether labour participation can be to the advantage of the failing firm? Both the above scenarios theoretically shows that there is more to be lost if the firm is allowed to fail than when it is saved from failing. This in principle supports the arguments that allowing employees to participate in mergers involving a failing firm will be in the public interest. In other words, saving a failing firm falls within the broader context of promoting public interests. Although these arguments have been allowed in the US and EU,³⁰⁶ in *Iscor/ Saldanha Steel*, the Tribunal categorically rejected them.³⁰⁷ It is submitted that whatever weight one might give to the Tribunal reasoning, the above scenario provides a reason why the additional notification requirement is not necessarily a burden to merging parties but can be a blessing in disguise as public interests can add weight to their causes. This is particularly true if the participating unions or employees perceive rescuing the failing firm in the interest of preserving jobs.

³⁰⁴ *International Shoe Co. v FTC* 280 US 291, 302-303 (1930) per Sutherland J. see also *United States v. General Dynamics Corporation*, 415 U.S. 486, 504, 507, 39 L Ed 2d 530, 94 S Ct. 1186 (1974).

³⁰⁵ Kokkoris I 'Failing Firm Defence in the European Union: A Panacea for Mergers?' (2006) *European Competition Law Review* 494, 506 (although allowing mergers can result in job losses, if a merger is not allowed and the firm is allowed to exit, jobs might be lost as a result of plant closure).

³⁰⁶ In Case IV/M 308 *Kali und Salz/MdK/Treuhand* [1994] OJ L186/30 the failing firm defence succeeded partly because the transaction involved firms that were in the rock salt and potash activities involved a German state owned company that was in a critical economic situation and was the brink of bankruptcy. Although the said transaction would create a monopoly in the potash market, leading to unacceptably high concentration, the Commission cleared it as it was regarded as necessary to avert massive job losses in Eastern Europe. The US Supreme Court's decision to allow the merger in *International Shoe Co.* (note 304 above) was also partly motivated by a host of public interest consideration namely the need to protect interest of shareholders, creditors and employees. *Iscor Limited/ Saldanha Steel (Pty) Ltd* (note 28 above) pars 98 and 99 (commenting on the *Kali und Salz* decision).

³⁰⁷ *Iscor Limited/ Saldanha Steel (Pty) Ltd* (note 28 above) pars 95 (rejecting the efficiency claim in failing firm doctrine), 98 and 99. In par 110(1) the Tribunal advised that the failing firm doctrine must not be invoked if it amounts to other provisions provided under the Act.

Labour participation in merger cases have gone beyond protecting labour interests but in some cases have raised competition issues.³⁰⁸ One might term this ‘crossing the divide’ between public interest and competition through encroaching upon each other’s domain. However, it is submitted that this must not only be understood as a source for providing rather useful evidence to the adjudicating authorities but a vindication of the fact that the broader-based objectives of the system can complement each other.

Probably the most contentious procedural aspect of merger regulation with potential dire consequences on failing firms is the intervention provisions contained in section 18. Provision is made to the effect that the Minister ‘may’ participate in merger proceedings on public interest grounds.³⁰⁹ Although the Act defines ‘Minister’ as the Minister of Trade and Industry,³¹⁰ other government ministers can also participate in merger proceedings on public interest grounds.³¹¹ The provision elevates the Minister to the status of custodian of public interest save for probably labour interests where organised labour can represent employees’ interests. It must also be stressed that the Minister is a political figure. This naturally raises the question as to whether the regulatory system will not be subjected to political influence and if so, it may be asked where this leaves the fate of a merger involving a failing firm.

It is concluded that no modern competition law regime can claim to be totally independent of political influences.³¹² However, it is submitted that the severity of the effects of such

³⁰⁸ See for instance in *Unilever plc/Robertson Foods* (note 302 above) pars 24,25 and 27, where CEPPWAWU made submissions relating to the competitive effects of the merger including on possible remedies.

³⁰⁹ Section 18(1) of the Competition Act 89 of 1998.

³¹⁰ Section 1 (1) (xvi).

³¹¹ In the recent combined application before the Competition Appeal Court, to challenge the Tribunal’s decision in the merger between Wal-Mart and Massmart, *Wal-Mart Stores Inc./Massmart Holdings Limited* (note 1 above), various government ministers filed for the review of the Tribunal’s decision. These were the Minister of Economic Development; Minister of Trade and Industry and Minister of Agriculture and Fisheries. See *South African Commercial Catering and Allied Workers Union (SACCAWU), The Minister of Economic Development, The Minister of Trade and Industry and The Minister of Agriculture and Fisheries v The Competition Commission, The Competition Tribunal of South Africa, Wal-Mart Stores Inc. and Massmart Holdings Limited* 110/CAC/Jul 11 and 111/CAC/Jul11. For purposes of clarity, the combined application will be referred to as *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart*.

³¹² Hamner KJ ‘The Globalization of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China’ (2001-2002) 11.2 *Journal of Transnational Law and Policy* 386, 389. Baudrier A ‘Independent Regulation and Telecommunications Performance in Developing Countries’ (2001) *Annual ISNIE*

influences depends much on the structure and degree of independence of the regulatory institutions. Independent regulators are in a better position to fend off political influences than those that solely depend on the government for financial and logistical support.³¹³ Chapter 4 of the Competition Act establishes and constitutes the South African competition authority. Part A of the Chapter 4 establishes the Competition Commission as an independent organ of the authorities³¹⁴ tasked primarily with competition promotion through, *inter alia*, conducting investigations into prohibited practices and making determinations accordingly.³¹⁵ Part B establishes and constitutes the Competition Tribunal³¹⁶ as an adjudicative organ of the authority with some appellate powers from decisions of the Competition Commission.³¹⁷ The last component of this three-tiered authority is the Competition Appeal Court established and constituted under Part C of Chapter 4³¹⁸ as a review and appeals court.³¹⁹

The three-tiered competition authority is crucial as it provides a buffer not only against internal possible misdirection in respect of the application of public interest provisions³²⁰ but

Conference, Berkley, 5 noted that the independence of regulatory institutions must not be construed as autonomy from developing actions and programming policies whilst ignoring the government but rather as the ability to implement such policies without interference from political and other interests.

³¹³ Oliveira G, Machado EL and Novaes LM 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' (2009) in Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* 285.

³¹⁴ Section 19 (1) read with section 20 (1) (a) and (b) of the Competition Act 89 of 1998.

³¹⁵ See section 21 of the Competition Act 89 of 1998 on the functions of the Competition Commission.

³¹⁶ Section 26 (1) of the Competition Act 89 of 1998.

³¹⁷ Section 27 (1)(a) read with subsection (c).

³¹⁸ Section 36 (1).

³¹⁹ Section 37 (1) (a) and (b).

³²⁰ In *Shell South Africa (Pty)Ltd/ Tepco Petroleum (Pty)Ltd* 66/LM/Oct01, the Tribunal though concurring with the Competition Commission that the merger involving a firm owned by previously disadvantaged person attracts some serious public interest concerns, found that the merger did not raise any competition concerns (paras 36 and 39). However, the Tribunal cautioned the Commission's approach in advancing its public interest mandate. It cautioned the effectiveness and usefulness of the conditions that the Commission had proposed (par 49). It further reiterated that although the Commission's role is to both promote and protect competition and specified public interest (par 51), such should not be used to produce results that do not only amount to unacceptable commercial interference but also serve no public interest thereby making a mockery of the entire system. In *Sasol Oil (Pty) Ltd v Nationwide Poles* CC 49/CAC/Apr05 the Competition Appeal Court in overturning the Tribunal's decision in a matter involving alleged anti-competitive behavior, similarly rejected the Tribunal's approach of introducing policy favouring small sized business enterprises.

ensures independence from possible influence by special interests. This independence is critical as it allows the authorities to devote their undivided attention to the primary goal of promoting and maintaining competition in South Africa.³²¹ Accordingly, it is submitted that the South African competition regulatory structure is better suited to withstand political pressure that can be exerted onto the competition system through the merger intervention procedure.

The importance of an independent competition authority can better be illustrated by the recent *Wal-Mart/ Massmart* merger.³²² The merger involved Wal-Mart Stores, the world's largest retailer incorporated in the United States of America³²³ and Massmart Holdings, a company incorporated in terms of South African laws.³²⁴ The proposed transaction involved Massmart acquiring a 51 per cent of Massmart's ordinary share capital thereby constituting a merger since the former could have effectively acquired control in the latter.³²⁵ The Competition Commission had recommended that the Tribunal conditionally approve the merger.³²⁶

The Commission found that the merger was not likely to substantially lessen or prevent competition as Wal-Mart was not an active market participant.³²⁷ However, the Commission found that the merger raised substantially public interest concerns relating to inter alia, labour and small-sized businesses (suppliers).³²⁸ Accordingly, the Commission recommended that the Tribunal approve the merger on conditions aimed at addressing these public interest concerns.³²⁹ On 31 May 2011, the Tribunal conditionally approved the merger.³³⁰ However,

³²¹ Oliveira et al (2009) (note 313 above) 285.

³²² *Wal-Mart/Massmart* merger Tribunal decision (note 1 above).

³²³ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 311 above) pars 2 and 3.

³²⁴ *Ibid*, par 6.

³²⁵ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) pars 12 and 13.

³²⁶ *Wal-Mart Stores Inc./Massmart Holdings Ltd* (note 1 above) par 1 of the order.

³²⁷ *Ibid*.

³²⁸ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) par 22 referring to page 4 of the Commission's report to the Tribunal.

³²⁹ *Wal-Mart Stores Inc./Massmart Holdings Ltd* (note 1 above) pars 1.1 to 1.5 of the order

³³⁰ *Ibid*, par 1.

this decision did not go down well with various groups who have actively participated in the proceedings under the banner of protecting various public interests.³³¹

In a joint application to the Competition Appeal Court, SACCAWU appealed the decision whereas the Ministers³³² sought review thereof.³³³ SACCAWU argued mainly that the merger must not be approved due to its implications for labour particularly given the history of Wal-Mart on retrenchments and hence the Tribunal's confirmation of the merging parties' commitments as conditions was inadequate.³³⁴ The Ministers' main arguments for seeking review to set aside the Tribunal's decision and refer the matter for a fresh hearing were that the Tribunal had made procedural errors failing to order merging parties to discover certain documents material to the determination as well as excluding parties who opposed the merger from the proceedings.³³⁵ In essence, the Ministers argued that the Tribunal had sacrificed thoroughness for expedition and efficiency.³³⁶

Regardless of the merits or lack thereof of the decision to appeal or review the Tribunal decision, the Tribunal decision gained considerable publicity both in the print and electronic media. It is submitted that this has two main effects. On the positive side, the public was accorded an opportunity to scrutinise the merits and demerits of the proposed merger. On the flip side, various statements made particularly by the opponents of the merger potentially subject the merged entity to public ridicule. The public will keep an eye on the merged entity

³³¹ During the investigation stage, the Competition Commission had engaged with the South African Commercial Catering and Allied Workers Union (SACCAWU), the South African Clothing and Textiles Workers Union (SACTWU), The Food and Allied Workers Union (FAWU) and the South African Small Business and Micro Enterprises Forum (SASMMEF) as well as the Department of Economic Development. During the Tribunal hearing, three groups participated as interveners. These were 'the unions' made up of SACCAWU, NUMSA, FAWU, SACTWU and the Labour Research Services; 'the Ministers' comprising the Minister of Economic Development, Minister of Trade and Industry and the Minister of Agriculture and Fisheries; and 'the small business' represented by SASMMEF. See *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) par 3.

³³² See note 313 above.

³³³ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) par 4.

³³⁴ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 311 above) par 15.

³³⁵ *Ibid*, pars 22 and 23.

³³⁶ See counter arguments by the Commission on par 30.

and can even scrutinise every aspect of the entity against the negative statements such as Wal-Mart's alleged labour record. This can in future tarnish its corporate reputation and goodwill leading to possible product and service boycotts especially if the merged entity fails to provide any significant public interest benefit such as low prices.³³⁷

On 9 March 2012, the Competition Appeal Court delivered its much awaited judgement on the combined appeal and review. The Court approved the merger although it modified the Tribunal's conditions. This decision partly upheld the appeal but dismissed the review.³³⁸ However, the approval, despite the public interest and pressure generated by the merger, is a vindication of the independence of the competition authorities and their ability to make decisions without fear, favour or prejudice. The developments also illustrate potentially negative aspects of public interest provisions especially the Ministers' arguments and prayer. The Ministers had prayed for setting aside of the Tribunal's decision and a hearing *de novo*.³³⁹ Allowing such requests would undoubtedly lengthen the merger determination process with undesirable consequences. Throwing the failing firm scenario into the mix, surely this would produce only one result, namely that by the time the determination is made, the firm would have been history with an even a bigger negative impact on employment.

Public interest provisions in merger procedure are also a potential source of smuggling into the system some special interests which are not to the benefit of the competition system but rather relates to certain individual competitors.³⁴⁰ Although this is possible, authorities are alert to these drawbacks as and can only consider them if they either impact on competition or amount to a specified public interest ground. In *Glaxo Wellcome plc./ Smithkline Beecham plc v The Competition Commission*,³⁴¹ the Tribunal unconditionally approved an intermediate merger involving two pharmaceutical firms despite a request from the Treatment Action Campaign (TAC) to have the merger approved on conditions that the merging parties 'allow generic competition for all medicines needed for the treatment of opportunistic infections in

³³⁷ Happer P 'Will Wal-Mart bring your prices down?' *City Press* 11 March 2012, 7; Grimbeek Y 'Up your Game Wal-Mart' *City Press*, 11 March 2012, 7.

³³⁸ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 311 above) pars 1 and 2 of the Order.

³³⁹ *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) par. 4.

³⁴⁰ *Nationwide Poles v Sasol (Oil) Pty Ltd* 72/CR/Dec03 pars 85 and 87.

³⁴¹ *Glaxo Wellcome plc./Smithkline plc v The Competition Commission* 58/AM/May 01.

HIV, AIDS and anti-retrovirals for HIV.’³⁴² Although the Tribunal expressed sympathy over TAC’s cause, it stated that there was no legal basis to either block the merger or impose any conditions in the absence of a showing that it had any effects on competition.³⁴³ Equally, the authorities are suspicious of special interests disguised as public interests made by parties that have hidden motives.³⁴⁴ In order to avoid such cases the legislature in its wisdom provided a closed list of well-defined public interest grounds in section 12A(A)(3).³⁴⁵

Assuming that Massmart was a failing firm, the mere decision to challenge the Tribunal’s decision to approve the merger would have surely prolonged the merger and delayed its implementation. By the time the appeal would have been decided, Massmart would have exited the market, creating an even more dire situation for the employees and suppliers alike. The approval would become mostly academic as the merger would have failed to achieve its objective of rescuing a failing firm. Here again the question is begged whether there is a need to rethink the place of public interest provisions in South African merger procedures.

It is submitted that in cases involving failing firms, there is at least a case for suggesting that the current status is not suitable. If this suggestion is adopted, the possibility is that there is a need to amend the current provisions to exclude some procedures when a merger involves a failing firm.³⁴⁶ However, there are three main challenges that this suggestion presents. Firstly, appeals and reviews are constitutionally entrenched rights. Section 34 of the Constitution provides for rights to access the courts for determination of disputes.³⁴⁷ This provision

³⁴² Ibid, par 20. The Treatment Action Campaign (TAC) is a voluntary organization that advocates for affordable healthcare in South Africa principally for people living with HIV/AIDS.

³⁴³ Ibid, par 26. The Tribunal’s decision followed a finding by the Commission that the merger was not likely to result in any product overlap (par 23).

³⁴⁴ This ugly face reared its head particularly in hostile takeovers where parties had tried to block the transactions using public interest as a front. This can be illustrated by the failed bid by Nedbank to acquire more than 49 per cent shares in Standard Bank Investment Corporation Ltd in *Nedcor/ Stanbic* (note 3 above); and the Gold Fields and Harmony Gold battle in *Gold Fields/Harmony Gold* (note 234 above).

³⁴⁵ Section 12 A(3) of the Competition Act 89 of 1998. See also *The Ministers/ SACCAWU v The Competition Commission/ The Competition Tribunal and Wal-Mart/ Massmart* (note 313 above) par 12.

³⁴⁶ A possible model can be found in the derogation clause in Article 7(3)(and (4) of the European Commission Merger Regulation (ECMR). This provision as was invoked in the Case IV/M. 116 C189/91 *Kelt/ American Express* has the effect of allowing the merging parties to put into effect the transaction before the Commission make a decision on the compatibility of the transaction with the Common Market.

³⁴⁷ Section 34 of the Constitution of the Republic of South Africa of 1996 (herein ‘the Constitution.’)

implies that should a litigant be aggrieved by the decision of that court, then the right to access courts extends to appealing or seeking review of such decision. As such any provision in the merger procedure having the effect of ousting this right might render the same unconstitutional.

Secondly, the merger regulating legislation is only but one of the many statutes mandated to promote the government's broader-policy objectives through, *inter alia*, complimenting other specific legislation. Therefore removing provisions aimed at promoting such policy goals will change little if not nothing at all in as far as merger procedures are concerned. This is because these interests will continue to be promoted and protected elsewhere. Consequently, the merging parties will still be required to comply with the requirements of these statutes. For instance, the parties will be required to notify labour regulators who will determine whether the merger is compatible with labour policy. The effects thereof are that there will be multiple notifications to various authorities. This situation will only serve to fragment and prolong the foregoing process. In view of the foregoing, it is submitted that the current procedures though not without their flaws, provide a one-stop shop for merger notification that is not only feasible but shortens the process making it more attractive and conducive to mergers involving failing firms.

Lastly, the procedural stage of merger regulation does not address substantive issues. As such, during the notification, intervention, appeal and even review proceedings substantive issues might still be outstanding. If the merger involves failing firm claims, it means the determination of whether such claims are founded is still to be made. Excluding such procedures in anticipation of the claims being justified becomes premature as the outcome might prove otherwise. It is difficult to require the authorities to make a preliminary determination on the applicability of the failing firm claim for purposes of determining whether or not certain proceedings must be allowed. To do so would only serve to prolong the proceedings, the very ill that ousting the proceedings is meant to achieve. Furthermore, a determination of whether the merger involves a failing firm is not done in isolation but forms part of a rather tedious three-pronged substantive inquiry into whether or not the merger can be authorised. This inquiry will be discussed and analysed shortly.

The procedural requirements for merger regulation must be taken as part of the regulatory framework. Although these requirements are not without shortcomings, there is enough evidence to suggest that the current framework is sufficiently equipped to address them

without tampering with the South African merger regulatory provisions. It is submitted that any attempt to tamper with these provision might not only prejudice the competition system, but also fails to promote the broader policy-objectives expected of the competition system.

If a merger involving failing firm claims has been properly notified and assuming no procedural issues arise as discussed above, the competition authorities must consider whether or not to approve it. This consideration basically entails an evaluation of the merger in accordance with the statutory substantive test laid down in section 12A(1) of the Competition Act. The implications of this test on the interpretation and application of the failing firm doctrine in South Africa will be discussed below.

5.4.2 Public interest, the substantive test and the failing firm doctrine

Section 12A(1) requires the Competition Commission or Competition Tribunal whenever considering a merger, to initially determine whether such merger is likely to substantially prevent or lessen competition. This determination is done by assessing a non-exhaustive list³⁴⁸ of factors set out in section 12(A)(2). As indicated earlier, one of the factors is an assessment of ‘whether the business or part of the business of a party to the merger has failed or is likely to fail.’³⁴⁹ This assessment is known as the failing firm doctrine. This section will first present a brief discussion of the failing firm doctrine from a South African perspective followed by an assessment of the impact of the substantive test incorporating a public interest component on the interpretation and application of the doctrine in South Africa.

If the initial inquiry reveals that the merger is likely to substantially prevent or lessen competition, the authorities are required to determine whether or not the anti-competitive effects of the merger can be outweighed or offset by any technological, efficiency or other pro-competition gains.³⁵⁰ This balancing second leg of the test also requires the authorities to determine whether the merger raises competition concerns that can or cannot be justified under a closed list of public interest grounds provided in subsection (3).³⁵¹

³⁴⁸ *Santam Ltd/ Emerald Insurance Co.*(note 23 above) par 52; *Schuman Sasol/ Price’s Daelite* Competition Appeal Court decision (note 23 above) 5.

³⁴⁹ Section 12A(2)(g) of the Competition Act 89 of 1998.

³⁵⁰ Section 12 A(1)(a)(i).

³⁵¹ Section 12 A(1)(a)(ii).

Whatever the outcome of the first and second inquiries, the authorities are still required to determine whether the merger can or cannot be justified on substantial public interest grounds set out in subsection (3).³⁵² This forms the last and final leg of the substantive test.

Before focusing the attention on the failing firm doctrine within the context of this three-pronged test, a few comments need to be made. Firstly, the Act requires the authorities to make an initial determination regarding the effect of the merger on competition under section 12A(1). It is only after a finding that the merger raises competition concerns that the authorities must determine whether there are any grounds, either efficiency or public interest grounds, to justify the approval of such merger. However, in the event that the merger raises no competition concerns following the initial inquiry, the authorities are still required to consider whether the merger can or cannot be justified public interest grounds.

Secondly, at first glance there appears to be a repetition of the public interest requirement in paragraph (a)(ii) and (b). Although both refer to the determination of whether the merger can or cannot be justified on substantial public interest grounds listed in subsection (3), there are material differences in the application of these different legs of the test. On the one hand paragraph (a) (ii) is applicable only if the initial determination reveals that the merger raises competition concerns. Paragraph (b) on the other hand, is applicable regardless of the outcome of the initial inquiry. The use of the term ‘otherwise’ implies that the authorities can still subject a merger to the public interest test even if it has been found to raise no competition concerns following the initial test or alternatively if it is found to be justifiable as resulting in substantial benefits.³⁵³ Lastly, the public interest test ‘must’ be applied, meaning that the authorities are not at liberty to do away with these considerations in evaluating the merger. It may thus be asked how these observations impact on the interpretation and application of the failing firm doctrine.

5.4.2.1 The failing firm doctrine in South Africa

As stated, one of the factors that must be taken into account in determining whether the merger is likely to substantially prevent or lessen competition, is whether the business of part thereof of a party to the merger has failed is likely to fail. In other words, the authorities *must* determine whether the failing firm doctrine is applicable, they have no discretion not to apply

³⁵² Section 12 A(1)(a).

³⁵³ See *IDC (SA) v Anglo-American Holdings* (note 23 above) par 138.

the doctrine. Although the doctrine is given express statutory recognition³⁵⁴ there are no further express guidelines administratively or otherwise on what must be proved for parties to make a successful failing firm claim.³⁵⁵ The tribunal has acknowledged the lack of statutory guidelines in South Africa hence made use of the criteria developed elsewhere.³⁵⁶ The implication of the Tribunal's approach is that in order for the parties to succeed, the following criteria must be established;

- (a) that the merger involves a firm that has actually failed or is likely to fail.
- (b) that the merger is the only available option to save the failing firm.
- (c) there are no alternative purchasers to acquire the target firm in a less anti-competitive merger.

Although these requirements can be formulated in various forms, they constitute the basic requirements for a successful failing firm claim.³⁵⁷ The following section will present a contextual application of the failing firm doctrine in South Africa by first, presenting the criteria for its application and secondly the approach adopted by the competition authorities.

5.4.2.2 The failing firm doctrine in practice

³⁵⁴ *Santam Ltd/ Emerald Insurance Co.* (note 23 above) 52.

³⁵⁵ In the US and EU, although the failing firm defence, as it is known, is not given statutory recognition but it has been acknowledged in case law and given impetus in administrative guidelines. See US *Horizontal Merger Guidelines* (2010) par 11 and EU *Horizontal Merger Guidelines* (2004) pars 89 -90. The defence is believed to have been originally recognized by the US Supreme Court in the 1930 *International Shoe Co.* case (note 304 above). The defence was further recognized in a host of cases including *Citizen Publishing Co. v United States* (1969) 394 U.S. 131 and *General Dynamics Corp.* (note 304 above). The *General Dynamics* approach was followed in the EU in the *Kali und Salz* appeal (note 306 above). See further cases where defence discussed Kokkoris (2006) (note 306 above).

³⁵⁶ See *Santam Ltd/ Emerald Insurance Co.* (note 24 above) par 55; *Schuman Sasol (South Africa) (Pty)Ltd/Price's Daelite (Pty)Ltd* (Schuman Sasol/ Price's Daelite Tribunal Decision) 23/LM/May 01 par 59; *Iscor/ Saldanha Steel* (note 35 above) par 101. It must be noted that although the Tribunal's decision in the *Schuman Sasol/ Price's Daelite* merger was overturned by the Competition Appeal Court, the latter did not deal with the failing firm doctrine as such the principles developed by the Tribunal on this aspect remains relevant to this discussion.

³⁵⁷ See *Santam Ltd/ Emerald Insurance Co.* (note 23 above) par 54. It must be pointed out that the relevance and applicability of this criterion depends on the facts of each case. See *Schuman Sasol/ Price's Daelite* Tribunal decision (note 356 above) par 59.

The logical point of departure is to ask how the competition authorities determine whether the doctrine has been established. In other words, how they employ the criteria set out above. Selected decisions can be used to answer these questions.

5.4.2.2.1. *Schuman Sasol/Price's Daelite: laying the criteria*

The applicability of the failing firm doctrine in South African merger regulation was first considered by the Competition Tribunal in a proposed acquisition by Schuman Sasol (South Africa) (Pty) Ltd. of the entire share capital of Price's Daelite (Pty) Ltd.³⁵⁸ This proposed merger was prohibited on the basis that it would have prevented or lessened 'competition in the candle wax market and the upstream market' by raising entry barriers in those markets in addition to further strengthening Schuman's dominant position.³⁵⁹

The merging parties invoked the failing firm doctrine and argued that the merger be reviewed using a lower standard since the target was a failing firm who, in the absence of the proposed merger, would fail and exit the relevant market together with its productive assets.³⁶⁰ They argued further that such a situation would constitute a net loss to competition given that the target was an effective competitor.³⁶¹

In considering this argument, the Tribunal noted that the failing firm concept 'is a term of art' hence 'the facts of each case will take precedence over the application of a derived formula.'³⁶² This signalled the Tribunal's preparedness to apply a flexible approach to the established criteria. It went on to consider and lay a criterion for the doctrine.³⁶³ The criteria can be derived from the Tribunal's analysis of the merger. This analysis, formulated in the form of an inquiry is:

(a) Whether the alleged failing firm is failing or is likely to fail³⁶⁴

The Tribunal accepted that the target firm was in a dire financial situation.³⁶⁵ However, that in itself was not enough to justify approval of the merger. In other words, the fact that the

³⁵⁸ *Schuman Sasol Price's Daelite* (note 23 above) par.2.

³⁵⁹ Par.31.

³⁶⁰ Par.57.

³⁶¹ Ibid.

³⁶² Par.59.

³⁶³ Pars. 60-68.

³⁶⁴ Par.60.

target was factually in a precarious position was considered inadequate evidence of failing in the statutory sense of the word.³⁶⁶ The Tribunal did not focus on whether the target firm was failing but rather on what brought about the alleged failure.³⁶⁷ This explains why the Tribunal had repeatedly refused claims of insolvency as evidence of failure as a firm that is continuously unable to meet its debt obligations can simply decide not to reinvest its funds and withdraw from the market.³⁶⁸ It noted that the reasons for failure are a necessary consideration in assessing how the contemplated merger would address the causes and resuscitate the allegedly failing firm.³⁶⁹ It concluded that despite its precarious financial position, a firm cannot be regarded as a failing firm if the failure is occasioned by a management decision.³⁷⁰ A similar approach has been adopted in the EU where the Commission rejected claims that the target firm was a failing firm and noted that its impending exit from the relevant market was a result of a management decision to shut it down and reinvest somewhere else.³⁷¹ *In casu*, the fact that Price's Daelite had excess capacity was regarded as an indication of the firm's potential and hence it was difficult to contemplate how it could have been in a financially dire situation.³⁷²

Failure is thus a factual situation that must be supported by documentary evidence.³⁷³ The onus is on the merging parties to adduce evidence to the effect that the target firm has failed

³⁶⁵ Ibid.

³⁶⁶ In *Santam Ltd/Emerald Insurance* (note 23 above) pars. 56 and 58, the Tribunal held that for the purposes of the Act, the determination of whether a firm is likely to fail requires a factual analysis that goes beyond a determination of its financial distress. In other words, failure is not equated to inability to meet financial obligations (ordinary insolvency) and goes beyond ordinary insolvency. See also *Iscor/Saldanha Steel* (note 28 above) par 109. In *Iscor*, the Tribunal in dismissing the failing firm claim noted that the mere fact that the firm in question was in a financially precarious situation was not conclusive of the fact that it was going to fail. Cf. *US Horizontal Merger Guidelines* (2010) par 11 requiring proof that the firm would not be able to meet its financial obligations in the near future.

³⁶⁷ *Schuman Sasol/ Price's Daelite* (note 23 above) pars.61-62.

³⁶⁸ See note 358 above. See also *Iscor/Saldanha Steel* (note 28 above) par 109.

³⁶⁹ *Schuman Sasol/ Price's Daelite* (note 23 above) par. 62.

³⁷⁰ Ibid.

³⁷¹ Case IV/M.053 *Aerospaiale –Alenia/de Havilland* [1991] OJ L334/42, L334/51 in para.31.

³⁷² *Schuman Sasol/ Price's Daelite* (note 23 above) par 62.

³⁷³ *Santam Ltd/Emerald Insurance* (note 23 above) par 65 (the Tribunal held that there was no evidence to support the claims that the target was failing).

or is likely to fail.³⁷⁴ Whereas proof that the target firm has failed is easy as it involves a simple showing that the target firm is no longer in the market, proof of likely failure is daunting. Failure is deemed likely if evidence can be deduced to show that the risk of failing is greater than the anti-competitive effects of the merger.³⁷⁵ The evidence must point to a firm that is genuinely failing not merely ‘ailing’ for an ailing firm can still recover absent the anti-competitive merger.³⁷⁶

A firm can only be deemed to be failing if absent the merger, it is to exit the relevant market due to a hopeless financially difficult situation that is not self-induced.

(b) Whether there are no alternative purchasers posing less anti-competitive concerns³⁷⁷

The merging parties seeking refuge under the failing firm doctrine must demonstrate that the proposed acquirer is the only available purchaser because there are no other acquirers whose acquisition of the alleged failing firm poses a less competitive threat than the proposed transaction.³⁷⁸ This can be done by demonstrating that a genuine attempt was made to find the said alternative purchaser.³⁷⁹ Such an effort must be inclusive and not predetermined.³⁸⁰ It was found that this requirement was not met when only external firms were selected.³⁸¹ However, it is acceptable that for purposes of maintaining a competitive market structure, a purchaser can only be regarded as an alternative if it meets the market profile of the allegedly

³⁷⁴ *Iscor/ Saldanha Steel* (note 28 above) par. 110(5). See generally on onus of proof in failing firm claims,

³⁷⁵ *Ibid.*

³⁷⁶ Kokkoris (2006)(note 305) 495.

³⁷⁷ *Schuman Sasol/ Price’s Daelite* (note 23 above) par. 64.

³⁷⁸ *Ibid.* See also *International Shoe Co.*(note 304 above) 301, 302-03 and *Kali und Salz* (note 306 above) L186/56 par. 80.

³⁷⁹ See *Kali und Salz* (note 306 above) par. 81 (met when reasonable efforts made through engaging an investment bank to solicit tenders).

³⁸⁰ *Schuman Sasol/Price’s Daelite* (note 23 above) par. 64.

³⁸¹ *Schuman Sasol/Price’s Daelite* (note 23 above) par. 64. See also *Blokker/Toys ‘R’ Us* (note 178 above) L316/15 par. 113 (refused claim that only the acquirer met the seller’s requirement of having sufficient knowledge of a particular market and necessary infrastructure).

failing entity.³⁸² This means that the said alternative purchaser must be able to influence the positive competitive behaviour of other firms on the market.

(c) Whether there are any prospects of reorganising the failing firm besides the merger³⁸³

Evidence that the failing firm cannot be resuscitated to become a viable business entity again gives credence to the failing firm argument.³⁸⁴ This resuscitation can be through capital injection or other statutory reorganisation mechanisms.³⁸⁵ *In casu*, it was concluded that an indication by Schuman that it would bring viability to Price's Daelite shows that the latter could still be resuscitated without resorting to the anti-competitive merger.

(d) What will happen to the failing firm's market share in the event of its failure and exiting the relevant market³⁸⁶

The failing firm argument can only be upheld if it can be shown that in the event of failure, the failing firm's to-be-available market share would inevitably fall to the acquiring firm.³⁸⁷ This shows not only that there are no other purchasers in the market but also that even if the merger is prohibited, the market conditions would still deteriorate as a result of the exit of the target firm and the acquirer would still assume a dominant position. The merger is thus not the cause of the deterioration in the market conditions hence its prohibition serves no purpose.³⁸⁸

(e) What will happen to the failing firm's assets post-failure³⁸⁹

³⁸² See *Pioneer Hi Bred International Inc./Panaar Seed (Pty) Ltd v. The Competition Commission/African Centre for Biosafety*, 113/CAC/Nov11 in para.20. See also Case No. COMP/M.2816 *Ernst Young France/Andersen France*, Commission decision of 05.09.2002 par. 80.

³⁸³ *Schuman Sasol / Price's Daelite* (note 23 above) par. 65.

³⁸⁴ See for instance, section 11 of the US *Horizontal Merger Guidelines* (2010) requiring parties to demonstrate that the alleged failing firm cannot be successfully reorganized under the insolvency/ bankruptcy laws.

³⁸⁵ For instance, 'Business Rescue' provisions under Chapter 6 of the new Companies Act 71 of 2008 as amended by Chapter 6 of the Companies Act Amendment No. 3 of 2011.

³⁸⁶ *Schuman Sasol/ Price's Daelite* (note 23 above) par.66. See EC *Horizontal Merger Guidelines* par. 90.

³⁸⁷ *Schuman Sasol/ Price's Daelite* (note 23 above) par.66

³⁸⁸ Par. 66. See also on lack of causality, Baccaro V 'Failing firm defence and the lack of causality: doctrine and practice in Europe of two closely related concepts' [2004] *European Competition Law Review* 11.

³⁸⁹ *Schuman Sasol / Price's Daelite* (note 23 above) par. 67.

Allowing the failing firm's productive assets to exit the relevant market constitutes a net competition loss. As such it must be demonstrated that post-failure, the assets will be kept in the relevant market by the acquisition. This is only if there are no other purchasers who can do the same.

Having considered what can be regarded as the essentials of the failing firm doctrine, attention will now turn to the South African approach to the doctrine. Here, the *Iscor/Saldanha Steel*³⁹⁰ decision will be used to illustrate the South African approach to the failing firm doctrine.

5.4.2.2.2 *Iscor/Saldanha Steel*: the approach

The Tribunal's decision follows a proposed acquisition of the shares of Saldanha Steel (Pty) Ltd from the other co-owner, the Industrial Development Corporation of South Africa Limited (IDC) by Iscor Limited, the other co-owner.³⁹¹ The transaction could have seen Iscor owning all the issued shares in Saldanha.³⁹² The Tribunal conditionally approved the merger though it admitted that it raised no quantifiable competition concerns.³⁹³ The basis for the approval was a finding that the target firm was failing hence the merger was conditionally cleared since it passed the pure competition leg of the test and the conditions were imposed to address the public interest concerns raised by the last leg of the test.

In considering the failing firm doctrine, the Tribunal after considering the theoretical basis of the doctrine, including its criticism,³⁹⁴ went on to set out what can be described here as the South African approach to the doctrine, namely:

(a) That establishing the doctrine does not amount to an absolute defence to an otherwise anti-competitive merger but rather it is a mere factor that helps to arrive at a conclusion that the merger is unlikely to substantially lessen or prevent competition.³⁹⁵

³⁹⁰ *Iscor Limited/Saldanha Steel* (note 28 above).

³⁹¹ Par. 2.

³⁹² Ibid.

³⁹³ Par. 6(3).

³⁹⁴ Pars.77-97.

³⁹⁵ Par.101.

(b) The doctrine is a distinct consideration that must be considered as such and separated from other similar doctrines or defences that may be invoked to justify a merger raising competition concerns.³⁹⁶ In particular the Tribunal set the record straight that if a merger involving an alleged failing firm is believed to result in any efficiencies or public interest benefits, it is advisable that merging parties rely on those considerations and they must be kept apart from the failing firm doctrine.³⁹⁷ This is intended to avoid clouding the doctrine given that those other considerations are adequately provided for in the Act.³⁹⁸

(c) The *Schuman Sasol/Price's Daelite*³⁹⁹ approach is confirmed that the doctrine is not cast in stone thus no single criteria can be said to be the exclusive. The applicable criterion is determined by the facts of each case.⁴⁰⁰ The Tribunal expressed the desire to apply and adapt the US and EU criteria.⁴⁰¹

(d) The application of the doctrine entails a flexible approach. The Tribunal expressly stated that it intends to allow for a flexible approach by not sticking to the strict approach employed in other jurisdictions.⁴⁰² However, this approach is largely dependent on the degree of the competitive effects raised by the merger.⁴⁰³ A merger, which after the competition analysis, presents serious competition concerns is likely to face a strict application of the doctrine. This is meant to ensure that the doctrine is employed to genuinely failing firm claims hence the competitive structure of the market is not compromised by allowing anti-competitive mergers to go through the assessment net on the basis of failing firm claims.

(e) The approach is not to rewrite the established principles of merger regulation but rather to adapt them to suit the South African situation. The approach adopted by the Tribunal shows departure from that employed in the US and the EU, but such departure is only limited to the interpretation of the doctrine as a factor rather than a defence. This is in line with the substantive assessment test which requires the merger even after an exhaustive assessment of

³⁹⁶ Pars. 98-99.

³⁹⁷ Par.110(1).

³⁹⁸ See generally ss12A (1)(a) (i) on efficiency justification and 12A(1)(a)(ii) read with subs (3) on substantial public interest benefits.

³⁹⁹ *Schuman Sasol/ Price's Daelite* (note 23 above).

⁴⁰⁰ *Ibid*, par. 59.

⁴⁰¹ *Iscor/Saldanha Steel* (note 28 above) pars.108, 110(2), (3) and (4).

⁴⁰² Par.108.

⁴⁰³ Par.110 (4).

the failing firm doctrine, to be subjected to further scrutiny under the public interest compatibility test.

The Tribunal *in casu* still valued the significance of promoting and maintaining competition. This is evidenced by its declaration that although it might relax other requirements employed in other jurisdictions, the less anti-competitive purchaser requirement was non-negotiable.⁴⁰⁴ This approach is also evidenced in the *Pioneer Hi-Bred/Panaar Seed*⁴⁰⁵ decision where, though the failing firm was found not to be applicable,⁴⁰⁶ the Tribunal took time to consider the significance of the alternative purchaser requirement and reached a conclusion that not every name of a purchaser that is thrown into the fray constitutes an alternative purchaser.⁴⁰⁷ A party is only regarded as an alternative purchaser if it can fit the market profile of the exiting firm.⁴⁰⁸ This ensures that the merged entity would be a significant player on the market in as far as competition is concerned by being able to put pressure on the incumbents of the market.

Having considered the place of public interest consideration in South African merger regulation and the principles underlying the failing doctrine and its application in South Africa, this discussion will now focus on the implications of the public interest consideration on the interpretation and application of the doctrine.

5.4.3 The impact of the substantive test on the failing firm doctrine in South Africa

It has been noted earlier that establishing that a merger involves a failing firm is just but one of the many factors that are assessed in order to determine the likely effects of such a merger on competition. Thus the inquiry does not end with either a successful or failed failing firm claim. A successful failing firm claim only assists the competition authorities in making a determination regarding the likely effects of the merger on competition as required by the first leg of the substantive assessment test. The merger is still subject to a further scrutiny, including a public interest test.

⁴⁰⁴ Par. 110 (6).

⁴⁰⁵ *Pioneer Hi-Bred/Panaar Seed* (note 382 above).

⁴⁰⁶ *Ibid*, par 3.

⁴⁰⁷ *Ibid*.

⁴⁰⁸ See note 382 above.

The implications of the above observations are clear. A successful failing firm claim in South Africa does not justify approval of a merger. In other words, it is not an absolute defence to an otherwise anti-competitive merger.⁴⁰⁹ With the strict criteria for establishing the doctrine, it is ironic to imagine a merger where it has been established that a party thereto is a failing firm as being regarded as anti-competitive. This must not be taken to mean that it is impossible to have an anti-competitive merger involving a failing firm but it is submitted that such situations occur in exceptional circumstances.⁴¹⁰ For instance, a genuinely failing firm, established after the rigorous criteria, cannot qualify as an effective competitor hence its removal from the market does not deprive the market of an effective competitor to such a degree as to negatively alter the competitive market structure.⁴¹¹ Furthermore, the strict requirements of the doctrine vindicate the fact that it is only in extreme cases that an otherwise anti-competitive merger involves a failing firm claim.

The substantive test thus impacts on the failing firm doctrine in two possible ways. These are on the interpretation of the doctrine and secondly on the subsequent application thereof. Section 12A(1)(a)(ii) requires the competition authorities, after determining that the merger is likely to substantially lessen or prevent competition, to then determine whether it can or cannot be justified on specified public interest grounds. Assuming that the merger involved a successful failing firm claim but still raises competition concerns, the fact that it is still subjected to a further scrutiny means that the failing firm doctrine is not a defence to an otherwise anti-competitive merger to establish a failing firm claim. In *Santam Ltd/ Emerald Insurance Co.Ltd*, even after exhausting the failing firm doctrine, the Tribunal still considered the public interest test although it was found that the merger raised no public interest concerns.⁴¹² This approach is in line with the standard analysis approach which the authorities employ to enable them to scrutinise all the elements of the statutory substantive assessment test, namely, the competition effects criteria, the balancing test and the public interest test.

⁴⁰⁹*Iscor Limited/ Saldanha Steel* (note 28 above) par101; *Santam Ltd/ Emerald Insurance Co. Ltd* (note 23 above) par 52.

⁴¹⁰See *Kali und Salz* (note 306 above) ; *International Shoe Co.* (note 304 above).See also Hewitt (1995)(note 2 above) 115.

⁴¹¹ *Santam Ltd/ Emerald Insurance Co. Ltd* (note 23 above) par 82.

⁴¹² *Santam Ltd/ Emerald Insurance Co. Ltd* (note 23 above) par 101; *Schuman Sasol/ Price's Daelite* (note 23 above) pars 73 -76.

As indicated, the three-pronged substantive test has been described as having a ‘Janus-faced’ quality.⁴¹³ This quality has far reaching effects for merger assessment in general and on mergers involving failing firms in particular. It implies that a merger that might have failed to pass the competition muster in which the failing firm consideration is but one of the factors, can still be authorised if it can be justified on either public interest grounds or efficiency gains. Similarly, a merger that raises no competition concerns can still be prohibited if it is not compatible with public interest.⁴¹⁴ In *Santam Ltd/ Emerald Insurance Co. Ltd*, although the merger failed to meet the failing firm criteria,⁴¹⁵ it was still unconditionally approved since it neither raised competition concerns nor public interest issues.⁴¹⁶ However, the question is, would this have been the case if it raised serious competition or public interest concerns?

In theory, the public interest leg of the test can operate to either sanctify an anti-competitive merger or to block one that raises no such concerns.⁴¹⁷ The first scenario can be a ‘panacea’ for a failed failing firm claim. This is because, section 12A(1)(a)(ii) provides in no uncertain terms that the authorities must still consider an otherwise anti-competitive merger to see if it can be justified on substantial public interest grounds. The use of the word ‘can’ in the provision means that the legislature did not intend the public interest scrutiny to be applicable only where the initial inquiry raises no serious competition concerns. This means that there is a theoretical possibility that an otherwise anti-competitive merger can still be approved on public interest grounds. However, practice shows otherwise as the competition authorities have hardly approved anti-competitive mergers on public interest grounds.⁴¹⁸

The second possibility that is raised by the ‘Janus-faced’ quality of the public interest leg of the assessment test is that a merger that raises no serious competition concerns can still be blocked if it ‘cannot’ be justified on substantial public interest grounds. This is because such a merger is still subject to public interest scrutiny under section 12A(1)(b). It is submitted that

⁴¹³ *IDC (SA) v Anglo-American Holdings* (note 23 above) par 22.

⁴¹⁴ *Anglo-American Holdings Ltd/Kumba Resources Ltd* (note 250 above) par 137.

⁴¹⁵ *Santam Ltd/ Emerald Insurance Co. Ltd* (note 23 above) pars 56, 65 and 76.

⁴¹⁶ *Ibid*, par 102.

⁴¹⁷ *Anglo-American Holdings Ltd/Kumba Resources Ltd* (note 250 above) par 137.

⁴¹⁸ Lewis (2007)(note 4 above) 360; Moodaliyar K ‘Competition policy in the SADC: a South African perspective’ (2012) in Drexl J, Bakhom M, Fox EM, Gal MS & Gerber DJ (eds.) *Competition Policy and Regional Integration in Developing Countries* 69.

if the legislature did not intend such mergers to be subjected to a further scrutiny on the grounds that they raise no competition concerns, the inquiry must have been limited to the one provided under paragraph (a)(ii). The use of the words ‘otherwise’ and ‘cannot’ surely means that the legislature intended the authorities to subject even a merger that raises no competition concerns to a further public interest scrutiny. Thus if the merger raises no competition concerns, the inquiry will be on whether it ‘cannot’ be justified.⁴¹⁹ This is because it does not make sense to base the inquiry on whether it ‘can’ be justified. The implication of this approach to the application of the failing firm doctrine is that even if parties succeed in establishing the failing firm claim, thereby rendering the merger free of competition concerns, the authorities can still prohibit the merger if it cannot be justified under public interest grounds. Equally true to say that if the merger raises serious competition concerns and there exist no public interest grounds to justify it, then it can be prohibited.

It is submitted that a construction that requires parties to positively prove public interest justifications where no serious competition concerns are raised can lead to drastic and undesired results. This might create unnecessary anxiety and hardships for merging parties as well as requiring the authorities to engage in the rather daunting task of determining the feasibility of such claims. Accordingly, the competition authorities have made use of several remedies that are provided by the legislature in order to ensure that mergers are compatible with public interest goals. These measures include holding parties to their public interest commitments and in certain cases making sure that the transaction is not implemented until parties demonstrate their willingness to abide by such conditions.⁴²⁰

Although the failing firm doctrine has generally gained a notorious reputation for being difficult to prove,⁴²¹ it is submitted the three-pronged substantive assessment test incorporating a public interest component is necessary to ensure that the authorities do not unnecessarily adopt a rigid approach to merger evaluation. This rigid approach will limit them to employing a rather formalistic approach that can potentially result in them blocking certain socially beneficial transactions. The current South African approach where the

⁴¹⁹ *Anglo-American Holdings Ltd/Kumba Resources Ltd* (note 250 above) par 139.

⁴²⁰ See for instance *DB Investments SA v De Beers Consolidated Miners Ltd* [2001-2002] CPLR 172 CCT (merger approved on condition that the merging parties undertake not to change the conditions of employment for a specific period post-merger); *Duan et Cie AG/Kolosus Holdings* (note 256 above) (approved on condition that parties limit the number of job losses to a specified figures per year).

⁴²¹ See note 28 above.

competition authorities employ a comprehensive standard merger analysis framework in assessing mergers involving failing firms within the context of the three-pronged substantive test answers a number of critics to the failing firm doctrine as it stands. Critics of the doctrine in general have ranged from those calling for its total disbandment to those calling for the relaxation of the criteria currently employed to establish it.

Advocates of the call to have the failing firm doctrine disbanded argue that if mergers involving failing firm claims exhibit some efficiency claims, then it must be treated as an efficiency defence. Similarly, if the merger exhibits some public interest benefit then it must be considered under public interest.⁴²² In *Iscor/ Saldanha Steel*, the Tribunal flatly rejected this approach.⁴²³ The Tribunal stated that the South African merger regulatory framework adequately provides for the consideration of mergers on efficiency and public interest grounds hence no need exists to cloud the failing firm doctrine under them.⁴²⁴ This reasoning is welcome as it ensures that the competition authorities ‘do not miss the tree because of the bush,’ a phenomena that the authorities have cautiously emphasised avoiding in dealing with particularly public interest provisions.⁴²⁵

⁴²² See on this discussion, Valentine (1995) (note 30 above). Although the Tribunal in *Iscor/ Saldanha Steel* (note 27 above) par 110(1) advised that parties should not bring a failing firm claim if it amounts to other factors provided under the statute, this should not be taken to mean that the doctrine must be avoided. It is rather a way of ensuring that issues are dealt with in a more clear manner than clouding them even where unnecessary. The approach advocated in *Iscor* was utilised in *Tiger Brands/ Ashton Canning* (note 383 above) par 71 where the Tribunal noted that although the failing firm doctrine was not the subject of the decision, it was considered under specific public interest grounds, particularly in par 128 (on employment).

⁴²³ *Iscor/ Saldanha Steel* (note 28 above) pars 95, 96, 99 and 110(1). Dragging public interest and efficiency issues into the failing firm doctrine would not only cloud issues, but also result in the possibility of anticompetitive mergers being authorised on sympathy grounds. See Areeda PE, Hovenkamp H and Solow JL *Antitrust Law* 2nd ed (1998) Vol. IVA 230 par 952d who contend that if merger raises efficiency defence, it must be confirmed to efficiency.

⁴²⁴ *Iscor/ Saldanha Steel* (note 28 above) par 95.

⁴²⁵ The need for authorities to avoid ‘missing the tree because of the bush’ was categorically stated by Manoj N, Presiding Member of the Panel of the Competition Tribunal of South Africa in the *Wal-Mart/ Massmart* merger Tribunal decision) (note 1 above) par 32 when he commented that; ‘Tribunal’s job in merger control is not to make the world a better place, *but* only to prevent it becoming worse as a result of a specific transaction.’ See also *Natal Association of Pharmaceutical Wholesalers & Others v Glaxo Wellcome (Pty) Ltd & others* CT 68/IR/Jun00 par 64 where it was stated that the competition legislation’s primary purpose is to promote and maintain competition. Accordingly, one can argue that although the authorities cannot ignore public interest

5.4.3.1 The South African approach and lessons for Zimbabwe

The current three-pronged merger assessment approach applied by the South African competition authorities promotes flexibility in dealing with the failing firm doctrine.⁴²⁶ Furthermore, it enables the authorities, through merger regulation, to promote and maintain not only an effective competition system but also to complement the broader-policy objectives required of it. This approach enables it to respond to the country's demands in line with its peculiar historical developments. The inclusion of public interest as a component of merger assessment though not without some challenges, is plausible if it continues to be supported by an independent competition authority determined to maintain a balance between the inherently conflicting objectives of the system. The merger regulatory authorities also appreciate that effective merger regulation plays a crucial but complementary role in the broader policy framework. This is a critical aspect that Zimbabwe must take note of. The exact extent to which the Zimbabwean system can adopt and adapt the South African model is the subject of latter chapters. Suffice to say at this point that the Zimbabwean merger regulatory framework requires serious alignment to those of comparable jurisdictions like South Africa. This alignment is particularly required in order to provide clarity to such crucial issues as the definition of mergers, defining public interest provisions and refocusing the competition authority so that it could be able to develop jurisprudence especially on the interpretation and application of the failing firm doctrine.

However, it is submitted the South African approach to failing firm doctrine cannot provide the exclusive basis upon which one can develop a model framework for Zimbabwe. This is because in the handful of cases involving failing firm claims that the competition authorities have handled, the decisions have failed to lay down clear guidelines as to what is required for

provisions, the promotion of public interest objectives should not be done in such a way as to constitute their core business.

⁴²⁶ In *Iscor/Saldanha Steel* (note 28 above) pars 106 and 107 the Tribunal correctly noted that treating the failing firm doctrine as a factor rather than an absolute defence allows adjudicators to exercise some degree of flexibility as they will not be under pressure to conform to the strict and rigid set criteria. This flexibility is evidenced in *Schuman Sasol/ Price's Daelite* (note 23 above) where the adjudicators did not limit their assessment of the doctrine to the traditional criteria that can be rarely achieved if the doctrine is treated in a more rigid way as is the case with an absolute defence where failure to meet the set criteria signal the end for the parties.

a successful failing firm claim in South Africa.⁴²⁷ The Tribunal has simply confirmed that the criteria established and currently utilised in the US and EU can be relied upon in South Africa.⁴²⁸ This must not be taken to mean that the doctrine is a defence as is the case in those jurisdictions as such reasoning has no legal basis in the South African Competition Act. The question is whether this reluctance to lay down tailor-made guidelines have a bearing on future development of the doctrine in South Africa and whether the unquestioned reliance on the US and EU set of criteria is a worrying sign for South Africa that Zimbabwe must take note of?

Sutherland criticised the approach adopted in *Iscor/ Saldanha Steel* decision particularly in failing to provide clear guidelines that should be adopted in South Africa.⁴²⁹ He noted that by adopting the US and EU criteria, the decision failed to take into account the peculiar South African situation.⁴³⁰ He developed a model in which he argued that the authorities must take into account public interest considerations probably as they are applied in such jurisdictions as Canada.⁴³¹ This is because unlike the EU and the US, the Canadian competition statute expressly provides for the consideration of public interest in merger regulation.⁴³² This places it on the same footing with South Africa thus it becomes logical to consider how the Canadian competition authorities had dealt with mergers involving failing firm within the broader public interest context.

It can be agreed with Sutherland especially on the failure by the authorities to consider how the failing firm doctrine has been applied in Canada given that that jurisdiction contains public interest provisions similar to South Africa. However, it is argued that the cautious approach in not developing guidelines promotes a flexible approach that is suited for such a

⁴²⁷ See Sutherland P 'Competition Law and Economics: South African Developments in light of Recent European Experiences: The Failing Firm doctrine in South Africa' (June 2007), available at http://www.rbbecon.com/sa-conference/downloads/Philip_Sutherland.pdf, (accessed 09 April 2012)(the 'Sutherland Model.')

⁴²⁸ See *Iscor/ Saldanha Steel* (note 28 above) par 110(2).

⁴²⁹ See Sutherland (2007) (note 427 above).

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.* Section 93 (b) of Canada Competition Act R.S.C., 1985 c-34 provides for the failing firm consideration as a factor in assessing the effects of a merger on competition. For a further discussion on the Canadian criteria see generally Crampton PS *Mergers and Competition Law* (1990) 1408 in particular note 59a.

⁴³² *Ibid.*

young competition system as South Africa. Although guidelines can promote a degree of certainty, it is submitted that they have a tendency of creating a rather formalistic and rigid system detrimental to the interpretation and application of legal doctrines. Competition law and merger regulation in particular must be understood not as a mere set of formal legal principles but rather as a practical set of dynamic rules and principles driving a living cause. As such the need for flexibility cannot be said to be overemphasised.

The need for flexibility must however not be taken to exclude the need for legal certainty. A cause to advance legal certainty must be realistic. Accordingly, it is argued that the current approach, devoid of guidelines but promoting both clarity and substance, is plausible for the following reasons, namely that it promotes flexibility, it avoids rigidity, and the authorities never intended to follow the US and EU approaches blindly but reference thereto is in line with established principles of statutory interpretation requiring an appreciation of the historical developments of the doctrine.⁴³³ Thus although this writer concedes to the oversight on Canada, it is still contended that such oversight cannot be a block on which the South African approach can be dismissed.

Recognising that precedents developed in other jurisdiction exist in different environments and as such are distinguishable, there is a need for this work to examine how Zimbabwe can learn from such jurisdictions as the US and EU to fill the gaps that are left by South African competition law. This is true especially considering that although the South African provision refers to the likely failure of part of business, there is no further authority to clarify and expand on this consideration in merger regulation from a South African perspective. This provision is also present in Zimbabwe. It is thus necessary to consider the variation in the doctrine with regard to the failing division concept from US perspective as is done in Chapter

⁴³³ See section 1(3) of the Competition Act 89 of 1998 which provides for the consideration of appropriate foreign law in interpreting and applying the Act. See *American Soda Ash Corporation v Competition Commission* 12/CAC/Dec01 par 15. In *Standard Bank Investment Corporation Ltd v Competition Commission* [2000] 2 ALL SA 245 (A) par 30 the Supreme Court of Appeal commented that the South African Courts have considered foreign law where appropriate. However, the court was rather negative about overreliance on foreign law. See also *Distillers Corporation (SA) Ltd/ Stellenbosch Farmers' Winery Group* (note 181 above) par 57 in defining relevant market where the Competition Commission relied on foreign jurisprudence, the Tribunal noted that although these jurisprudence cannot be ignored entirely, weight attached thereto must be appropriate to the unique South African situation. Although the use of such comparative foreign has been met with mixed reactions in South Africa it is submitted its consideration in the interpretation and application of the failing firm is appropriate.

6 of this study. However, the immediate attention of the study will be on how the EU approaches the failing firm doctrine given that the South African Competition Tribunal in *Iscor/Saldanha Steel* expressed its preference to that jurisdiction's approach.⁴³⁴

5.5 Concluding remarks

Public interest considerations are a unique but central feature of the South African merger assessment process. They mirror the country's broad based socio-economic and political policies. The Competition Act expressly provides that the adjudicating authorities must take into account the effects of any proposed merger on such factors as employment creation and retention, the ability of small to medium businesses to compete, the country's industrial strategy and the need to promote historically disadvantaged members of the society. The public interest considerations thus have a noble agenda within the broad-based competition system. However, they also have some far reaching implications on crucial aspects of merger regulation.

Public interest considerations, as part of a broad-based competition regime, impacts upon the interpretation and application of the failing firm doctrine in merger analysis. The Competition Act provides that in considering a merger, the authorities must assess, *inter alia*, whether or not a party to such a merger has failed or is likely to fail. Unlike in the US and EC where a finding that a party to the transaction is a failing firm is an ultimate defence to a rather anti-competitive merger, in South Africa such a finding is merely a satisfaction of one of the components of a three-pronged test. A merger thus cannot be cleared on the basis that the parties have managed to establish the existence of a failing firm by satisfying the set criteria. The merger must still meet the public interest compatibility component of the test, that is, whether it can or cannot be justified on public interest grounds.

The implications of public interest considerations on the application of the failing firm doctrine in South Africa are that they do not only subject the merger to further scrutiny but also ensure that the competitive structure of the market is maintained. Furthermore, the broad-based system encompassing public interest considerations promotes flexibility that ensures that in appropriate circumstances and contrary to the widely held notion, mergers can be allowed on the grounds that a party thereto is a failing firm as was the case with the *Iscor/Saldanha Steel* large merger.

⁴³⁴See *Iscor Saldanha Steel* (note 28 above) par 110(3).

However, the inclusion of public interest in merger assessment has a sloppy side as well. As illustrated by the events following the decision to approve a merger between Wal-Mart and Massmart, public interest can provide an opportunity for the ‘smuggling’ of special interests into the process and potentially results in legal uncertainties if they are not properly construed. This ugly face of the public interest consideration can be kept in check by maintaining the present approach of interpreting public interest factors in a more restrictive and purposeful manner aimed at maintaining the fabric of the competition regime in general and the merger regime in particular.

Zimbabwe which has almost similar provisions relating to the failing firm and public interest has a lot to learn from the commendable approach of the South African competition authorities in interpreting and applying the same.

Chapter 6: Regulating mergers with failing firms in the EU: lessons for Zimbabwe

6.1 Introduction

In *Iscor/Saldanha Steel*,¹ the South African Competition Tribunal professed its preference for the EU criteria for establishing the failing firm doctrine when it stated that ‘a merger would not be regarded as lessening competition if the conditions laid out in the more stringent EU test can be satisfied.’² Although the failing firm doctrine is not given express recognition³ by the Council Regulation (EC) of 2004 (‘the ECMR’)⁴ which is the primary merger control regulation in the EU, the European Commission, which is the EU competition authority,⁵ has stated in its 2004 *Horizontal Merger Guidelines* that⁶

The Commission may decide that an otherwise problematic merger is nevertheless compatible with the ‘internal market’⁷ if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger.

The *Horizontal Merger Guidelines* further provide a test that must be met before the Commission can accredit failing firm claims.⁸ This test is a product of successive case law

¹ *Iscor Ltd/Saldanha Steel (Pyt) Ltd* 67/LM/Dec01.

² Par.110 (3).

³ Kokkoris I ‘Failing Firm Defence in the European Union: A Panacea for Mergers’ (2006) *European Competition Law Review* 494,497.

⁴ European Council (EC) *Regulation No. 139/ 2004 of 20 January 2004 on the control of concentrations between undertakings*, OJ L24/1-22 of 29.01.2004 (‘the ECMR’), available at <http://ec.europa.eu/competition/mergers/legislation/regulations.html>, (accessed 17 August 2012).

⁵ The European Commission- Directorate –General for Competition (herein after ‘the Commission’) is the EU’s competition authority.

⁶ *EC Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, [2004] OJ C31/5 pars.89-91 (‘the *Horizontal Merger Guidelines*.’)

⁷ The original wording refers to the ‘common market’. However this term has been replaced by the ‘internal market’. As such wherever the term internal market appears, it shall mean the former common market.

⁸ Par. 90 of the *Horizontal Merger Guidelines*.

jurisprudence.⁹ Accordingly, the Commission's approach to the failing firm doctrine is stated in the *Horizontal Merger Guidelines* as

The Commission considers the following three criteria as relevant for the application of a "failing firm" defence. First, the alleged failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchaser than the notified concentration. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.¹⁰

Crucially, the Commission must be satisfied that the merger is not the cause of the deterioration of the competitive structure, that is, the deterioration would have occurred even in the absence of the merger.¹¹ This lack of causality is at the centre of the EU failing firm doctrine¹² and is in essence a confirmation of the legal standard for merger assessment under Article 2 of the ECMR requiring an assessment of post-merger deterioration of the market structure in the near future.¹³

A successful failing firm defence requires merging parties to cumulatively meet the criteria set in the merger guidelines and applied by the courts.¹⁴ This requirement, coupled with the inherent link between the *Horizontal Merger Guidelines* and the ECMR, particularly Article 2 of the ECMR, largely explains why the failing firm criteria are stricter in the EU¹⁵ than for instance in South Africa. Articles 2 (2) and (3) of the ECMR contains the substantive test for determining

⁹ See for instance, Case IV/M.308 *Kali und Salz/Mdk/Treuhand* (I) ,[1994] OJ L186/38 and Case IV/M. 308 *Kali und Salz/Mdk/Treuhand* (II), OJ C275/3 pars.19-24 where the European Commission ('the Commission') established a three-pronged test for the failing firm doctrine; Case IV/M. 2314 *BASF/Eurodiol/Pantochim [2001]*, Commission decision of 11.07.2001, par.163. See also Kokkoris (2006) (note 3 above) 494.

¹⁰ Par. 90 of the *Horizontal Merger Guidelines*.

¹¹ Par. 89 of the *Horizontal Merger Guidelines*.

¹² Ibid. See also generally on the lack of causality in EU merger regulation, Baccaro V 'Failing firm defence and the lack of causality: doctrine and practice in Europe of two closely related concepts' [2004] *European Competition Law Review* 11; Bavasso A and Lindsay A 'Causation in the EC Merger Control' (2007) 3(2) *Journal of Competition Law and Economics* 181, 182; Kokkoris (2006)(note 3 above)498.

¹³ See Article 2 of ECMR.

¹⁴ See Case COMP/M.2876 *NewsCorp/Telepiu* [2004] OJ L110/73 par. 220, the Commission noted that since the parties had failed to meet the first two of the three set requirements, it was unnecessary to take the final test. See also Kokkoris (2006)(note 3above) 494 and Baccaro (2004)(note 12 above) 23.

¹⁵ See generally Bavasso and Lindsay (2007)(note 12 above) 194 (the failing firm doctrine is drawn too narrow as a result of the lack of causality requirement.)

whether a ‘concentration’¹⁶ is compatible with the internal market, that is, whether a merger would lead to a significant impediment of effective competition in the internal market or a substantial part thereof. Article 2(1)(b) provides that in appraising whether a merger is compatible with the internal market, the Commission ‘shall take into account’ *inter alia*, ‘the market position of the undertakings concerned and their economic and financial power.’ Additionally, central to the application of the ECMR is the requirement that there must be a causal link between the concentration and the deterioration in the competitive structure of the market, namely, any harm to competition should be linked to the merger.¹⁷ All these factors restrict the interpretation of the failing firm doctrine in order to advance the objects of the EU’s merger control regime.

As indicated, the South African merger regulatory framework that gives effect to the failing firm doctrine is strikingly similar to the Zimbabwean one. In both jurisdictions the doctrine is given express statutory recognition as a factor that must be considered, if applicable, in determining whether a merger is likely to significantly lessen or prevent competition.¹⁸ Given the lack of doctrinal developments in Zimbabwe and its resemblance to South Africa, and considering that the latter had expressed preference to the EU approach to the failing firm doctrine,¹⁹ it is imperative that this study explore the interpretation and application of the failing firm doctrine from an EU perspective in order to assess whether the approach preferred by the South African authorities can be of significance to the development of a suitable and effective merger regulatory framework for Zimbabwe.

¹⁶ ‘Concentration’ is the term used to refer to mergers in EU parlance and this chapter will use the two interchangeably.

¹⁷ See Joined Cases C-68/94 and C-30/95 *France v Commission* [1998] ECR I-1375 ; Whish R *Competition Law* 6th ed (2009) 856 (observing that although the case was decided under the EC *Merger Regulation* 4064/89 of 1990 which contains the ‘dominance test’ as the substantive test for merger determination, there is nothing to suggest that the causal link requirement would not apply in the cases of the ‘substantial impediment to effective competitive’ test contained in the 2004 ECMR.)

¹⁸ Section 12A(2)(g) of the South African Competition Act 89 of 1998 and section 32 (4a) of the Zimbabwean Competition Act [*Chapter 14 :28*] (7 of 1996).

¹⁹ *Iscor/ Saldanha Steel* (note 1 above) par. 110(3).

This Chapter therefore seeks to provide an assessment of the extent to which the EU approach to the failing firm doctrine in merger regulation can be adopted and, if possible, adapted to develop an effective merger regulatory model for Zimbabwe. The central issues to be explored are whether there are any lessons that Zimbabwe can learn from the EU merger regulatory framework in general and in particular from the EU approach to the failing firm doctrine.

Part II of this Chapter will provide a brief overview of the EU merger regulatory framework where the focus will be on the main legal instruments that regulate mergers in the EC. This is not intended to provide a comprehensive coverage of these instruments but rather to provide a contextual framework for the failing firm doctrine. This will be followed by a discussion and analysis of the interpretation and application of the doctrine from an EU perspective in Part III. Part III will essentially provide a discussion of the essential elements of the doctrine focusing on the criteria required to establish the defence under the *Horizontal Merger Guidelines* as interpreted by the courts. A meaningful analysis is only possible if one appreciates the regulatory framework that underlies merger regulation in the EC. Part IV will analyse some selected judicial and administrative decisions of the courts and the Commission in which the failing firm defence was tested. Here it will be shown that although the EC approach is relatively commendable and the regulatory framework is flexible enough to promote beneficial corporate transactions without harming the competitive process, meeting the set criteria is rather difficult. The rationale behind these criteria cannot be said to be applicable to Zimbabwe where the doctrine is merely a factor in merger determination as opposed to an absolute defence.

Finally, the chapter will motivate why the EU approach, despite it being preferred by the South African authorities, cannot be adopted for Zimbabwe without alterations. It will be argued that although Zimbabwe requires an effective merger regulatory framework to deal with mergers involving failing firms and established jurisdictions like the EU provides a workable model, a wholesale adoption thereof is not favourable. The need for an approach that is relevant to Zimbabwe cannot be overemphasized given the fundamental difference in the regulatory structure of the two jurisdictions. Furthermore, the possible reason why the South African Competition Tribunal in *Iscor/Saldanha Steel* preferred the EU's stricter approach is due to the belief that such approach is capable of promoting and maintaining a competitive market structure in line with the overall goals of competition law. However, this Chapter will continuously

question the belief that only a stricter approach to the failing firm doctrine will achieve such a goal. It will be argued that the substantive test provided by the Zimbabwean legislation can be adapted to ensure that an effective merger regulatory framework promotes beneficial corporate transactions without necessarily harming the competition process.

6.2 The EU merger regulatory framework

6.2.1 A general overview

Any meaningful discussion of the regulatory framework underlying EU merger control cannot be complete without reference to various legal instruments that established firstly the then European Economic Community (EEC) in 1958,²⁰ thereafter the European Community (EC) in 1992²¹ and finally the current EU in 2009.²² For a number of years, general and specific provisions of these instruments were employed to appraise concentrations with ‘potential adverse effect on competition within the common market.’²³ However, these provisions’ application to merger control was severely handicapped by the lack of specific merger control regulations²⁴ as discussed hereinafter. These shortcomings led to the adoption of numerous proposals aimed at merger control in the EU.²⁵ However, differences in opinions between Member States on how to

²⁰ Treaty establishing the European Economic Community of 1 January 1957 (EEC Treaty or The Treaty of Treaty), available at http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf. (accessed 21 October 2011).

²¹ The Treaty on the European Union or Maastricht Treaty of 1992, *OJ* C191/92 amended the Treaty of Rome and particularly replaced the European Economic Community with the European Community. See <http://www.eurotreaties.com/maastrichtec.pdf>, (accessed 22 October 2011).

²² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *OJ* C306/2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:FULL:EN:PDF>, (accessed 22 October 2011).

²³ Van der Woude M and Dumas-Eymord A ‘EU’ (1999) in Verloop P (eds.,) *Merger Control in the EU: A Survey of European Competition Laws* (3rd ed) (1999)3.

²⁴ *Ibid.*

²⁵ The earliest proposals to adopt, merger control regulations were made in 1973 in form of the Commission *Proposal for a Regulation of the Council of Ministers on the Control of Concentrations between Undertakings*, *OJ* [1973] C 92/1; see also drafts in *OJ* [1982] C36/3; *OJ* [1984] C51/8; *OJ* [1986] C324/5; *OJ* [1988] C130/4.

regulate mergers at Community level meant the proposed regulatory mechanisms only materialized in 1989 with the adoption of the Regulation 4069/89 in 1990.²⁶

Regulation 4064/89²⁷ which entered into force on 21 September 1990 was amended in 1997²⁸ and subsequently repealed and replaced in 2004 by the current ECMR which contains the current EU merger control rules.²⁹ In addition, the EU merger regulatory framework includes Implementing Regulations, Commission Notices and Guidelines.³⁰ This Part will briefly discuss the legal instruments establishing the EU and how they were used to effect merger control. This will be followed by a discussion of merger control regulations under the current regime as provided under the ECMR and supplemented by the *Horizontal Merger Guidelines*. The aim is primarily to provide a contextual framework upon which the EU approach to the failing firm doctrine can be analysed and discussed.

6.2.2.1 EU merger control under the EU Treaty

The Rome Treaty of 1958 established the European Economic Community ('the EEC').³¹ In 1992, the name was changed by the Maastricht Treaty³² from the EEC to the European Community ('the EC') by deleting the 'Economic' aspect from the name. This was meant to reflect a departure from a purely economic 'Community' to one with a stronger political inclination.³³ The EC became one of the three 'pillars' of the EU alongside Police and Judicial Cooperation in Criminal Matters, and the Common Foreign and Security Policy.³⁴ The 'pillar'

²⁶ Council Regulation 4064/89 on the control of concentrations between undertakings, OJ [1990] L 257/1 (Regulation 4064/89.) See Whish (2009)(note 17 above) p818.

²⁷ Council Regulation 4064/89.

²⁸ Council Regulation 1310/97 on the control of concentrations between undertakings, OJ [1997] L180/1(Regulation 1310/97.)

²⁹ Whish (2009) (note 17 above) 817.

³⁰ These will be referred to in this writing as and when necessary.

³¹ Treaty of Rome of 1957.

³² Maastricht Treaty of 1992.

³³ Wish (2009)(note 17 above) 49 n.3.

³⁴ Ibid.

system entails that the EC was a legal entity separate from the EU. This position was changed by the Lisbon Treaty of 2009.³⁵

The Lisbon Treaty abandoned the ‘pillar’ system, the result of which was that the EC lost its separate legal status.³⁶ The treaty was amended and renamed as The Treaty on the Functioning of the European Union and the ‘Community’ hence became the ‘EU.’³⁷

Throughout its evolution, various legal instruments in the form of treaties emphasized the significance of a competitive economy as a tool to achieve the EU’s goals. As such, competition policy remains critical to the EU. Article 2 of the EC Treaty provided as one of the aims of the Community, for the promotion of a high degree of competitiveness and convergence of economic performance. In order to achieve this, Article 3(1)(g) envisaged the establishment of ‘a system ensuring that competition in the internal market is not distorted.’³⁸

Article 3(3) of the EU Treaty repealed Article 3(1)(g) of the EC Treaty by providing for the establishment of an internal market in the place of ‘a system ensuring that competition in the internal market is not distracted.’ Although the former provision does not make express reference to competition, the EU is still committed to an effective competition policy within the internal market. This commitment is echoed in the Protocol on the Internal Market and Competition annexed to the EU Treaty.³⁹ This means the Treaty’s silence on competition must not be construed as meaning that the EU has abandoned competition policy for reference thereto in the

³⁵Whish (2009)(note 17 above)50.

³⁶ Ibid

³⁷ See Council of the European Union ‘Presidency Conclusions Brussels European Council 21/22 June 2007’ *Council of European Union* 23 June 2007, Annex 1, Pen24 par.2, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94032.pdf, (accessed 17 August 2012)

³⁸Article 3(1)(g) of the EC Treaty. See further on the interpretation of Articles 2 and 3(1)(g) of the EC Treaty, *France v. Commission* (note 17 above) ECR I-1375, [1998] 4 CMLR 829, pars. 169-178 and Case T-102/96 *Gencor v. Commission* [1999] ECR II-753, [1999] 4 CMLR 971, pars.148-158.

³⁹ See Protocol on the Internal Market and Competition, available at <http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01015601.htm>, (accessed 23 October 2012).

Protocol will give effect to competition policy given that the Protocol has the same effect as the Treaty.⁴⁰

6.2.2.2 The EU Treaty and merger control

Although successive Treaties clearly contained provisions aimed at prohibiting anti-competitive behaviour within the internal market,⁴¹ they lacked specific provision on merger control regulation.⁴² However, this limitation did not deter the Commission from scrutinizing anti-competitive mergers in order to determine their compatibility with the internal market. The Commission employed particularly Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 of the EU Treaty) to prohibit such mergers if they fall under the prohibition of a dominant position.⁴³

Article 81 of the EC Treaty (now Article 101 of the EU Treaty), prohibits cartels and other agreements that potentially disrupt free competition in the internal market. By prohibiting agreements that could disrupt competition and in turn restrict business, Article 101 essentially prohibits mergers which might be anti-competitive.⁴⁴ This is based on the reasoning that mergers and acquisitions create dominant positions that are also prohibited under Article 102 (ex Article 82) due to their anti-competitive nature.

Articles 101 (ex 81) and 102 (ex 82) provide a regulatory framework under which mergers were prohibited. However, it is submitted that in as much as these provisions were stretched to apply to mergers, their application and subsequent usefulness was severely handicapped. Article 102 (ex 82) requires that there be a dominant position in existence that the merging parties will in

⁴⁰ See statement by Commissioner Kroes of 8 November 2007. MEMO/O7/250 stating that, ‘the Protocol maintains in full force the competition rules which have served the European citizens so well for fifty years,’ available at http://www.ec.europa.eu/comm/competition/speeches/index_2007.html, (accessed 17 August 2012.)

⁴¹ Articles 81 and 82 of the EEC Treaty, then Articles 86 of EC and now Articles 101 and 102 of the EU Treaty.

⁴² Woude and Dumas-Eymord.(1999)(note 23 above) 3. Van Bae l& Bellis (eds.), ‘Control of Mergers, Acquisitions and Certain Joint Ventures’ in *Competition Law of the European Community* (5th ed) (2010) 634.

⁴³ See for instance, *Europemballage and Continental Can.v Commission* (I) [1973] ECR 215. See also Van Bael & Bellis (2010)(note 42 above) 634 n4.

⁴⁴ *Ibid.*

turn abuse. This means that where the merger itself creates a dominant position, the provision is not applicable for there is no previously existing dominant position to be abused.⁴⁵

Article 101 (ex 82) envisages a prohibition where the merging parties would continue to exist as independent entities post-merger. This essentially reflects a joint venture rather than a legal merger where a new entity is created post-merger or one of the merging parties is absorbed into the other.⁴⁶ In these scenarios, entities will not remain independent post-merger. However, Article 101 (ex 82) is only applicable in principle to cases where the parties remain independent post-merger.⁴⁷

In addition to some substantive shortcomings, both Articles 101 and 102 raises serious practical challenges for effective merger regulation.⁴⁸ They are basically reactive provisions in nature making them unsuitable for merger control particularly because the sanctions provided thereunder are difficult to implement in practice.⁴⁹ Article 101(2) (ex 81(2)) provides that any agreements between undertakings, decisions by associations of such undertakings and concerted practices aimed at preventing, restricting or distorting competition within the internal market, in particular those specified in Article 101(1),⁵⁰ ‘shall be automatically void.’

⁴⁵ Van Bael & Bellis (2010)(note 42 above) 634.

⁴⁶ See Article 3(1) (a) of the Regulation 4064/89.

⁴⁷ Van Bael & Bellis (2010) (note 42 above) 634.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Article 101 (1) of the Treaty on the Functioning of the European Union provides that;

‘The following shall be prohibited as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions;(b) limit or control production, markets, technical development, or investment;(c) share markets or sources of supply;(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

This nullity provision raises practical challenges as it is customarily difficult to ‘unscramble’ a merger once it is implemented⁵¹ and thus poses enforcement challenges.

The shortcomings of the Treaty provisions created uncertainties and loopholes that were laid bare in several court decisions.⁵² These decisions confirmed the need for an effective merger control regime. The first proposals for merger control regulation were introduced following the *Continental Can* case as will be discussed below.⁵³ However, these proposals did not materialize as the first real merger control regulations came in 1989⁵⁴ following the uncertainties created in the *British American Tobacco/RJ Reynolds* decision.⁵⁵ The European Council formally adopted merger control regulations on 29 December 1989 and it came into force on 21 September 1990. Regulation 4064/89 was later amended in 1997⁵⁶ and subsequently repealed and replaced by the current ECMR in 2004. The significance of the ECMR to EU merger regulation will be discussed below.

6.2.3 The EU and merger control regulations

6.2.3.1 The Regulation 4064/89

The first set of merger control regulations were adopted by the European Economic Council (EEC) on 30 December 1989 and became effective on 21 September 1990.⁵⁷ Regulation 4064/89 which ushered in an era of formal merger control regulation, was adopted following proposals from the Commission⁵⁸ and opinions of the European Parliament⁵⁹ and the Economic and Social

⁵¹ See DePamphilis D *Mergers, Acquisitions, and other restructuring activities: An integrated approach to Process, Tools, Cases and Solutions* (2001) 60.

⁵² See for instance, *Continental Can* (note 43 above); *British American Tobacco Co. Ltd and RJ Reynolds Industries v Commission* [1997] ECR 448.

⁵³ *Commission Proposals for a Regulation of the Council of Ministers on the Control of Concentrations between Undertakings* [1973] OJ C92/1. See also Van Bael & Bellis (2010)(note 42 above) 635.

⁵⁴ *Council Regulation 4064/89 on the control of concentrations between undertakings*.

⁵⁵ Van Bael & Bellis (2010)(note 42 above) 635.

⁵⁶ *Council Regulation 1310/97 on the control of concentrations between undertakings*.

⁵⁷ *Council Regulation (EEC) 4064/89 on the control of regulations between undertakings*.

⁵⁸ *Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentration between Undertakings*, OJ C130/4 of 9 May 1988, 4

⁵⁹ European Union Parliament Opinion, *OJ C309* of 5 December 1988, 55.

Committee.⁶⁰ Regulation 4064/89 thus furthered the aims of the EC Treaty particularly instituting a system to ensure that competition in the common market was not distorted.⁶¹ Although Regulation 4064/89 primarily aimed at merger control, it was formulated with a focus towards the achievement of a proposed internal market.⁶² The merger control regulation thus provides a legal instrument to promote effective competition within the EU through, *inter alia*, monitoring corporate transactions.⁶³ The adoption of the Regulation 4064/89 was meant to arm the Commission with a new and exclusive legal instrument for merger control.⁶⁴

The Regulation 4064/98 significantly acknowledged that although Articles 85 and 86 of the EC Treaty were applicable to certain concentrations, such application was limited hence they were not sufficiently designed to cover all transactions which were potentially harmful to competition and incompatible with the common market.⁶⁵

Regulation 4064/89 applied to all concentrations having a Community dimension.⁶⁶ A concentration was deemed to have a Community dimension for purposes of the Regulation 4064/89 if:

- (a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5000 million, and
- (b) (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieve more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.⁶⁷

⁶⁰ Opinion of the European Union Economic and Social Committee, *OJ C208* of 8 August 1988,11.

⁶¹ Article 3 (f) of the EC Treaty.

⁶² Preamble to *Regulation 4064/89 on the control of concentrations between undertakings*, *OJ L395/1*.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Article 1(1) of *Regulation 4064/89 on the control of concentrations between undertakings*, *L395/3*. The concept of a Community dimension will be discussed in detail below under the ECMR. See also Article 4(1) providing that all concentrations with a community dimension must be notified to the Commission.

⁶⁷ Article 1(2) of *Regulation 4064/89 on the control of concentrations between undertakings*, *L 395/3*.

The aggregate turnover for the threshold levels is calculated in terms of Article 5 of Regulation 4064/89 and the levels laid down in Article 1(2) were subject to review after a four year period.⁶⁸

The Regulation 4064/84 also introduced a new substantive assessment test for merger control. Article 2 in paragraphs (2) and (3) of Regulation 4064/89 contained this test. Paragraph (2) provided that;

A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.⁶⁹

Paragraph (3) of Article 2 in turn provides that a concentration ‘shall be declared *incompatible* with the common market if it ‘creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it.’⁷⁰

The substantive test for merger appraisal continued to be applied even after the Regulation 4064/89 was amended in 1997.⁷¹ However, the adoption of the ECMR in 2004 saw the test being altered from the creation of strengthening of a dominant position-test in Regulation 4064/89 to the substantial impediment of effective competition (‘the SIEC’) test.⁷² The significance of this change on merger control in general will be discussed below under the ECMR.

However, before turning attention to the regulation of mergers under the ECMR and in particular the implications of the SIEC test, it is important to highlight some of the salient features of Regulation 4064/89. This Regulation introduced a compulsory prior notification requirement for all concentrations having a Community dimension. Article 4(1) of the Regulation required

⁶⁸ Article 1 (3).

⁶⁹ Article 2 (2), L395/3.

⁷⁰ Article 2(3), L395/4.

⁷¹ Van Bell & Bellis (2010) (note 42 above) 635. Article 4(1) provided for a compulsory notification of all mergers with a community dimension. The Regulation 4064/89 was amended in 1997 by Regulation 1310/97 OJ L180/1 of 1997.

⁷² See generally, Fountoukakos K & Ryan S ‘A new Substantive Test for EU Merger Control’ (2005) 5 *ECLR* 277; Kokkoris I & Katana K (2010) ‘Critical Analysis of the ECMR Reform’ in Iionos I & Kokkoris I (eds.,) (2010) *The Reform of EC Competition Law: New Challenges* .

concentrations with a Community dimension to ‘be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest’⁷³ whichever occurred first.⁷⁴ If a concentration took the form of a merger between two or more previously independent entities (a legal merger)⁷⁵ or acquisition of control by one or more persons already having a controlling stake in the whole or part of the acquired entity,⁷⁶ notification was to be jointly filed.⁷⁷ However, ‘in all other cases,’ that is, besides a legal merger and acquisition of control, it was required that the acquiring entity effect the notification within the prescribed timeframe as indicated above.⁷⁸

Lastly, Article 6 of the Regulation provided for issues relating to the examination of notifications and initiation of proceedings. Upon receipt of the notification, the Commission was enjoined to examine it.⁷⁹ The initial examination was to determine whether the notified concentration falls within the ambit of the Regulation.⁸⁰ If the answer was negative, the Commission was required to record as such by means of a decision.⁸¹ However, if the answer was affirmative, but the notified concentration raised no serious doubts as to its compatibility with the common market, then the Commission was normally expected not to challenge it.⁸² If the notified concentration fell within the scope of the Regulation and raised serious doubts as to its compatibility with the common market, the Commission was expected to initiate proceedings⁸³ aimed at either prohibiting it or attempting to secure some commitments to remedy the identified concerns.⁸⁴

⁷³ Article 4(1) of *Regulation 4064/89 on the control of concentrations between undertakings*, L395/4.

⁷⁴ *Ibid.*

⁷⁵ Article 3 (1)(a), L395/4.

⁷⁶ Article 3 (1)(b), L395/4.

⁷⁷ Article 4 (2), L395/4.

⁷⁸ *Ibid.* See also note 73 above.

⁷⁹ Article 6 (1), L395/6.

⁸⁰ *Ibid.*

⁸¹ Article 6(1)(a).

⁸² Article 6 (1)(b).

⁸³ Article 6 (1)(c).

⁸⁴ See generally Article 8 on the powers of the Commission.

Whatever decision the Commission was to take, it needed to have been transmitted to the parties concerned as well as the relevant regulatory authorities of the Member States without delay.⁸⁵

The decision whether or not to initiate proceedings following a preliminary determination had to be made within a month of receiving the necessary notification.⁸⁶ However, this period was not cast in stone for provision was made for it to be increased to a further six weeks upon a request from a concerned Member State.⁸⁷ In the event that the undertakings concerned had offered commitments to remedy any serious doubts that might be raised by the concentrations, the Commission was obliged to take the appropriate decision without any delay.⁸⁸ In the case of any other notified concentrations, the Commission was to make a decision within not more than four months following the date of initiating proceedings.⁸⁹

The above time lines clearly provided for an expedient and flexible notification and decision making procedure. This feature is commendable as it greatly promotes an effective merger regulatory framework which ensures that effective competition is not distorted on the one hand, and which promotes benevolent corporate transactions on the other hand.

The prospects of an increase in corporate reorganisations through, *inter alia*, mergers and acquisitions loomed, spurred by an internal market and economic and monetary union, an

⁸⁵ Article 6 (2).

⁸⁶ Article 10(1), L395/8.

⁸⁷ Article 10(1) read with Article 9(2). Article 9(2) provides that ‘within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission which shall inform the undertakings concerned that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.’

⁸⁸ Article 10(2) read with Article 8(2). Article 8(2) provides that ‘where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfills the criterion laid down in Article 2 (2), it shall issue a decision declaring the concentration compatible with the common market. It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.’

⁸⁹ Article 10(3).

enlarged EU and the subsequent dismantling of trade and investment barriers, and necessitated an even stronger merger control regulation.⁹⁰ This resulted first in the amendment of the Regulation 4064/89 in 19907 by Regulation 1310/97.⁹¹ If any piece of legislation continues to undergo some amendments it often ends up losing much needed clarity hence the need to provide clarity to the EU merger control regulatory framework culminating in the adoption of the ECMR in 2004.⁹² The ECMR recast Regulation 4064/ 89 as amended by Regulation 130/97 in order to provide a comprehensive reflection of the changing merger regulatory environment within the EU.⁹³ The following section will focus on the fundamental changes that were introduced by the ECMR with particular emphasis on the substantive assessment test for merger control.

6.2.3.2 The ECMR

The ECMR was adopted on 20 January 2004 by the Council of the EU and became effective from 1 May 2004.⁹⁴ Just as the case with the Regulation 4064/89, this adoption followed proposals from the Commission,⁹⁵ the opinions of the European Parliament⁹⁶ and that of the European Economic and Social Committee.⁹⁷ The ECMR aims at furthering the aims of the EU Treaty through providing an effective merger control regulatory framework that is capable of safeguarding the competitive process from harm without distorting free competition.⁹⁸ The ECMR was thus a response to the need for an exclusive merger control regulation in the EU.⁹⁹

The Council acknowledged the role that Regulation 4064/89 had played in merger control but emphasized the need to take even further legislative steps to address some of the challenges that an even larger EU could pose.¹⁰⁰ It must be borne in mind that despite the need for a stronger

⁹⁰ Par 3, L24/1 of the Preamble to the ECMR.

⁹¹ *Regulation (EC) 1310/97 on the control of concentrations between undertakings*, OJ L180/1 of 1997.

⁹² Par. 1, L24/1 of the Preamble to the ECMR Preamble.

⁹³ *Ibid.*

⁹⁴ Article 26.1 of ECMR.

⁹⁵ EC Proposals for Merger Reform, *OJ C20/4* of 28 January 2003.

⁹⁶ Opinion of the EU Parliament on ECMR

⁹⁷ Opinion of the EU Economic and Social Committee on ECMR.

⁹⁸ Pars. 1-5 of the Preamble to the ECMR.

⁹⁹ Par. 6 of the Preamble to the ECMR.

¹⁰⁰ Par. 6 of the Preamble to the ECMR.

merger control regulation, such a regulation's mandate was to be restricted to the scrutinizing and prohibition of mergers to the extent that they would be inconsistent with the principles of a common market not to distort free competition.¹⁰¹ It is submitted that this realization forms the cornerstone of the EU merger control. Crucially, the Council acknowledged the challenges posed by first the use of Articles 81 and 82 of the EC Treaty and then the substantive assessment test in Regulation 4064/89. The ECMR was thus adopted with these realisations in mind hence it is no surprise that it brought with it far reaching changes to the EU merger regulatory framework as discussed below.

(a) *The application of the ECMR*

As the case with the Regulation 4064/89, the ECMR applies to 'all concentrations with a Community dimension.'¹⁰² The regulations through the concept of a 'Community dimension' confer upon the Commission jurisdiction to deal with such concentrations having a 'Community dimension.' As such the ECMR retained the features of its predecessor albeit with some modifications, notably the change in the currency from the European Currency Unit (ECU) in Regulation 4064/89¹⁰³ to Euro in the ECMR.¹⁰⁴ In a bid to extend the application of the ECMR, it further extended the concept of a 'Community dimension' beyond the traditional combined aggregate turnover of the undertaking concerned and 'the aggregate Community-wide turnover of each of at least two of the undertakings concerned'¹⁰⁵ to situations falling short of this criteria.¹⁰⁶ A concentration can now be deemed to have a 'Community dimension' regardless of not meeting the criteria in Article 1(2) (a) and (b) of the ECMR where

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

¹⁰¹ Par. 6 of the Preamble to the ECMR.

¹⁰² Article (1), L24/6 of the ECMR. See also articles 4 (5) and 22 of the ECMR and similarly worded article 1(1) of Regulation 4064/1.

¹⁰³ Article 1(2), L395/3 of Regulation 4064/89.

¹⁰⁴ Article 1(2), L24/6 of the ECMR.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

- (c) in each of at least three Member States included for purposes of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member States.¹⁰⁷

The ECMR also introduced the principle of a ‘one-stop-shop’ to EU merger control.¹⁰⁸ It is submitted that this principle provides as a general rule, that the Commission should have exclusive merger review jurisdiction over transactions having an impact beyond national boundaries. This is supported by the prior notification requirement compelling parties to a concentration to notify the Commission prior to implementation.¹⁰⁹ The rationale behind ‘a one-stop-shop’ is to facilitate speedy assessment of a notified concentration as well as avoiding unnecessary multiple notifications in all the Member States that might have an interest in the concentration.¹¹⁰ Multiple notifications are not only time consuming but are expensive.¹¹¹

However, the general rule that the Commission has exclusive jurisdictions over all concentrations having a Community dimension is subject to a number of exceptions. These exceptions are contained in a system of referrals that is provided under the ECMR.¹¹² The Commission may make a decision to refer a notified concentration to a competent national authority of a Member State.¹¹³ Such a referral is made if an analysis of the products or geographic markets concerned¹¹⁴ reveals a distinct market that poses a competitive threat only to such a Member State.¹¹⁵

¹⁰⁷ Article 1(3), L24/6 of the ECMR.

¹⁰⁸ Par. 8, L24/2 of the Preamble to the ECMR.

¹⁰⁹ Article 4(1), L24/8.

¹¹⁰ See generally Rakovsky C, Godhino de Matos M, Kopke A, Ohrlander P and Shiels P ‘EC Merger Regulation contributes to more efficient merger control in EU’ (2009)2 Competition Policy Newsletter, available at http://ec.europa.eu/competition/publications/cpn/2009_2_4.pdf, (accessed 21 November 2012).

¹¹¹ *Ibid.*

¹¹² See generally Article 9, L24/12.

¹¹³ Article 9(1).

¹¹⁴ Article 7 of ECMR.

¹¹⁵ Article 9(3)(b).

A Member State can have jurisdiction over a notified concentration if it can sufficiently notify the Commission that a notified concentration threatens a distinct market under its national jurisdiction and has no effects on the common market or any substantial part thereof.¹¹⁶ In the event that the Commission confers jurisdiction upon a Member State, the latter is obliged to make a decision without undue delay.¹¹⁷

The ECMR also amended the notification requirements contained in its predecessor. The Regulation 4064/89 required concentrations having a Community dimension to ‘be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest’ whichever occurs first.¹¹⁸ Although the ECMR in Article 4(1) retained the circumstances under which a concentration having a Community dimension must be notified to the Commission, it replaced the ‘not more than one week’ requirement with a requirement that such concentration must be notified simply ‘prior to their implementation.’ The ECMR further introduced as an alternative requirement that a concentration may be notified upon demonstration by the undertakings concerned that they have ‘a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid.’¹¹⁹ This requirement must be backed by a showing that the perceived agreement or bid would result in a concentration having a Community dimension.¹²⁰

The amended notification requirement is meant to provide the Commission with ammunition to scrutinize as many transactions that might have an impact on effective competition as possible. The amendments further provide a much needed degree of flexibility to the notification procedure given that the ‘not more than one week’ requirement was somewhat rigid.¹²¹ It is submitted that it is also possible for a concentration to be notified even before a binding agreement is concluded as long as it can be demonstrated that there is a good intention to do so. However, despite its noble rationale to provide flexibility necessary for an effective merger

¹¹⁶ Article 9(2) read with (3) of ECMR.

¹¹⁷ Article 9(6), L24/12 of the ECMR.

¹¹⁸ Article 4(1), L395/4 of Regulation 4064/89.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Van Bael & Bellis (2010) (note 42 above) 638.

control regulation, Article 4(1) in particular paragraph (2), presents some practical challenges. Van Bael and Bellis indicate that it is almost impossible to meet the requirement that a concentration can be notified even before an agreement is concluded given the time that it takes to undergo all the pre-notification formalities and the amount of time that goes into the preparation for the notification.¹²² However, it is submitted that paragraph (2) is simply an alternative proviso that parties can resort to if they cannot satisfy paragraph (1). As such failure to meet the former should not be taken as a major hindrance to the achievement of a flexible and effective merger control regulatory framework.

A fundamental change brought about by the ECMR relates to the refocusing of the substantive assessment test from the dominance test in the Regulation 4064/89 to the one which assesses whether or not a concentration would ‘significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.’¹²³ This test will be discussed below.

(b) The ECMR and the ‘SIEC’ test

(i) The dominance test under Regulation 4064/89

Prior to the adoption of the ECMR in 2004, the dominance test provided in Article 2(2) and (3) of the Regulation 4064/89 was the substantive assessment test employed to determine whether a proposed concentration was compatible with the internal market. The inquiry under this test focused exclusively on whether the proposed concentration would result in the creation or strengthening of a dominant position in the entire or substantial part of the internal market, referred there as the common market.¹²⁴

There were four elements of the dominance test: The first being the determination of the relevant market in which a dominant market was either created or strengthened.¹²⁵ The second was the

¹²² Van Bael & Bellis (2010)(note 42 above) 638.

¹²³ Article 2 (2) and (3) of the ECMR.

¹²⁴ This Chapter will refer to the geographic area under the EU merger control jurisdiction as the internal market either when discussing old instruments and decisions or the current ones.

¹²⁵ Article 2(3) of Regulation 4064/89.

creation of a dominant position.¹²⁶ It is submitted that this implies that prior to the proposed concentration, the concerned parties did not command a dominant position on the relevant market as individual entities and as such the proposed concentration would create a merged entity with a dominant market position. The third element was the strengthening of a dominant position.¹²⁷ This means that even if prior to the proposed concentration, either of the concerned entities commanded a dominant position, such a position would be strengthened post-merger.¹²⁸ The last element was the creation or strengthening of the dominant position in the entire or significant part of the internal market.¹²⁹ This requires is an assessment of the competitive effects of the proposed concentration on both the product and geographical market of the EU. On the geographic market, the effect could either be on the entire market¹³⁰ or a substantial part thereof.¹³¹

Whereas the dominant test's utility in EU merger regulation was not questioned, two main developments placed it in the spotlight: the European Court of Justice (ECJ)'s decisions on its applicability to cases of collective dominance and the ongoing reform of EU merger control. The application of the dominance test to cases creating or enhancing single firm dominance was never in issue.¹³² However, its applicability to cases of collective dominance was a thorny one.

¹²⁶ Article 2(3) of Regulation 4064/89.

¹²⁷ Article 2(3) of Regulation 4064/89.

¹²⁸ See for instance, Case No. IV/M.053 *Aerospatiale-Alenia/de Havilland*, [1991] OJ L334/42, particular pars. 27 and 28 where the Commission found that the proposed concentration would have the effect of significantly strengthening ATR's position on the relevant market by increasing its market shares. ATR being a joint owned and operated entity of the acquiring firms. See also Case IV/M.993 *Bertelsmann/Kirch/Premiere*, [1999] O.J. L53/1, L53/19 par.100 27.2.1999.Commission decision of 27 May 1998.

¹²⁹ Article 2(3) of Regulation 4064/89.

¹³⁰ See for instance *Kali und Salz* (note 9 above) L186/47 par. 57 where the Commission noted that the proposed concentration would eliminate effective competition on the potash market within the EC.

¹³¹ See for instance *Bertelsmann/Kirch/Premiere* (note 128 above) L53/5 par. 22 where the geographical market that was to be affected by the concentration was defined as Germany and Germany-speaking regions of the UE being Germany, Austria and German-speaking parts of Belgium, Switzerland and Luxembourg. See also *Kali und Salz* (note 9 above) L186/45 par.46 where it was found that the proposed concentration had the effect of creating a *de facto* monopoly on the Germany market for potash and Germany being a substantial part of the EU.

¹³² See note 133 below.

Although the dominance test was accepted as applicable to collective dominance cases,¹³³ questions surrounded its applicability to situations where neither the merger created a dominant firm nor the firms in the market were dominant in their individual capacity but with unilateral effects potentially harmful to competition.¹³⁴ The *Airtours* cases as discussed below raised the question as to whether the Regulation 4064/89 through the application of the collective dominance concept could be applied to situations of unilateral conduct by non-dominant firms as opposed to traditional dominant situations.¹³⁵ This ultimately invoked the debate as to whether there was a gap in EU merger control.¹³⁶

This debate was mainly between academics and regulators. The academics argued mainly that the dominance test as provided in the Regulation 4064/89 and through the application of the collective dominance concept did not suffice to cover cases of unilateral conduct by non-dominant firms hence there was a ‘gap’ in the EU merger regulatory framework.¹³⁷ On the other end of the spectrum were regulatory authorities who insisted that there was no ‘gap’ and citing

¹³³ *France v Commission* (note 17 above) par. 178 where the Court of First Instance (CFI) confirmed that although Article 2 of Regulation 4064/89 did not expressly refer to a collective dominance situation as opposed to Article 86 of the EC Treaty, collective dominance positions were captured by the scope of the regulation. In *Gencor/Lonrho* OJ 1997 111/30 upheld upon appeal by the CFI in *Gencor v. Commission* (note 37 above) pars. 273-276, it was stressed that collective dominance can still be created without establishing the existence neither of active collusion nor structural links. In highly concentrated markets, the merged entities that are relatively dependent can still be in a position to conform their conduct to such markets. See also *Joined Cases T-68/89, T-77/89 and T-78/89 SIV and others v Commission* [1992] ECR II-1403 (*Flat Glass* cases) where the CFI in applying the dominance test under the Regulation 4064/89, implied related the test to the notion of the prohibition of abuse of dominance under Article 82 of the EC Treaty.

¹³⁴ This situation arises in *Airtours/ First Choice* OJ 2000 L93/1 and upon appeal, Case T-342/99 *Airtours v Commission* 2002. In this case the Commission first applied the collective dominance concept to a case where there was no clear collective dominant position in an oligopolistic market. The post-merger market structure would have seen the merged entity, *Airtours/First Choice* commanding a 32 % market share with Thomson having 27% and Thomas Cook on 20%. In addition, the relevant market was characterised by being heterogeneous with perfectly substitutable products and low entry barriers. These conditions did not favour collusive behaviour. See further on the case, generally Barr M ‘Implications of the *Airtours* Case’ (2002) *Lex Mundi Regional Conference* (Brussels, 23-25 August 2002) 2, in particular on the market conditions.

¹³⁵ See Barr (2002) (note 134 above).

¹³⁶ See generally notes 137 and 138 below.

¹³⁷ See Barr (2002) (note 134 above).

that the dominance test has been used in many cases to deal with alleged inadequacies.¹³⁸ The merits or lack thereof on either side of this debate is largely beyond the scope of this Chapter and study at large. The focus here is to explore how the EU's approach to the regulation of mergers involving failing firms can be adopted and where necessary, adapted in suggesting and developing an effective and suitable model for Zimbabwe. As such, what is of significance here is that, regardless of the substantive assessment test employed, if the result is a competition concern, then it may be asked how the failing firm doctrine is going to be invoked in such instances. It suffices however to state that the said debate was influential in shaping the current substantive test in EU merger regulation: the 'SIEC test.'

Whatever resolve the Commission might have had of holding on to the dominance test wilted with a series of judicial reversals of its decisions by the ECJ¹³⁹ and the irresistible force of reforming the EU merger control.¹⁴⁰

(ii) *The effects of ECJ's judicial reversal of the Commission's decisions*

(a) *The Airtours cases*¹⁴¹

In prohibiting the merger, the Commission held that a showing that the market participants would engage in tacit rather than explicit collusive behaviour post-merger was not necessary provided the degree of interdependence between them rationalized them to restrict output thereby hampering competition so as to create a dominant position.¹⁴² Accordingly, the Commission concluded that the merger would lead to the creation of a dominant position in the UK market for short-hand foreign package holidays with the result that competition in the common market would be significantly impeded.¹⁴³

¹³⁸ See Commission's Merger Task Force 'Collective Dominance under the ECMR; The Implications of the *Airtours Case*' ABA Brown-Bag Seminar 26 June 2002.

¹³⁹ See notably, *Airtours v Commission* (note 134 above);

¹⁴⁰ See note 72 above.

¹⁴¹ See note 134 for the facts.

¹⁴² *Airtours/ First Choice* (note 134 above) pars. 54 and 150.

¹⁴³ *Airtours v Commission* (note 134 above) 11-2594 par. 4.

The Commission's finding that the merger would create a joint dominant position hence justifying the applicability of the dominance test was premised on its view that tacit collusion was not necessary to establish collective dominance thereby applying the doctrine of unilateral effects.¹⁴⁴ This deviation from established case law jurisprudence¹⁴⁵ created confusion. The Commission's application of the dominance test to prohibit a merger giving rise to unilateral effects in the absence of neither single firm dominance nor tacit collusion extended the application of the merger regulation to concepts that were widely perceived as falling outside the scope of EU merger control regulations regardless of the detrimental effects of such transactions.¹⁴⁶ Whatever the merits of such an approach, the uncertainty that it caused resulted in the *Airtours* appeal to the CFI.¹⁴⁷

(a)(i) Airtours v Commission

The decision to prohibit the merger was appealed by Airtours. The basis of appeal was that the Commission's factual findings were incorrect and its subsequent application of the dominance test contained in the merger regulation was wrong.¹⁴⁸ The CFI annulled the Commission's decision finding in favour of the appellants.¹⁴⁹ The Court concurred that the Commission had wrongly found that the merger would create a dominant position particularly in the absence of convincing evidence to support such finding.¹⁵⁰

The CFI made a number of significant findings which largely rebuked the Commission's approach as being erroneous and not being based in factual evidence.¹⁵¹ The Court particularly disputed the Commission's claims that the merger which would have eliminated one competitor from the tour operator market, would have provided an incentive for the remaining operators to engage in anti-competitive practices through ceasing any existing competition amongst

¹⁴⁴ *Airtours/ First Choice* (note 134 above) par. 54. See also Barr (2002)(note 134 above) 3.

¹⁴⁵ Barr (2002) (note 134 above) 3.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Airtours v Commission* (note 134 above).

¹⁴⁸ 11-2595 par. 16.

¹⁴⁹ *Airtours v Commission* (note 134above) par. 62.

¹⁵⁰ *Ibid.*

¹⁵¹ Par. 294.

themselves.¹⁵² The Commission's claims were found to be unsubstantiated.¹⁵³ The Commission had based its prohibition on, *inter alia*, the fact that elimination of one of the four tour operators would significantly result in the deterioration of the competitive market structure.¹⁵⁴ Again this finding was rejected by the Court holding that there was no evidence to suggest that the level of competition would deteriorate post-merger.¹⁵⁵ The CFI further found that the Commission had failed to adequately appreciate the role such countervailing forces as the other small operators, potential rivals and consumers could play in maintaining effective competition in the tour operator market.¹⁵⁶

In annulling the Commission's decision, the CFI concluded that the latter was

[F]ar from basing its prospective analysis on cogent evidence, is vitiated by a series of errors of assessment as to factors fundamental to any assessment of whether a collective dominant position might be created. It follows that the Commission prohibited the requisite transaction without having proved to the requisite legal standard that the concentration would give rise to a collective dominant position of the three major operators, of such a kind as significantly to impede effective competition in the relevant market.¹⁵⁷

The CFI did not clarify the issue of whether tacit collusion was a requirement for the application of the dominance test.¹⁵⁸ It is submitted that the uncertainties that the judgment created perpetuated the age old question as to whether there was a 'gap' in the EU merger control regulation. This issue became the subject of an interesting debate.¹⁵⁹ Following the CFI ruling, the Commission insisted that there was no 'gap' in the merger regulation for the Court had only ruled upon the matter before it without limiting the application of the regulation.¹⁶⁰ This view is premised on an interpretation that the merger regulation is widely applicable to cover a wide

¹⁵² 11-2631 par. 108.

¹⁵³ *Ibid.*

¹⁵⁴ 11-2595 par.9.

¹⁵⁵ 11-2688 par. 283.

¹⁵⁶ 11-2605 par.44; 11-2638 par. 133.

¹⁵⁷ 11-2693 par.294.

¹⁵⁸ Barr (2002) (note 134 above) 3.

¹⁵⁹ See note 138 above.

¹⁶⁰ *Ibid.*

range of anticipative scenarios in oligopolistic markets including where firms are in a position to effect price increases and thereby exercise market power.¹⁶¹

However, it is submitted that the fact that the merger regulation can be of wide application seems not to justify its application to such situations as raised in *Airtours*. The failure by the CFI to clarify the status of the merger regulation and by extension, the dominance test in cases where a merger might give rise to unilateral effects in the absence of neither single firm dominance nor tacit collusion created unwanted uncertainties in the EU merger control regulatory framework. This observation partly contributed to the creation of new merger regulation in the form of the ECMR in 2004 containing a new substantive test, the SIEC test.

(ii) *The SIEC test*

Article 2(2) and (3) of the ECMR contained the new substantive assessment test for mergers with a Community dimension. Paragraph (2) provides that:

A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.¹⁶²

Paragraph (3) provides for the prohibition of a concentration that ‘would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position’ on the basis that such is incompatible with the common market.¹⁶³

These provisions basically form the core of the SIEC test. The test can be easily mistaken as a replication of the old dominance test in the Regulation 4064/89.¹⁶⁴ However, whereas the erstwhile test focused on the question of whether or not the merger would create a dominant position resulting in the substantial impediment of competition, the new test goes beyond an inquiry of whether a dominant position will be created or strengthened to ask whether or not any

¹⁶¹ See note 130 above. See also Barr (2002)(note 134 above) 5.

¹⁶² Article 2 (2), L24/7 of the ECMR .

¹⁶³ Article 2 (3), L24/7 of the ECMR.

¹⁶⁴ See Articles 2(2) and (3) of Regulation 4046/89.

significant impediment to effective competition would be a result of the creation or strengthening of a dominant position.¹⁶⁵ By so doing the SIEC refocused the substantive assessment test.¹⁶⁶

The refocusing of the substantive assessment test following the adoption of the ECMR in 2004 goes a long way in providing clarity to the application of the test and the merger guidelines to cases of unilateral effects. It is submitted that this is a welcome development given the uncertainties created by the *Airtours* decisions. Refocusing the substantive test strengthens it ensuring that its application goes beyond situations that were covered by the erstwhile test.

The question that one needs to consider is whether the refocused test impacts on the Commission's approach to merger assessment? Although the wording of the test significantly changed, Roller and De la Monoin observe that it appears that there is nothing to suggest 'a radical change in the way the Commission would assess the competitive effects of mergers.'¹⁶⁷ The refined test emphasizes a shift towards a comprehensive 'effects based' merger assessment approach accounting for all the relevant market characteristics.¹⁶⁸

In addition to the ECMR, the EU merger control regulatory framework consists of some administrative instruments such as the Implementing Regulation¹⁶⁹ and a series of Notices and Guidelines on both substantive and procedural matters.¹⁷⁰ The Commission is bound in its

¹⁶⁵ See Fountoukakos & Ryan (2005) (note 72 above) 277.

¹⁶⁶ See note 72 above.

¹⁶⁷ Roller LH and De La Monoin M 'The Impact of the New Substantive Test in European Merger Control' (2006) *European Competition Journal* 9. See also Van Bael and Bellis (2010)(note 39 above) 637-38 n 22.

¹⁶⁸ Ibid.

¹⁶⁹ *EC Implementing Regulation 802/2004 of April 7, 2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings*, (2004) OJ L133/1., available at <http://ec.europa.eu/competition/mergers/legislation/legislation.html>, (accessed 11 February 2012). The Implementing Regulation contains the rules on notification, time limits, right to be heard and hearings, access to file and treatment of confidential information as well as remedies.

¹⁷⁰ Some of these Notices and Guidelines are the *Commission Notice on the definition of the relevant market* OJ C372/5 [1997]; *Guidelines on the assessment of horizontal mergers* OJ C31/5 [2004]; *Commission Notice on a simplified procedure for treatment of certain concentrations* OJ C56/32 [2005]; *Commission Notice on the restrictions directly related and necessary to concentrations* OJ C56/24 [2005]; *Commission Notice on Case Referral* in respect of concentrations OJ C56/2 [2005]; *Commission Notice on access to the file* OJ C325/7 [2005]; *Commission Guidelines on the assessment of non-horizontal mergers*, available at

merger regulatory mandate by these administrative instruments to the extent that they are not in conflict with the EU Treaty or the ECMR.¹⁷¹ It is noted that the said instruments are an integral feature of the EU merger regulatory framework. However, since the focus of this study is to examine ways in which the EU approach to the failing firm doctrine can be adopted and adapted to develop an effective merger regulatory framework for Zimbabwe, emphasis will now turn to the *Horizontal Merger Guidelines* or the *Guidelines* as the instruments containing the failing firm doctrine.

6.2.4 The Horizontal merger guidelines and the failing firm doctrine

The 2004 *Horizontal Merger Guidelines* were published together with the ECMR as part of the EU's merger control reforms.¹⁷² The *Horizontal Merger Guidelines* provide an analytical framework on how mergers involving actual or potential market competitors are to be assessed by the Commission.¹⁷³ These guidelines provide a framework on how the Commission deals with market shares and concentrations ratios.¹⁷⁴ Although the ECMR does not provide for

<http://www.ec.europa.eu/comm/competition>, (accessed 20 February 2012); *Commission Consolidated Jurisdiction Notice*., available at <http://www.ec.europa.eu/comm/competition>, (accessed 20 February 2012); The *Consolidated Jurisdiction Notice* replaced the 1998 full-function joint ventures OJ C66/1 [1998]; *concept of concentration* OJ C66/5 [1998]; *undertakings concerned* OJ C66/14[1998] and the *calculation of turnover* OJ C66/25 [1998].

¹⁷¹ See Case T-282/06 *Sun Chemical Group BV and Others v Commission* [2007] ECR II-000, [2007] 5 CMLR 438, par.55.

¹⁷² See for a further discussion of the *Horizontal Merger Guidelines*, Voight S and Schmidt A 'The Commission's guidelines on horizontal mergers: Improvement or deterioration?' (2004) 41 *Common Market Law Review* 1583.

¹⁷³ Par 5 of the *Horizontal Merger Guidelines*; *Sun Chemical Group BV* (note 171 above) par. 57. See also Wish (2009)(note 17 above) 857.

¹⁷⁴ Pars 14-15 of the *Horizontal Merger Guidelines* notes that market shares and concentration ratios provides useful preliminary indicators of the market structure and the merging parties' competitive relevance thereto. Although not conclusive, these indicators are important as they provide 'a device for conducting a first screening of a merger.' See Case M.938 *Price Waterhouse/ Coopers & Lybrand*, decision of 15 October 1997, OJ 150/27 [1997], [1999] 4 CMLR 665, pars. 108-111; Case M.2389 *Shell/ DEA* , decision of 20 December 2001, par. 21; Schmidt A 'Spotting the Elephant in Parallel Mergers: First Past the Post, or Combined Assessment?' (2003) 24 *ECLR* 183. Case T-282/06 *Cementbouw Handel & Industries BV v Commission* [2007] ECR II-000, [2007] 5CMLR 438, pars.201 (very large market shares of 50% or more may indicate the existence of a dominant position). However, pars. 17 and 18 provides that even markets shares of between 40% and 50 % or even less can be of relevance but normally any

mathematical criteria for appraisal of concentrations,¹⁷⁵ the Commission through the guidelines preferred the Herfindahl-Hirschman Index (HHI) to determine the overall concentration levels of the market in order to provide the competitive situation therein.¹⁷⁶ The Guidelines also deal with how the Commission assesses the likelihood that a merger would have anti-competitive effects;¹⁷⁷ determines countervailing buyer power;¹⁷⁸ possibility of market entry and competition constraints;¹⁷⁹ efficiency¹⁸⁰ and, of significance to this study, the failing firm doctrine.¹⁸¹

market shares below 25% are presumed to be in compatible with the common market. See also Recital 32 of the ECMR.

¹⁷⁵ *Opinion of Advocate General Tesouro in France v Commission* (note 17 above) I-1386 par.7.

¹⁷⁶ Par. 19 of the *Horizontal Merger Guidelines*. The HHI ‘totals the squares of the market shares of the individual undertakings involved in the concentration. In order to establish the actual increases in the degree of market concentration resulting from the operation, the product of the market shares of the undertakings involved is doubled. If the HHI is under 1 000 after the concentration, the operation will, as a rule, be authorised. If it is between 1 000 and 1 800, the concentration will be examined and may be prohibited where it involves an increase of more than 100. Finally if the HHI is above 1 8000, the concentration may be prohibited even if it entails an increase of less than 50.’ See *Opinion of Advocate Tesouro* (note 175 above). Par. 19 of the *Horizontal merger guidelines* provide that a market with a post-merger HHI of less than 1,000 is deemed to pose less competitive concerns. Pars 20 provides that a post-merger concentration level of between 1,000 and 2,000 and a change below 250, or a post-merger HHI above 2,000 and a change below 150 are unlikely to pose a serious competition concern unless if such conditions are preceded by special conditions. See also Wish (2009) (note 17 above) 41-42.

¹⁷⁷ Pars. 22 to 63 discuss the possibilities of anti-competitive effects of horizontal mergers. These are divided into non-coordinated or unilateral effects and coordinated effects. Unilateral effects results from the post-merger elimination of an effective competitors and in the process enhancing the dominant position of the remaining market participants (par. 24 of the Guidelines). See further Case M. 3916 *Ryanair/Aer Lingus*, decision of 27 June 2007, on appeal Case T-342/07 *Ryanair v Commission*; Case M. 3916 *T-Mobile/ telering*, decision of 26 April 2006. See further Luebking J ‘*T-Mobile Austria/telering: Remediating the loss of a maverick*’ *Competition Policy Newsletter* (Summer 2006) 46. Wish (2009)(note 17 above) 856-7.Coordinated effects arises where firms in a particular market considers it economically necessary and desirable to adopt sustainable price increases thus the possibility of the merger resulting in substantial impede of effective competitive as the post-merger firms will be able to behave in a coordinated manner even in the absence of an agreement to do so (para.39 of the Guidelines). See further *Airtours v Commission* (note 134 above) par.62; Case T-464/04 *Impala v Commission* [2006] ECR II-2289, [2006] 5 *CMLR* 1049, paras.288-294. See also Volcker S and O’ Daly D ‘The Court of First Instance’s *Impala* Judgment: a Judicial Counter-reformation in EU Merger Control?’ (2006) 27 *ECLR* 589; Brandenburger R and Janssens T ‘The *Impala* Judgment: Does EC Merger Control Need to be Fixed or Fine-Tuned?’ (2007)3 (1) *Competition Policy International*

Paragraph 89 of the Guidelines provides that the Commission can find an otherwise anti-competitive merger compatible with the internal market where one of the parties thereto is a failing firm. In order for the Commission to make such a finding, the merging parties must cumulatively prove the following:

- (a) that if not acquired by another firm, the allegedly failing firm would be forced out of the relevant market in the near future due to its financial difficulties;
- (c) there is no alternative to the notified merger posing less competitive threats; and
- (d) the assets of the failing firm would inevitably exit the market in the absence of the proposed merger.¹⁸²

For merging parties to successfully rely on the failing firm defence, the aforementioned criteria must be satisfied cumulatively.¹⁸³ The criteria will be analysed and discussed below where it will

301; Ysewyn J and Tajana A ‘The *Sony/BMG* Judgment of the Court of First Instance : Its Main Legal Implications and Impact on the Merger Control Process ‘ (2007) 2 *European Business Law Journal* 233.

¹⁷⁸ Par. 64 explains that competitive pressure can come not only from the firm’s competitors but also from a customer if such a customer possesses countervailing power, that is, bargaining power vis-à-vis a seller as a result of its size, commercial influence and ability to switch to alternative suppliers. See also Case M4071 *Apollo/Akzo Nobel IAR*, Decision of 29 May 2006, on appeal *Sun Chemical Group BV* (note 171 above) par.57.

¹⁷⁹ Par. 68 explains that if entry into a market is easy then the merger is unlikely to lead to substantial impede effective competition. Entry can only be said to be a competitive constraint if it can be shown that it likely, timely and sufficient. See pars. 69,71, 74 and 75.

¹⁸⁰ Pars. 76 to 88 provide guidance on the conditions under which the Commission may accredit efficiency claims. The Commission takes into account any claims for substantial and potential efficiencies that the merging parties’ might put forward. Although efficiency claims are not a defence to an otherwise anti-competitive merger, they may counteract the effects on competition and the otherwise potential harm to consumers. For the Commission to accredit efficiency claims, the guidelines requires that the claims be of benefit to consumers, be merger specific and be verifiable and such requirements be proved cumulatively (par . 78).See further Case M 4000 *Inco/Falconbridge*, decision of 4 July 2006, pars. 529-550 , where the Commission considered but rejected claims that the merger would generate efficiencies on the basis that the merging parties had failed to demonstrate that the efficiencies could not be obtained by less anti-competitive means and further that the consumers would benefit therefrom . cf. Case M. 4057 *Krorsnas/ Assidoman Cartonboard*, decision of 12 May 2006 pars. 57-64.

¹⁸¹ Par 89- 91.

¹⁸²Par.90.

¹⁸³ See note 14 above.

be argued that the strict and narrow application of the failing firm doctrine in the EU legitimately and reasonably ensures the promotion and maintenance of a competitive market structure in line with the internal market policy. This is meant to be achieved through a process that ensures that the competitive market structure is not compromised by allowing otherwise anti-competitive mergers under the guise of failing firms. However, it will be stressed that Zimbabwe must not blindly adopt the EU approach to the failing firm doctrine. The motivation behind such an emphasis will be demonstrated through a critical analysis of each and every criterion for the failing firm defence as applied in the EU. This scrutiny is meant to assess, where, if necessary, the criteria can be adapted to suit Zimbabwe's needs in pursuit of an effective merger control regulatory framework. This will be done bearing in mind the difference in the interpretation of the failing firm doctrine in the EU and Zimbabwe where in the former it is accepted as an absolute defence to an otherwise anti-competitive merger¹⁸⁴ whereas in the latter it is merely a factor in assessing the likely competitive effects of a given merger.¹⁸⁵ A question will thus be posed as to whether there is a need for a strict approach to the doctrine in Zimbabwe as in the EU considering that treating it as a mere factor within a three-pronged substantive assessment test will provide the much needed flexibility and safeguards required to maintain a competitive market structure.

6.3 The criteria for a successful failing firm defence in the EU

The failing firm doctrine in the EU is underpinned by the lack of causality principle.¹⁸⁶ This principle which is provided under article 2 of the ECMR provides that a merger is not the cause of the deterioration in the market structure post-merger if it can be shown that the said deterioration could occur regardless of whether or not the merger was approved.¹⁸⁷

The lack of causality requirement is at the heart of the criteria that the Commission would consider in determining whether or not to accredit failing firm claims.¹⁸⁸ The three-pronged

¹⁸⁴ Par. 89 of the *Horizontal Merger Guidelines*.

¹⁸⁵ See note 18 above.

¹⁸⁶ See note 12 above.

¹⁸⁷ See note 6 above.

¹⁸⁸ 'Note by the Services of the European Commission Director-General for Competition' (2009) OECD Competition Committee Roundtable on Failing Firm Defence (21 October 2009) 183 ('EC Note to OECD').

criteria for assessing failing firm claims as laid down in paragraph 90 of the *Horizontal merger guidelines* will be discussed below.¹⁸⁹

(a) *The failing firm must be facing financial difficulties*¹⁹⁰

The first leg of the test requires the merging firm to demonstrate that the allegedly failing firm is in financial difficulties. A firm is regarded to be in financial difficulties if it is unable to meet its financial obligations as they become due and payable in the near future, that is, if it is factually insolvent.¹⁹¹ It is however possible for such a firm to embark upon resuscitation strategies aimed at enabling its continued market existence as a viable going concern.¹⁹² Thus for purposes of demonstrating that the allegedly failing firm is facing financial difficulties, the merging parties are required to show that there are no such resuscitation strategies in existence.¹⁹³ This can be done by demonstrating that there are no present or prospective shareholders or investors willing to commit capital required for the resuscitation process.¹⁹⁴ In other words, there are no other alternative means at restructuring and resuscitating the failing firm.¹⁹⁵ As such the proposed merger remains the only realistic available option of keeping the assets of the alleged failing firm in the relevant market.¹⁹⁶

It is important in assessing this requirement to consider the question as to when is a firm deemed to be failing - must it be shown that it has failed or merely that it is about to fail? It is a relatively easier task to show that a firm has failed for it will be conspicuous in its absence from the

¹⁸⁹ The EU criteria for failing firm reduces the test to a three-pronged inquiry from the US formulated four legs. See for US, section 11 of the US Horizontal Merger Guidelines requiring (a) a demonstration that the firm in question is likely to fail in the near future, (b) that there are no less anti-competitive alternative purchasers, (c) that the firm cannot be restructured under bankruptcy laws and (d) absent the merger, the alleged failing firm's assets would exit the relevant market. See further *International Shoe Co. FTC* 280 U.S. 291, 302-303; *Citizen Publishing Co. v U.S.* 370 131, 137-138 (1969).

¹⁹⁰ Par.90 of the *Horizontal merger guidelines*.

¹⁹¹ See section 11 of the US *Horizontal merger guidelines*.

¹⁹² EC Note to OECD (2009) (note 188 above) 183.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.* See also section 11 of the US *Horizontal Merger Guidelines*.

¹⁹⁶ See section 11 of the US *Horizontal Merger Guidelines*.

relevant market. The real issues are raised by the second scenario, in which it may be asked when a firm can be deemed to be failing. It is submitted that it is possible that a firm that is still in business can be overburdened to such an extent that its financial future becomes bleak as it become unable to meet its financial obligations. Such factually insolvent firms might be considering bankruptcy proceedings. Thus the intention to commence bankruptcy proceedings can be construed as an indication that the firm is facing financial difficulties hence failing. However, for purposes of the EU criteria, it appears that initiating bankruptcy or any similar resuscitation proceedings is irrelevant for a showing that the firm is failing.¹⁹⁷ A firm is only deemed to be failing if it can be shown that absent the contemplated merger, there is a real possibility that the firm would embark upon bankruptcy or similar proceedings in the near future.¹⁹⁸

The requirement that parties show that the failing firm is facing financial difficulties that can only be solved by its acquisition by a financially healthy firm has two notable sides. On the one hand, it is practically difficult to determine with certainty when bankruptcy proceedings are instituted given the multiplicity of bankruptcy regimes in the EU.¹⁹⁹ As a result, the Commission adopts a case-to-case approach to determine whether an allegedly failing firm is likely to face bankruptcy proceedings in the near future.²⁰⁰ It is submitted that this approach is naturally commendable as it provides much needed flexibility, a precondition for an effective merger regulatory system. On the other hand, requiring merging parties to simply demonstrate that absent the merger the allegedly failing firm would exit the relevant market, is essentially a requirement that the merging parties motivate that the proposed merger must be allowed.²⁰¹

In theory the requirement is easier to meet as it appears that all the merging parties need to do is to motivate why the proposed merger must be allowed by simply showing that it would bring

¹⁹⁷ EC Note to OECD (2009) (note 188 above) 184.

¹⁹⁸ Ibid.

¹⁹⁹ The EU is a Member States based organisations. Although it has several institutions that bring together these states, the states largely retain their autonomy from the bloc in several aspects. It is thus inevitable that the Member States follow different bankruptcy regimes.

²⁰⁰ EC Note to OECD(2009) (note 188 above) 184.

²⁰¹ EC Note to OECD(2009) (note 188 above) 184.

about the usual well documented benefits associated with corporate mergers.²⁰² In other words, the merging parties must simply show that absent the merger the failing firm would simply exit the relevant market to the detriment of the consumers who will have their choices limited. However, given the possibility that other corporate restructuring strategies besides anti-competitive mergers can achieve similar results, it becomes difficult to expect the Commission to easily allow an otherwise anti-competitive merger as being the only option to rescue the failing firm.²⁰³ The merging parties need to prove that the proposed merger, albeit anti-competitive, is the only available option to serve the failing firm.²⁰⁴ In addition, they must show that the failing firm would one way or another exit the market in the absence of the merger thus the competitive structure of the market would deteriorate anyway.²⁰⁵ This deterioration would ensue even if the merger is prohibited.²⁰⁶ It is submitted that the issue of whether there exist a causal link between the deterioration of the competitive structure of the market and the proposed merger becomes paramount.

Should merging parties succeed in showing that the merger would not only be necessary to keep the failing firm's business and assets in the relevant market, but also that even in the absence of the merger, the failing firm's business would fail anyway and its assets inevitably exit the relevant market, the Commission might allow it, only if the other two requirements are met.

(b) There are no less-anticompetitive solutions to the failing firm's financial difficulties

Having established that the allegedly failing firm is facing financial difficulties that can only be solved by the proposed merger, the merging parties are required not only to show that the proposed merger is the only available solution to address the dire financial situation of the failing

²⁰² See generally, DePamphilis (2001) (note 51 above) 17-22; Lajoux AR *The Art of Mergers and Acquisitions Integration: A Guide to Merging Resources, Processes, and Responsibilities* 2nd Edition, (2005) 8; Lichtenberg F & Siegel D 'Productivity and Changes in Ownership of Manufacturing Plants' 1987 *Brookings Papers on Economic Activity* 3, 643-683 (suggested the need to enhance economies of scale through change in ownership structures of business entities as a rationale for mergers).

²⁰³ EC Note to OECD (2009) (note 188 above) 184.

²⁰⁴ Par. 90 of the *Horizontal Merger Guidelines*.

²⁰⁵ *BASF/Eurodiol/Pantochim* (note 9 above) pars. 142-43; *NewsCorp/Telepiu* (note 14 above) par. 207. See also Kokkoris (2006)(note 3 above) 127.

²⁰⁶ *BASF/Eurodiol/Pantochim* (note 9 above) par. 139.

firm but also that there are no less anti-competitive options for the problem.²⁰⁷ In other words, the second criterion requires the merging parties to show that there are no other alternative purchasers for the failing firm posing a less competitive threat than the current acquiring firm.²⁰⁸

The Commission employs a counter-factual approach in order to verify the claims that there are no less anti-competitive options to the merger.²⁰⁹ This predicts how the market structure would look like should there be alternative purchasers.²¹⁰ Thus less competition restrictive solutions are deemed to exist where there are alternative purchasers that pose a less anti-competitive threat to the market.²¹¹ Accordingly, a showing that no such alternative purchasers exist fortifies claims that the proposed merger is the only available option even if it raises competition concerns.²¹²

An alternative purchaser can be described as a party whose acquisition of the failing firm's business and assets could not result in substantial impediment of effective competition in the relevant market.²¹³ However, it is submitted that it is possible that despite the existence of such alternative purchasers, the proposed merger could provide some substantial benefits that cannot otherwise be achieved by the said alternative purchaser. A case in point relates to efficiencies. If the alternative purchaser is a relatively smaller business to the acquiring firm, the former might not be able to provide efficiencies that the latter can provide. The issue thus turns more to efficiency considerations in mergers involving failing firms. This raises a number of questions.

Firstly, can competition be sacrificed for efficiencies? Secondly, what is to be protected, mere competition or effective competition? There is no doubt that efficiency considerations play a

²⁰⁷ Par. 90 of the *Horizontal Merger Guidelines*.

²⁰⁸ *Ibid.*

²⁰⁹ EC Note to OECD (2009) (note 188 above) 184.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Cf. section 11 of the US *Horizontal Merger Guidelines* (2010) in n16 defining an alternative purchaser as 'any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer. Liquidation value is the highest value the assets could command for use outside the relevant market.'

significant role in merger assessment.²¹⁴ This role is typified in the application of the rule of reason approach²¹⁵ where a merger is not prohibited merely because it has the potential to negatively affect competition (the *per se* approach),²¹⁶ but rather that it must be assessed in such a manner as to determine whether the perceived anti-competitive effects thereof can be offset by any benefits that can flow from such a merger. It is thus acceptable to allow a merger on the basis that it will enhance efficiencies. The rationale thereof is that an efficient firm would subsequently produce goods and provide services to the consumers at a lower cost than a wasteful one.²¹⁷ This will in turn force other firms to follow suit in a bid to compete for the customers hence maintaining competition within the relevant market.²¹⁸

If one is to accept the efficiency theory stated above, it can then be argued that where a seemingly anti-competitive merger involving a failing firm promotes greater efficiencies, the combined effects thereof would offset the anti-competitive effects of such a merger. It is not enough for merging parties to simply allude to the fact that the merger would enhance efficiencies that any perceived third party purchaser cannot provide. Merging parties are required to substantiate their efficiency claims.²¹⁹ Efficiency claims are only given credence if they are verifiable, merger specific and to the benefit of consumers.²²⁰ Thus it is submitted that bringing in efficiency considerations in failing firm assessment will likely create an additional burden of

²¹⁴ See further on the importance of efficiency considerations in merger assessment, Whish (2002)(note 17 above) 4-6.

²¹⁵ See *Opinion of Advocate General Tesouro in France v Commission* (note 175 above) 1-1385 par. 7 where it was confirmed that the EU merger regulations do not contain any presumptions of illegality on part of mergers. See generally on rule of reason in merger control, *Standard Oil Co. of New Jersey v US* 221 US (1911); Bork R 'The rule of Reason and the per se concept: Price fixing and market division'(1965) *Yale Law Journal* 775.

²¹⁶ See generally Bork (1965)(note 215 above) .

²¹⁷ Whish (2009)(note 17 above) 4-6.

²¹⁸ *Ibid*, 5.

²¹⁹ Recital 29 in ECMR.

²²⁰ See Veroud V 'Merger Analysis and the Role of Efficiencies in the EU' (2004) 7, (presentation at the FTC and U.S DOJ Merger Enforcement Workshop, Washington DC, February 17-19, 2004), available at <http://www.ftc.gov/bc/mergerenforce/presentations/040219verouden.pdf>, (accessed 15 April 2013).

proof on the part of the merging parties. This can also cloud the issues and potentially lead to the undesired result of losing focus of the real issues.²²¹

The focus of EU competition law is not merely to promote competition but rather to promote effective competition.²²² The SIEC test refers to substantial impediment of effective competition. This implies that for a merger to be prohibited as falling foul to the ECMR, it must have the effect of materially restricting effective competition within the internal market.²²³ Thus the fact that the available alternative purchaser is a smaller party cannot necessarily promote the goal of promoting and maintaining effective competition.²²⁴ In such cases, bigger might be better even if it raises competition concerns.²²⁵ Either way, the ability of a bigger acquirer to enhance efficiencies can work to neutralize any perceived anti-competitive effects of such a merger.

Even if the requirement that the merging parties must consider other alternative purchasers outside the merger raises some concerns, merging parties are still expected to comply with it. The merging parties must show that they have made a good faith attempt to solicit for alternative

²²¹ Cf. the South African Competition Tribunal's decision in *Iscor/Saldanha Steel* (note 1 above) par. 110(1) where it noted that if a merger involving a failing firm claim raises other considerations such as public interest and efficiencies, then that merger must be reviewed under those considerations. However, see Valentine DA 'Horizontal Issues: What's Happening and what's on the Horizon?' (1995), available at <http://www.ftc.gov/speeches/other/dvhorizontalissues.shtm>. (accessed 22 March 2012) who maintained that if a merger raising failing firm claims exhibits efficiency or other benefits, then it must be treated as such. In other words, there must be no distinction between these considerations when they are raised in a single merger.

²²² The SIEC test refers to the significant impediment of competition implying that not only competition must be impeded, but impeded to a significant degree. It follows that only mergers which have the effect of reducing competition to a substantial degree can be regarded as being incompatible with the EU's competition policy hence deserving of blocking. Effective competition concept takes into account the actual level of competition pre-and post-merger. See Case 31/85 *ETA/DK Investment* [1985] *ECR* 3933, par. 11. See also Langeheine B 'Substantive Review under EEC Merger Regulation' (1990) *Fordham Corporate Law Institute* 48; Bellamy C and Child DG *Common Market Law of Competition 4ed* (1993) 336.

²²³ Article 2 (1) of the ECMR.

²²⁴ See generally the discussion of the *Arthur Andersen* cases in 6.4.6.3.1 below.

²²⁵ See OECD 'Summary Record of the Discussion on Competition and Financial Markets: Roundtable 3 on Real Economy and Competition Policy in a Period of Retrenchment' (2009) *DAF/COMP/M(2009)1/ANN4*, 10 April 2009, available at <http://www.oecd.org>.

purchasers before settling for the current acquirer.²²⁶ An attempt is deemed to have been made in good faith if it can be shown that the merging parties pursued serious offers and accorded them opportunities to acquire the failing target firm.²²⁷ Where tender procedures are utilized, a good faith attempt is not construed as meaning the opening up of tender processes.²²⁸ It is adequate to show that the merging parties made efforts to listen to interested parties.²²⁹

It is important to note that in a bid to comply with the ‘good faith attempt’ requirement, the merging parties might lose valuable time through negotiations.²³⁰ Time is of essence when the merger is to genuinely save a failing firm. As such any negotiations must be made taking into account the amount of time available. In other words, negotiations that are unnecessarily long and bearing no results must be avoided for they might well be harmful to competition as they compound the woes of the struggling firm.²³¹

It is submitted that the ‘no less anti-competitive’ requirement is met if the merging parties can show that the available purchasers outside the merger can equally pose or even aggravate the competitive harm than the proposed acquisition. It is further submitted that in line with the lack of causality principle, even if another purchaser is brought in, the competitive harm will still exist just as with the proposed merger. The harm to competition would result in any event thus the proposed merger can still be justified on additional grounds, for instance, that only through the merger will greater efficiencies be achieved.

(c) Assets of the failing firm would exit the relevant market

The final leg of the criteria begs the question as to whether in the absence of the proposed merger, the allegedly failing firm’s business could cease to operate and its assets exit the relevant

²²⁶ *Kali und Salz* (note 9 above) pars.81 and 82.

²²⁷ *Kali und Salz* (note 9 above) par.81. See *Citizen Publishing Co.* (note 189 above) 138 where the US Supreme Court noted that the good faith effort requirement to solicit an alternative purchaser is not met if it is not shown that the property of franchise of the alleged failing firm was placed in the hands of a broker for purposes of securing purchasers.

²²⁸ EC Note to OECD (2009) (note 188 above) 184.

²²⁹ *Kali und Salz* (note 9 above) par. 82.

²³⁰ EC Note to OECD (2009) (note 188 above) 184.

²³¹ *Ibid.*

market and in the process cause more harm to competition.²³² A merger is likely to get approval if the merging parties can show that as a result thereof, the productive assets of the failing firm would remain in the relevant market either in their current use or redeployed more efficiently.²³³ Either of these options would be able to avoid complete liquidation of the failing firm's business and productive assets.²³⁴ Similarly, merging parties must demonstrate that absent the merger, the failing firm's productive assets would exit the relevant market as the entity facing financial difficulties will be liquidated in the near future.²³⁵

It is submitted that requiring that merging parties consider the option of a less anti-competitive solution in the form of any available alternative purchasers in essence requires them to consider a third party to the merger. The problem is that this requirement to a larger extent, disregard the capacity or willingness of the said third party alternative purchaser to maintain the productive assets of the failing firm in the relevant market.²³⁶ There is no mention of how long the alternative purchaser must keep the productive assets of the allegedly failing firm in the relevant market.²³⁷ It is sufficient that the productive assets must be kept within the relevant market in the near future.²³⁸ It is accordingly submitted that one can assume that referring to the 'near future' is made with the hope that allowing acquisition by an alternative purchaser posing a less competitive threat, might promote effective competition through, *inter alia*, dismantling entry barriers. It is further submitted that this in turn maintains a competitive market structure to such an extent that upon the advent of the contemplated near future, there will still be other competitors in the market.

²³²Par. 90 of the *Horizontal Merger Guidelines*.

²³³ EC Note to OECD (2009) (note 188 above) 184.

²³⁴ *Ibid*.

²³⁵ Par. 90 of the *Horizontal Merger Guidelines*.

²³⁶ McDavid J 'Efficiencies, Failing Firms and the *General Dynamics* Defence' (1995), available at www.ftc.gov/opp/global/194817.htm, (accessed 20 October 2011).

²³⁷ *Ibid*.

²³⁸ This near future construction can be supported by referring to the use of similar terminology in the guidelines where it is provided that absent the merger, the assets of the alleged failing firm would in the near future, exit the relevant market.

Even if the above assumption is accepted, it is submitted that the alternative purchaser requirement fails to take into account the possibility that the current acquirer would possess the capacity to maintain the productive assets of the failing firm in the relevant market for a much longer period. However, such maintenance could come at a cost to the competitive structure of the market. The only remedy to such a cost is allowing a third party acquisition. However, even the third party acquisition might not effectively maintain the competitive structure of the market. Thus the requirement that the merging parties show that absent the proposed merger, the productive assets of the failing firm would exit the relevant market provide a counterfactual link between the acquisition by an alternative third party purchaser and the anti-competitive merger.²³⁹

The counterfactual analysis poses the question as to whether the proposed merger would retain the productive assets in the relevant market and maintain competition similar to or better than what the alternative purchaser would do.²⁴⁰ If the answer thereto is affirmative, then the proposed merger would be favoured. Similarly, a determination needs to be made whether the said assets would be maintained in their current use or would be redeployed for a better use.²⁴¹ A distinction must be made between the competitive implications of assets redeployment and business transfer on consumers.²⁴²

A merger that involves the acquisition of the failing entity's assets is likely to be favoured should it not disrupt supply of goods and services to the customers and subsequently consumers in the long run.²⁴³ Similarly, where the acquisition by an alternative purchaser causes the redeployment of the failing firm's assets and such redeployment results in supply disruptions that negatively affect competition -it is unlikely to be favoured.²⁴⁴ Ultimately, the question turns on whether the proposed merger, albeit raising competition concerns, equals or betters the competition concerns raised by engaging an alternative third party purchaser. Thus the summation of the three legged

²³⁹ See Bavasso and Lindsay (2007)(note 12 above) 184.

²⁴⁰ EC Note to OECD(2009) (note 188 above) 184.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ EC Note to OECD (2009) (note 188 above) 184.

²⁴⁴ Ibid.

criteria is a comparative inquiry into the competitive harm that would result with or without the merger.

The inquiry in the context of the third leg of the Guidelines looks into the pre-merger market structure and predicts the likely effects of the proposed merger thereupon.²⁴⁵ This is done by assessing how the assets of the failing firm would be utilized.²⁴⁶ It is submitted that a merger involving a failing firm would be approved if the proposed utilization of the allegedly failing firm's assets would maintain the competitive structure of the market for the ultimate benefit of the consumers who must not be prejudiced either by supply disruptions or any restrictions in competition.

If the parties cumulatively prove that the allegedly failing firm is facing financial difficulties and that absent the merger, its productive assets and business would in the near future exit the relevant market for there are no less anti-competitive solutions to the proposed merger, the Commission might then approve the merger despite it being anti-competitive.²⁴⁷ The approval of an otherwise anti-competitive merger following the establishment of the failing firm doctrine is justified not only in the *Horizontal Merger Guidelines*, but also in case law jurisprudence that draws from the very legal instruments that establishes the EU, the EU Treaty and the ECMR, notably the principle that where the merger does not substantially impede effective competition in the common market, such a merger must not be blocked.²⁴⁸ A merger does not lead to a substantial impediment of effective competition if as a result thereof, the competitive structure of the relevant market would deteriorate to a degree similar to what it could have done absent the merger.²⁴⁹ It follows that a merger involving a failing firm must not be regarded as the cause of the deterioration in the competitive market conditions for the said deterioration can occur in the event of failure and exit absent the merger.²⁵⁰

²⁴⁵ See par.90 of the EC *Horizontal Merger Guidelines*.

²⁴⁶ EC Note to OECD (2009) (note 188 above) 184.

²⁴⁷ Par 90 of the EC *Horizontal Merger Guidelines*.

²⁴⁸ Article 2(3) of the ECMR.

²⁴⁹ Par. 89 of the *Horizontal Merger guidelines*. See also notes 12 and 13 above.

²⁵⁰ *Kali und Salz* (note 9 above) par. 72.

Having laid the theoretical basis for the failing firm doctrine in the EU, it is imperative to consider how the doctrine has been applied in the EU by the Commission and the European courts. Accordingly, the following part will discuss selected decisions where the failing firm doctrine was applied. The aim thereof is to make an assessment on the utility of the EU approach to the doctrine in the development of an effective merger regulatory framework in Zimbabwe in general and the regulation of mergers involving the failing firm in particular.

6.4 Application of the failing firm doctrine in the EU: some selected decisions

This part will extend the discussion to some decisions made pursuant to the old substantive assessment test under Regulation 4064/89 regarding the assessment of the compatibility of a concentration with the internal market, namely whether the concentration would have created or strengthened a dominant position in the relevant market ('the dominant test').²⁵¹ However, the fact that this test was refocused under the ECMR does not materially change the principles underpinning the applicability of the failing firm doctrine in the EU. It is assumed that a finding on the competitive effects of a concentration, whether made under the old dominant test or the refocused SIEC test, triggers the application of the failing firm doctrine in the EU. As such both decisions made under the new and old regime will be discussed with this in mind and any reference to either of the tests in any particular discussion hereunder is not meant to distract from the fact that the failing firm defence is invoked in an attempt to mitigate a finding of incompatibility against a concentration.

6.4.1 *Aerospatiale/Aleania/de Havilland*:²⁵² setting the tone for the failing firm defence in the EU

The discussion of this decision serves to highlight the significance of the decision as a pacesetter for the application of the doctrine.

The matter concerned a proposed joint acquisition of the assets of de Havilland, a Canadian based division of the Boeing Company (Boeing) and a manufacturer of regional turbo-prop

²⁵¹ See for instances such decisions as *Kali und Salz* (note 9 above); Case IV/M.774 *Saint Gobain/Wacker-Chemie/NOM* [1997] OJ L247/1, Commission decision of 4 December 1996.

²⁵² *Aerospatiale-Alenia/de Havilland* (note 128 above). For a further discussion of the decision, see generally Kokkoris (2006)(note 3 above) 84.

aircraft²⁵³ by Aerospatiale SNI (Aerospatiale), a French company active in the aerospace industry²⁵⁴ and Aliena-Aeritalian e Selenia SpA (Alenia), an Italian firm specialising in the aerospace industry.²⁵⁵ The proposed acquiring firm jointly owned the Groupement d'Ineret Economique (GIE) Aviens de Transport Regional (ATR), which designed, developed, manufactured and sold industrial regional aircraft.²⁵⁶

After defining the relevant product and geographical markets, the Commission concluded that the proposed concentration had the effect of significantly strengthening ATR's position on the commuter market²⁵⁷ and increasing its market share on the world market for aircrafts with between 40 to 59 seats from 46 to 63 percentage points with the nearest competitor having 22 percentage points of the market share.²⁵⁸ Its overall market share worldwide of 20 to 70 seats would increase from approximately 30 to 50 percentages with the nearest competitor having around 19 percentage points particularly through the elimination of de Havilland as an effective competitor.²⁵⁹ It is the conclusion that the proposed transaction would have significantly lessened competition through the elimination of de Havilland as an effective competitor that is of interest here.

The Commission based the above conclusion on de Havilland's sales figures which painted a picture of it as the most successful competitor of ATR.²⁶⁰ The Commission concluded that if the proposed transaction had proceeded, an effective competitor would thus be removed from the relevant market with a net competition loss.²⁶¹ However, the merging parties, in what can be considered as an attempt to introduce the failing firm defence, argued that 'although de

²⁵³ *Aerospatiale-Alenia/de Havilland* (note 128 above) L334/42 par. 1 and L334/43 par. 4.

²⁵⁴ *Ibid*, L334/42 par. 3.

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid*.

²⁵⁷ *Ibid*, L334/49 pars.27 and 28.

²⁵⁸ *Ibid*, L334/50 par. 29.

²⁵⁹ *Aerospatiale-Alenia/de Havilland* (note 128 above) L334/50 par. 31.

²⁶⁰ *Ibid*. On the market of 40 to 59 seats, Fokker, arrival commuter aircraft manufacturer, had initially a higher market share than de Havilland but by 1990 it was falling behind. De Havilland had a backlog of 72 sales; Fokker had 27 and ATR a distant 103.

²⁶¹ *Ibid*. par.90.

Havilland would not be immediately liquidated, its production might be phased out by Boeing so that it might in any case be eliminated as a competitor in the medium to long term.²⁶² In essence, the parties raised the defence that either by acquisition or otherwise, the elimination of de Havilland as an effective competitor to ATR was unavoidable in the medium to long term.²⁶³ The effect thereof can be taken to mean that the deterioration of the market conditions following the proposed acquisition would occur in any event for de Havilland would exit the relevant market.

The Commission, however, discounted this argument as not being based on the fact that the exit of de Havilland would be occasioned by the firm's financial difficulties but rather simply an investment decision on Boeing's part.²⁶⁴ The Commission concluded that:

[D]e Havilland produces high quality, well-known and highly respected products, the net selling process of which have been increasing; progress already being made in reducing excess employees, and relations with trade unions have improved; there is still however scope for further improvement in production management since de Havilland's productivity is relatively poor.²⁶⁵

This assessment thus painted a picture not of a firm or division likely to fail due to financial hardships but one that showed potential and capacity necessary to improve its current position and hence survive.²⁶⁶ Its purported exit from the relevant market was perceived only as a management investment decision and hence the competitive effects of the proposed acquisition could not be justified on the basis of the failing firm defence.²⁶⁷ Accordingly the Commission concluded that;

On the evidence made available to the Commission, there is therefore no likelihood that de Havilland, in the absence of the proposed concentration, would in any case be phased out. Boeing has however expressed its preference to sell de Havilland rather than to continue to operate it. This would seem possible given that

²⁶² *Ibid*, L334/51 par. 31.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

²⁶⁵ *Aerospatiale-Alenia/de Havilland* (note 128 above) L334/51 par. 31.

²⁶⁶ De Havilland's reputation as a producer of quality products could aid it in increasing its production and return to viability.

²⁶⁷ *Aerospatiale-Alenia/de Havilland* (note 128 above) L334/51 par. 31

the parties are not the only potential buyers. British Aerospace, for example, has expressed an interest to buy de Havilland.²⁶⁸

It is submitted that the above statement set the tone for the criteria for accepting the failing firm defence in the EU. These criterion are deduced as the following:

(a) there must be a likelihood of the target firm being forced out of the relevant market if not acquired by another.

(b) this likelihood must either be occasioned by financial difficulties or management decision but must not be as a result of the proposed transaction. However, the preferred option is that it must be a result of financial difficulties rather than a mere management decision for the latter cannot be held with any certainty as painting a picture of a failing firm.

(c) even if put up for sale as a business decision, acquisition of the target firm by other purchasers posing a less competitive threat must be preferred to the proposed acquisition.

This decision, as will be seen below, laid the foundation for the formulation of the failing firm criteria. Although the facts to an extent, did not portray a typical failing firm scenario but more of a “failing division” case in that de Havilland was a division of Boeing, the Commission did not base its decision on this distinction. Again, this development will be considered in the context of other decisions where the Commission actually acknowledged the failing division defence but made no attempt to develop separate criteria regarding such defence apart from the criteria applied in failing firm cases.²⁶⁹

6.4.2.1 *Kali und Salz/MdK/Treuhand*²⁷⁰

The failing firm doctrine was discussed at length by the Commission in its decision in *Kali und Salz/MdK/Treuhand* (II).²⁷¹ The Commission considered the applicability of the ‘failing company defence’ in EU merger law in determining a notification concerning the proposed joint

²⁶⁸ Ibid.

²⁶⁹ See 6.4.4.2 below.

²⁷⁰ *Kali und Salz* (note 9 above).

²⁷¹ Ibid, L186/38 pars. 70 -90. For a discussion of the case see also Kokkoris (2006)(note 3 above) 498-499; Bavasso and Lindsay (2007) (note 12 above) 185-186; EC Note to the OECD (2009) (note 184 above) 185.

venture between Kali+ Salz (K+S) and the Treuhandanstalt (Treuhand) which would see the combination of the potash and rock-salt activities of K+S and Mitteldeutsche Kali AG (MdK).²⁷² K+S was a subsidiary of a German chemical company BASF primarily engaged in the production of potash, potash-and salt based industrial products, and salt used in waste disposal.²⁷³ MdK which combined the potash and rock-salt activities of the former German Democratic Republic (GDR), was solely owned by the Treuhand, a public institution mandated with the restructuring and privatisation of the former GDR's state owned enterprises.²⁷⁴

The project involved the proposed conversion of MdK into a private limited company (GmbH), MdK GmbH, an entity jointly controlled by K+S and the Treuhand.²⁷⁵ The project constituted a concentration in the form of a concentrative joint venture as K+S and the Treuhand were to withdraw from their rock-salt activities and vest such activities into the Mdk GmbH.²⁷⁶

The Commission identified the relevant product market as being the potash and rock salt market²⁷⁷ and two geographical markets being the Germany market and the Community market apart from Germany.²⁷⁸ The Commission concluded that the concentration could have created a *de facto* monopoly on the German market for potash used for agricultural purposes given K+S and MdK's combined market share of up to 98 per cent.²⁷⁹ Within the Community markets apart from Germany, it was concluded that the proposed concentration could have created a dominant duopoly between K+S/MdK and Société commerciale des Potassés et L'Azare (SPCA), a

²⁷² *Kali und Salz* (note 9 above) L186/38 par. 1.

²⁷³ *Ibid*, L186/38 par.4

²⁷⁴ *Ibid*.

²⁷⁵ *Ibid*, L186/38 pars. 6-7. K+S principally held 51% of the voting rights and was to be responsible for the joint venture. However, in practice, the Treuhand held the decisive influence as it was to approve all strategic decisions.

²⁷⁶ Par. 8. Article 3 of the Council Regulation (EEC) 4064/89 which was applicable at the time of the decision classified concentrated joint ventures as concentrations between undertakings for purposes of merger regulation.

²⁷⁷ *Ibid*, L186/40 pars. 12-16.

²⁷⁸ *Ibid*, L186/43 par. 31 (the EC market) and par.32 the Germany market.

²⁷⁹ *Ibid*,L186/45par.46.

subsidiary of the French group Enterprise Minière et Chimique (EMC).²⁸⁰ The merged entity K+S/MdK and SCPA jointly accounted for 80 per cent of the Community's potash production.²⁸¹

The Commission concluded that the merger would, on one hand, eliminate effective competition between K+S /Mdk in the Germany market and on the other between the merged entity and SCPA on the Community market.²⁸² However, although the Commission's findings on the effects of the merger on the Community markets were reversed on appeal,²⁸³ this will not affect the subject focus of this discussion, namely the EU approach to the failing firm doctrine in merger regulation. This is because the Commission considered the failing firm arguments as raised in line with the effects of the proposed merger on the German market. Furthermore, the ECJ in *France v Commission*, discussed later in this Chapter, did not alter the Commission's findings on the failing firm defence hence kept the principles established in *Kali und Salz* intact.

6.4.2.2. *Kali und Salz*: laying the criteria for the failing firm defence in the EU

The Commission, after concluding that the proposed merger could strengthen K+S/MdK's dominant position on the German potash market, went on to note that such deterioration in the competitive structure of the relevant market was not a result of the concentration concerned.²⁸⁴ The Commission considered arguments by the merging parties that absent the proposed merger, MdK would soon exit the relevant market and its available market share would accrue to K+S.²⁸⁵ The Commission further stated that in apprising such arguments, a determination must be made as to whether the requirements for the application of the 'failing company defence' justifying the acceptance of the creation or strengthening of a dominant position in such circumstances, have been satisfied.²⁸⁶

The Commission made it clear that any acceptance of the failing firm defence must be made within the broader context of the causality requirement in Article 2(2) of Regulation 4064/89,

²⁸⁰ Ibid, L186/46 par. 51.

²⁸¹ Ibid, L186/46 par. 51.

²⁸² Ibid, L186/47 par. 47.

²⁸³ *France v Commission* (note 17 above).

²⁸⁴ *Kali und Salz* (note 9 above) L186/46 par. 50.

²⁸⁵ Ibid, L186/49 par. 70.

²⁸⁶ *Kali und Salz* (note 9 above) L186/49 par. 70.

namely, the deterioration in the competitive market structure following the creation or strengthening of a dominant position in the relevant market must not be a result of the concerned merger.²⁸⁷ In accepting the failing firm defence in EU merger regulation and laying down the criteria that has become known as the *Kali und Salz* criteria,²⁸⁸ the Commission noted that

A merger which should normally be considered to lead to the creation or reinforcement of a dominant position on the part of the acquiring firm can be regarded as not causing such a position on the market if, even in the event of the merger's being prohibited, the acquirer would inevitably achieve or reinforce a dominant position. Accordingly, a merger generally is not the cause of the deterioration in the competitive structure if it is clear that;

- the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,
- the acquiring undertaking would take over the market share of the acquired undertaking if it were forced out of the market,
- there is no less anticompetitive alternative purchase.²⁸⁹

Kali und Salz thus established a three-pronged criterion. However, these criteria which were subsequently reflected in the current *Horizontal Merger Guidelines* have already been discussed above²⁹⁰ and will not be repeated here. This Part will only address a few observations made in relation to the application of the criteria as set out above to the facts *in casu*.

(a) *The cumulative nature of the requirements*

For parties seeking to successfully rely on the failing firm defence to get the Commission's approval for an otherwise prohibited merger, the criteria set out in *Kali und Salz* and modified in the current *Horizontal Merger Guidelines* must be met cumulatively.²⁹¹ The Commission stressed this when particularly referring to the fact that given that the merger *in casu* was likely to create a *de facto* monopoly that is *prima facie* anti-competitive, there is a need to ensure that

²⁸⁷ *Ibid*, L186/49 par. 71.

²⁸⁸ Kokkoris (2006)(note 3 above) 498 n27.

²⁸⁹ *Kali und Salz* (note 9 above) L186/49 par. 70.

²⁹⁰ See 6.3 above.

²⁹¹ *Kali und Salz* (note 9 above) L186/49 par.71.

less damage is done to competition hence the need to ensure that the set criteria is met without exemptions.²⁹²

(b) Failing firm arguments appraised within the broader causality principle

The Commission indicated that the exit by the alleged failing firm from the relevant market resulting in the deterioration of the said market's competitive structure must be 'unavoidable' in the event that the proposed merger is blocked.²⁹³ In other words, the deterioration must occur either way, with or without the merger. This deterioration must, however, be a result of the exit from the market by the failing firm and not a result of the merger itself.²⁹⁴ This constitutes a departure from Article 2(3) which requires that the post-merger deterioration of the competitive market structure must not be a result of the merger.

However, as the case in most departures or exceptions from general legal principles, acceptance that the deterioration would have occurred as a result not of the merger, but rather of the failing firm exiting the relevant market, needs to be treated as an exceptional event and as such the failing firm defence is accepted in exceptional cases.²⁹⁵ It may be asked what amounts to an exceptional case? It is submitted that the answer can be as simple as that whenever it can be shown that the set criterion is met.

The Commission's approach that the failing firm defence needs to be accepted in exceptional cases supports claims that the criteria for the defence are strict and meeting it is a daunting task.²⁹⁶ This claim can further be supported by a glance at two of the criteria considered in *Kali und Salz*, namely, the requirement that in the event that the failing firm would exit the market, its market share could accrue to the acquiring firm and the absence of a less anti-competitive alternative purchase.

²⁹² Ibid.

²⁹³ Ibid, L186/49 par 72.

²⁹⁴ Ibid. See also Case No. IV/M.1221 *Rewe/Meinl* [1999] OJ L274/1 par. 63; Case IV/M.890 *Blokker/ Toys 'R' Us* [1998] OJ L316/1 par. 111.

²⁹⁵ *Kali und Salz* (note 9 above) par. 72; *Rewe/ Meinl* (note 294 above) par. 64.

²⁹⁶ See generally EC Note to the OECD (2009) (note 188 above) 184 where it was stated that the requirement that absent the merger the alleged failing firm's assets could exit the relevant market is strictly applied hence difficult to fulfil.

(i) The market share requirement

Having accepted that MdK was a failing firm,²⁹⁷ the Commission considered whether in the event of MdK exiting the relevant market, which event was a reality, its market share would accrue to K+S.²⁹⁸ This inquiry largely turned on consideration of the characteristics and structure of the relevant market. *In casu*, the German potash market was characterised as being ‘sealed off against competitors from other countries.’²⁹⁹ Thus the absence of other competitors meant that in the event of MdK’s inevitable exit, K+S was the only available vulture to pick and feast on its carcass hence it would increase its potash production with relative ease.³⁰⁰ K+S would become Germany’s sole supplier and hence take over the available MdK market share.³⁰¹

This requirement is a unique feature of the EU criteria as no corresponding requirement can be found in the US.³⁰² This modification makes the failing firm criteria narrow and strict. However, given that the entire acceptance of the defence is a departure from the established lack of causality principle and that it offers a justification to the clearance of an otherwise anti-competitive merger, it is submitted that one can find justification in a stricter approach. It is submitted that such an approach will ensure the approval of only genuinely failing firm claims and the safeguarding of a competitive market structure.

(ii) The alternative purchaser requirement

The third requirement laid out in *Kali und Salz* was that even if it can be shown that the target firm was a failing firm and its exit from the relevant market was inevitable and that should it exit, its available market share could accrue to the acquiring firm, it must still be considered whether there are ‘no less anticompetitive alternative purchase’ to the merger.³⁰³ This

²⁹⁷ *Kali und Salz* (note 9 above) L186/50 pars. 73, 74 and 76.

²⁹⁸ *Ibid.*, par. 78.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Kali und Salz* (note 9 above) par. 78.

³⁰² In *France v Commission* (note 17 above) 1-1482 par. 91, the market share requirement was at the center of the French Government’s appeal where it contended that the Commission must not have included as it was not part of the US criterion.

³⁰³ *Kali und Salz* (note 9 above) L186/56 par. 80.

requirement is probably the most difficult to meet. The Commission's decision provides a number of meaningful insights as to what constitutes a less anti-competitive alternative purchase, namely that it:

(a) must be an offer that if accepted, provides less of a threat to competition as compared to the proposed purchase.

(b) must be an offer for the acquisition of the entire or substantial part of the failing firm. *In casu*, the Commission considered as inadequate an offer by the Peine Group to take over an asset of MdK, being the Bischofferode mine.³⁰⁴ The mine was regarded as not relating to the substantial part of MdK.³⁰⁵

(c) must be an offer chosen after an effort to find a less anticompetitive purchase. The requirement is met if it can be shown that an effort was made to elicit and then seriously consider a wide range of offers from potential purchasers. *In casu*, the Commission accepted as reasonable efforts by the Treuhand to engage an investment bank, Goldman Sachs International Limited, as responsible for inviting tenders.³⁰⁶ Goldman Sachs in turn approached 48 firms worldwide with the aim of securing a purchaser for MdK.³⁰⁷ However, only 19 firms expressed initial interest and of these only three, K+S, Potash Corporation of Saskatchewan (PCS) and EMC, met the required criteria.³⁰⁸ Negotiations with PCS and EMC failed to go beyond the initial stages leaving K+S as the only available purchaser.³⁰⁹

The Commission expressed its satisfaction with the effort made by the investment bank as being sufficient to show that an attempt was made to reach as many potential purchasers as possible.³¹⁰ Goldman Sachs went on to the extent of sending repeated reminders to any firm that had initially expressed even the slightest of interest.³¹¹ It is submitted that Goldman Sachs was flexible in its

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ *Kali und Salz* (note 9 above) L136/51 par.81.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Par. 82.

³¹¹ Ibid.

search by following every reasonable possibility of acquisition regardless of whether such was concerned with the purchase of a substantial part of MdK. However, despite these efforts, no firm offer was made, leaving K+S as the only available purchaser.³¹²

The Commission was still not satisfied with the documentary evidence supporting the search and found the procedure as not being adequate to establish the absence of a ‘no less anti-competitive purchase.’³¹³ It went on to contact other undertakings that had been approached by the merging parties to determine whether they would have taken up the offer should information that the Treuhand would offer substantial financial assistance in the merger have been made available.³¹⁴ No positive feedback was received.³¹⁵ It is thus clear that the Commission was prepared to leave no stone unturned in ensuring strict compliance with the criteria that there was no less anti-competitive purchaser besides K+S. This illustrates the extent to which merging parties must go in order to convince the authorities that the merger must be cleared on the basis of the failing firm defence.

It was only after first being satisfied with the evidence supplied by the Goldman Sachs and secondly, after its own search yielded no positive results, that the Commission concluded that there was ‘sufficient evidence to suggest that an acquisition of all or a substantial part of MdK by an undertaking other than K+S can be ruled out.’³¹⁶

(c) High degree of proof

It is clear that the merging parties bear a relatively high burden of proving that all the requirements for a failing firm defence are met.³¹⁷ As if this is not a daunting task on its own, they are further required to demonstrate the lack of causation between the exit from the relevant market and the inevitable deterioration of the competitive market structure. However, the most

³¹² Ibid. *Kali und Salz* (note 9 above) L136/51 par.82.

³¹³ Ibid, L186/51par. 84

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ *Kali und Salz* (note 9 above) L186/52.

³¹⁷ Ibid,par. 71; *Blokker/Toys ‘R’ Us* (note 294 above) par. 110.

significant aspect is that the lack of causality must be ‘clear’³¹⁸ implying that anything below a showing of a probability of failure is not acceptable.³¹⁹

6.4.3.1 *Saint Gobain/Wacker-Chemie/NOM*³²⁰

On 1 July 1996, Société Européenne des Produits Réfractaires, Courbevoie (SEPR), a member Saint-Gobain group of France, Elektroschmelzwerk Kempten GmbH, Munich (ESK), a member of the Wacker-Chemie group of Germany, and NV Noordelijke Outwinnelingsmaatschappij, Groningen (NOM) which was owned by the Dutch Government, jointly notified the creation of a joint venture under Dutch law.³²¹ The proposed joint venture, which was to operate as an independent producer and processor of silicon carbide on a lasting basis,³²² was to be jointly controlled by SEPR (60 per cent) and ESK and NOM with 20 per cent apiece of the share capital and none of the parties having the power to unilaterally determine strategic decisions.³²³

The transaction involved first the establishment of a Dutch joint venture as a public limited company (BV).³²⁴ As soon as the company became functional, it was to create and incorporate a Germany subsidiary in the form of a private limited company (GmbH).³²⁵ The newly created Dutch joint venture was then to acquire all the assets of ESK’s Dutch subsidiary, ESD and, through its newly created Germany subsidiary, acquire all the assets of ESK’s processing facilities in Grefrath as well as some assets of the processing plant in Kempten which were involved in the silicon carbide business.³²⁶ A series of other agreements were entered into to the effect that (a) Norton was to transfer certain technology and technical assistance to the joint venture, and (b) ESK was to manufacture silicon carbide micro grits and powder for the joint venture for an initial three year period whereafter ESK’s Kempten plant was to be closed and

³¹⁸ *Kali und Salz* (note 9 above) L186/49 par. 70.

³¹⁹ See Bavasso and Lindsay (2007)(note 12 above) 191.

³²⁰ *Saint Gobain/Wacker-Chemie/NOM* (note 251 above).

³²¹ *Ibid*,L247/1 par.1.

³²² *Ibid*, L247/3 par. 12.

³²³ *Ibid*, L247/1 par. 1 and L247/3 par.11.

³²⁴ *Ibid*, L247/2 par.8

³²⁵ *Saint Gobain/Wacker-Chemie/NOM* (note 243 above) L247/2 par.8.

³²⁶ *Ibid*.

some of its assets transferred to the joint venture.³²⁷ These transactions were constructed as a concentration by the Commission and as such falling within the ambit of Regulation 4064/89.³²⁸

Having identified the general product market as ‘the production, processing, marketing and sale of silicon carbide’³²⁹, the Commission defined as the relevant product market as the market for silicon carbide for metallurgical purposes, for crude crystallised silicon carbide, processed silicon carbide for abrasive applications, and for refractory purposes.³³⁰ More than one geographic market was thus defined with the focus being on the European Economic Area (EEA).³³¹

In assessing the effects of the concentration on competition, the Commission found that on the silicon carbide market for metallurgical purposes, the presence of numerous competitors was a factor that at least guaranteed effective competition,³³² on the crude crystallised silicon carbide market, the parties’ activities were insignificant to either create or strengthen their dominant position.³³³

The Commission concluded that the joint venture would have become the largest supplier of silicon carbide in the crude silicon carbide market in the EEA by a wider margin,³³⁴ as well as of silicon carbide for abrasive applications in the EEA,³³⁵ and would make the parties the largest producers of processed silicon carbide for refractories with market shares ranging between 60

³²⁷ Ibid,L247/3 par. 10.

³²⁸ Ibid,L247/1 par. 2 and L247/3 pars. 14 and 15. The decision was made under Council Regulation (EEC) 4064/89.

³²⁹ Ibid,L247/4 par. 18.

³³⁰ Ibid,L247/4 pars. 19, 20, 21 and 22.

³³¹ Ibid,L247/27.pars. 131 (the geographic market for processed silicon carbide defined as the EEA), par. 135 (for processed silicon carbide for refractories as the EEA), par. 136 (left open the definition for the geographic market for other industrial applications due to the fact that this product market was considered as raising no competition issues). The EEA was established in 1994 following the agreement between members of the European Free Trade Association (EFTA) and the European Union (EU). See Agreement on the European Economic Area *OJ* L1 3.1/1994.

³³² *Saint Gobain/Wacker-Chemie/NOM* (note 243 above),L247/ 30 par. 164.

³³³ *Saint Gobain/Wacker-Chemie/NOM* (note 243 above) L247/31 par. 167.

³³⁴ Ibid,L247/30 par.161.

³³⁵ Ibid,L247/39 par.220 (the available competitors were all too small to effectively compete with the joint venture.)

and 70 per cent.³³⁶ In some segments, the joint venture would even have become the sole producers.³³⁷ The Commission thus concluded that the proposed transaction was anti-competitive.³³⁸

6.4.3.2 *Saint Gobain/Wacker-Chemie/NOM* and the failing firm defence

In response to the parties' attempt to invoke the failing firm defence in order to get the Commission to clear the proposed concentration, the Commission ruled out that the defence was inapplicable to the situation.³³⁹ The Commission firstly made a general observation that the 'defence could only be accepted if, even in the event of the merger being prohibited, the acquirer would inevitably achieve or reinforce a dominant position.'³⁴⁰ What followed was a reiteration of the *Kali und Salz* criteria, which have been discussed above.³⁴¹ The Commission considered firstly, that the parties had not sufficiently established that ESK's business was failing and its assets would be forced out of the relevant market in the foreseeable future³⁴² and secondly that, ironically, even if ESK was to withdraw from the market, its to-be-available market share was not to accrue to Saint-Gobain.³⁴³ Lastly Saint-Gobain was not the only available purchaser as the Grefrath processing plant was in a position to attract third buyers.³⁴⁴

(a) Some thoughts on the decision

The general statement made by the Commission and quoted above³⁴⁵ shows that the defence is applied strictly and in its narrowest sense. The phrase 'would inevitably achieve or reinforce a dominant position' implies that it must be proved on a higher scale with certainty that should the

³³⁶ Ibid.

³³⁷ Ibid,L247/41 pars. 236.

³³⁸ Ibid, L247/45 par.265.

³³⁹ Ibid,L247/43 par. 247.

³⁴⁰ Ibid,L247/43 par. 243.

³⁴¹ See 6.4.2.2 above.

³⁴² *Saint Gobain/Wacker-Chemie/NOM* (note 251 above),L247/43 pars. 248, 249 and 252.

³⁴³ Ibid, L247/43 par. 253. The Commission noted that in the event of ESK's exit, neither Saint-Gobain nor any of the potential competitions were in a position to fill in the gap left by ESK in the market and also that ESK's exit would result in price increases, a situation conducive for attracting more entrants into the market.

³⁴⁴ Ibid,L247/44 par.257.

³⁴⁵ Note 340 above.

merger be prohibited, the deterioration of the market structure could still occur as the acquirer would certainly be able to fill in the gap left by the exiting failing firm in the relevant market and as such to create or strengthen its dominant market position.³⁴⁶ The statement also reiterates the central role of the lack of causality requirement in appraising failing firm arguments in the EU merger control.³⁴⁷

The Commission made a telling observation that even if it could be shown that Saint-Gobain would take over some of the market shares left by the exiting ESK, it was not enough as it was required that the acquirer must take over all of the available market share.³⁴⁸ The rationale for this can be understood as aimed at ensuring that there are no other alternative purchasers for the failing firm's business outside the merging parties. However, this only makes the alternative purchaser requirement and the criteria narrower and stricter.

In concluding that the failing firm criteria as set out in *Kali und Salz* was not met, the Commission considered the applicability of the causality principle and noted that it was not sufficiently shown that the competitive market structure would deteriorate anyway even if the merger was prohibited. To the contrary, the Commission stated that the proposed concentration was likely to cause deterioration in the competitive structure of the market to an extent not rivalled by the likely exit of ESK.³⁴⁹ As such the cause of the deterioration of the competitive structure of the market was to be pinned squarely on the proposed concentration.

6.4.4.1 Bertelsmann/Kirch/Premiere:³⁵⁰ a 'failing company' or a 'failing division'?

A discussion of this decision will focus mainly on the application, or lack thereof, of the 'failing division defence' in the EU. It will be asked whether there is a need to have all the seemingly

³⁴⁶ See Bavasso and Lindsay (2007)(note 12 above) 191.

³⁴⁷ Par. 89 of the *Horizontal Merger Guidelines*.

³⁴⁸ *Saint Gobain/Wacker-Chemie/NOM* (note 251 above),L247/43 par. 254. See also *Kali und Salz* (note 9 above) L186/56 par. 80.

³⁴⁹ *Saint Gobain/Wacker-Chemie/NOM* (note 251 above) L247/43 par.253.

³⁵⁰ *Bertelsmann/Kirch/Premiere* (note 128 above).

cumbersome criteria for establishing the criterion set-out in *Kali und Salz* ³⁵¹ when in actual fact what requires to be established is a 'defence on the ground of lack of a causal link.'³⁵²

The *Bertelsmann* decision involved the proposed acquisition of joint control through a series of share purchases, of Premiere Medien GmbH & Co. KG (Premiere), BetaDigital Gesellschaft für digitale Fernsehdienste mbh (BetaDigital) and BetaReserach Gesellschaft für Entwicklung und Vermarktung digitaler Infrastrukturen mbh (BetaReserach) by CLT-UFA SA (CLT-UFA) and Taurus Beteiligungs-GmbH & Co. KG (Taurus).³⁵³

Bertelsmann AG (Bertelsmann) was a leading German media group whose business interests involved a range of media activities in both print and electronic media including commercial television.³⁵⁴ CLT-UFA was a joint venture between Bertelsmann and Audiofina SA in which the parent holding companies merged their European television interests including shareholding in Premiere.³⁵⁵ Before the proposed transaction, Premiere was a German pay-TV supplier owned by CLT-UFA (37.5 per cent shareholding), Kirch (37.5 per cent) and Canal+ SA (Canal+) (25 per cent).³⁵⁶

The proposed transaction would have seen Canal+ divesting its shareholding in Premiere and CLT-UFA and Kirch both increasing their shareholding to 50 per cent apiece.³⁵⁷ CLT-UFA was to acquire half of BetaDigital's stake from Kirch³⁵⁸ as well as half of the stakes in Beta Research.³⁵⁹ The effects of these series of transactions would have seen CLT-UFA and Kirch jointly controlling BetaDigital and BetaResearch in equal shares and also a change in the nature

³⁵¹ *Kali und Salz* (note 9 above) L186/49 par. 71.

³⁵² *Bertelsmann/Kirch/Premiere* (note 128 above) L53/53 par.76. See also Bavasso and Lindsay (2007)(note 12 above) 195 who argued that once the parties had managed to establish the lack of a causal link between the merger or the exit of a failing firm and the ensuing deterioration of the competitive structure of the market, there is no need to establish all the other criteria as required by the guidelines.

³⁵³ *Bertelsmann/Kirch/Premiere* (note 128 above),L53/1.par. 1.

³⁵⁴ *Ibid*,L53/2 par. 6.

³⁵⁵ *Bertelsmann/Kirch/Premiere* (note 128 above),L53/2 par.6.

³⁵⁶ L53/3 par.13.

³⁵⁷ L53/2par.7.

³⁵⁸ Par. 9.

³⁵⁹ L53/3 par. 15.

of the control of Premiere after the withdrawal of Canal+. It is this change in the nature of control that constituted a concentration for merger control purposes.³⁶⁰

The Commission defined the relevant markets as the pay-TV and the technical services for pay-TV.³⁶¹ The relevant geographic market was identified as confined to Germany and the German-speaking parts of Belgium, Austria and some parts of Belgium, Switzerland and Luxembourg.³⁶²

The Commission identified a number of effects that the proposed concentration would have on competition in the relevant market, being pay-TV and technical services for pay-TV in Germany and German-speaking regions of the EEA. These will only be summarised here and focus will be on how the failing firm doctrine was invoked. The Commission concluded that the proposed concentration would have led to the creation or strengthening of a dominant position for Premiere on the pay-TV market in Germany,³⁶³ particularly in that;

- (a) it would have a near monopoly as a pay-TV supplier,³⁶⁴
- (b) it would become the only programme platform for digital pay-TV,³⁶⁵
- (c) it would have access to the most attractive and comprehensive programme resources,³⁶⁶
- (d) public television suppliers would not be able to considerably control its scope of competition,³⁶⁷
- (e) it would have exclusive programme resources necessary to establish a programme platform.³⁶⁸

³⁶⁰ L53/3 par.13. See also Article 391) of Regulation 4064/89.

³⁶¹ L53/4 pars. 17, 18 and 19.

³⁶² L53/5 par.22.

³⁶³ L53/6 par. 29.

³⁶⁴ *Bertelsmann/Kirch/Premiere* (note 128 above),L53/6 par. 30.

³⁶⁵ *Ibid*, L53/6pars 31 and 32.

³⁶⁶ *Ibid*, L53/6.pars.34, 35,36 , 37 and 42.

³⁶⁷ *Ibid*,L53/8 par. 43.

³⁶⁸ *Ibid*,L53/9 pars. 49 and 50.

The Commission concluded that the proposed concentration would have given and strengthened the long term dominant position for Premiere on the pay-TV market in Germany.³⁶⁹ It considered the fact that even though claims were made that Kirch's DF I was experiencing some losses, such claims would not neutralise the fact that Premier already had an established subscriber base and as such its acquisition of DF I would not have resulted in a new set-up but would merely have strengthened its dominant position.³⁷⁰

6.4.4.2 Bertelsmann/Kirch/Premiere and the failing firm doctrine

The Commission considered arguments that DF I had performed poorly as Kirch's digital pay-TV Channel, and as such its acquisition by Premiere could not be the cause of any deterioration in the competitive structure of the relevant market.³⁷¹ The Commission argued that 'the fact that DF I has had only limited success so far does not mean that the conditions of competition will be the same with or without the concentration.'³⁷² Unsurprisingly, this argument in essence hinges on the lack of causality requirement.

The Commission referred to the *Kali und Salz*-criteria as pivotal in establishing whether DF I's limited success justifies approving a merger that clearly created and strengthened Premiere's dominant position in the pay-TV business.³⁷³ The Commission, however correctly pointed out that the present case was distinguishable from *Kali und Salz* in that *Kali und Salz* concerned the alleged failure of the entire company whereas the current case concerned the alleged failure of DF I, a division of, and not the entire Kirch business.³⁷⁴

However, despite accepting that the current case concerned a failing division and as such should be treated under the 'failing division defence',³⁷⁵ the Commission did nothing more to develop the said defence. In fact, the decision was based on the *Kali und Salz* criteria. The only thing that the Commission did was to lay a standard for the 'failing division defence' in stating that

³⁶⁹ Ibid,L53/1119 par. 100.

³⁷⁰ Ibid,L53/14 par. 69.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ *Bertelsmann/Kirch/Premiere* (note 128 above),L53/14 par. 19.

³⁷⁴ *Bertelsmann/Kirch/Premiere* (note 128 above) L53/14 par.71.

³⁷⁵ Ibid,L53/14 pars. 69 and 70.

Where the ‘failing division defence’ and not the ‘failing company defence’ is invoked, particularly high standards must be set for establishing that the conditions for a defence on the grounds of lack of causal link have been met.³⁷⁶

The rationale for setting a high standard is to avoid a situation whereby

[A]ny concentration involving the disposal of an alleged unprofitable area of a business could be justified for merger control purposes by a declaration on the part of the seller that, without the merger, it would be necessary to close down the seller’s business in that area.³⁷⁷

Thus the furthest the Commission went was to emphasise that a standard even higher than that required when establishing a failing firm defence was needed for a failing division defence. However, there was no attempt to clarify the issue as to what criteria should such a higher standard be applied. It can only be assumed that the raised standard must be applied to the *Kali und Salz* criteria for the failing firm defence but with probable adaptations to suit the failing division scenario. For instance, it had to be established *in casu* that DF I as a division was failing and would be forced out of the relevant market. This is what the Commission appraised and the parties were caught wanting on this criterion.³⁷⁸ The Commission also considered arguments that should DF I exit the relevant market, its market share would have accrued to Premier and found that this requirement was not met.³⁷⁹ Finally, the Commission noted that the parties had not shown that there were no other purchasers besides Premier.³⁸⁰

The Commission concluded that the merging parties had met neither the *Kali und Salz* criteria nor the lack of causality principle.³⁸¹ However, the Commission referred to the *Kali und Salz* criteria simply as the criteria for establishing a ‘defence on the grounds of lack of causal link.’³⁸² This might imply that it is simply an academic question as to whether one chooses to rely on the

³⁷⁶ Ibid, L53/14 par. 71. See also Bavasso and Lindsay (2007)(note 12 above) 193.

³⁷⁷ Ibid.

³⁷⁸ *Bertelsmann/Kirch/Premiere* (note 128 above), L53/14 pars. 72 and 73.

³⁷⁹ Ibid,L53/15 par. 74. There existed a possibility that other parties could have used Kirch’s pay-TV broadcasting rights to enter the pay-TV market with less anti-competitive effects than the current acquisition by Premier.

³⁸⁰ Ibid,L53/15 par.75.

³⁸¹ Ibid,L53/15 par. 76. The Commission found that the parties had failed to sustain their argument that the acquisition of DF I by Premier could not be the cause of the deterioration in the market conditions failed

³⁸² Ibid, L53/14 par. 71.

‘failing company defence’ or the ‘failing division defence.’ It is submitted that the real issue is however whether it has been shown that there is no causal link between the alleged failing entity exiting the relevant market and the deterioration in the market structure that follows the merger. Given that the Commission stressed that the standards of establishing lack of causality in a ‘failing division defence’ context are higher than that in a ‘failing company defence’ context, one would wonder whether establishing the said standard needs to vary as much as there appears to be no separate criteria for the two defences.

If there is no distinction between the criteria for establishing the two defences save for a variation in the standards of proof, then it is submitted that a case can be made for reducing the criteria to a single requirement, namely that of establishing lack of causality, with the current criteria as set out in *Kali und Salz* and provided in the *Horizontal Merger Guidelines* being employed as a non-exhaustive list of guidelines. This is one of the suggestions that this study makes in developing an effective and suitable model for the regulation of mergers involving struggling firms in Zimbabwe.³⁸³

6.4.5.1 *NewsCorp/Telepiu*³⁸⁴

This decision will be discussed briefly with the aim of emphasizing the points made above in relation to the treatment or rather mistreatment of the ‘failing division defence’ in EU merger control. The ultimate aim is to ask whether Zimbabwe can adopt such approach and if so, how to adapt such an approach.

The Commission concluded that the proposed acquisition of sole control by The News Corporation Limited (NewsCorp) of the Italian pay-TV’s Telepiu Spa and Stream (Telepiu and Stream) in a transaction that would have combined Telepiu and Stream’s activities in Direct-to-Home (DHT) satellite pay-TV platform with Italian S.p.A (Telecom Italia) holding a minority stake³⁸⁵ would have strengthened on a lasting basis a dominant position in the Italian pay-TV market by, *inter alia*, creating a monopoly on the DHT means of transmission and with the

³⁸³ See Chapter 8.

³⁸⁴ *NewsCorp/Telepiu* (note 14 above).

³⁸⁵ *NewsCorp/Telepiu* (note 14 above) pars. 1 and 9.

potential and possibilities of foreclosing actual and potential competitors through, *inter alia*, raising rivals' costs and raising entry barriers.³⁸⁶

6.4.5.2 *NewsCorp/Telepiu* and the failing firm or failing division doctrine

In considering the applicability of the failing firm defence or the concept of a 'rescue merger',³⁸⁷ the Commission made reference to some of its own decisions in *Kali und Salz*,³⁸⁸ *BASF/Eurodiol/Pantochim*³⁸⁹ and that of the ECJ's decision in *France v Commission*.³⁹⁰ The Commission then reiterated that the application of the failing firm doctrine 'requires that the deterioration of the competitive structure resulting from the merger is at least no worse than which would have occurred in the absence of the merger'.³⁹¹ This essentially amounts to the lack of causality requirement.³⁹²

The transaction under consideration involved the acquisition of Stream, an alleged failing division of NewsCorp, by its parent company as a separate division in an operation that would have merged it with another healthy division, Telepiu.³⁹³ The question was raised as to the applicability of the failing firm defence in such a situation.³⁹⁴ Thus the inquiry will continue here as to whether the Commission applied the correct legal principles, namely the failing firm defence instead of the failing division defence.

Following the footsteps of *Rewe/Meinl*,³⁹⁵ it was stressed that the burden of proving lack of causality between the merger and the deterioration in the market condition in the context of failing division arguments falls on the merging parties.³⁹⁶ However, the context of this statement

³⁸⁶ Par. 140.

³⁸⁷ Pars. 205-2-8.

³⁸⁸ *Kali und Salz* (note 9 above).

³⁸⁹ *BASF/Eurodiol/Pantochim* (note 9 above).

³⁹⁰ *France v Commission* (note 17 above).

³⁹¹ *NewsCorp/Telepiu* (note 14 above) par. 209.

³⁹² Par. 89 of the *Horizontal Merger Guidelines*. See notes 12 and 13 above.

³⁹³ *NewsCorp/Telepiu* (note 14 above) pars. 1 and 9.

³⁹⁴ *Ibid*, par. 211.

³⁹⁵ *Rewe/Meinl* (note 294 above).

³⁹⁶ *NewsCorp/Telepiu* (note 14 above) par.212.

is confusing in that it implies that the burden lies on some other parties in the case of the failing firm defence.³⁹⁷ In any case, the onus is on the party seeking refuge under the ‘rescue merger’ concept.³⁹⁸ In justifying that the burden lies on the merging parties in the case of the failing division defence, the Commission stated that the burden was higher in the former scenario thereby creating the impression that the burden was lesser in the case of the failing firm defence.³⁹⁹ As much as a stricter approach to the acceptance of the ‘rescue merger’ concept in merger control can be entertained on the basis that only through the approval of genuinely failing firms can the competitive structure of the market be maintained, it is difficult to accept any variations in the burden of proof.⁴⁰⁰ It is submitted that it becomes even harder when it is accepted that the same criteria are applied to both the failing firm defence and the failing division defence, being the lack of causality requirement.

Of significance is that the Commission kept its focus of appraisal on the lack of causality principle.⁴⁰¹ However, what followed thereafter was disappointingly, an appraisal of the ‘failing company defence’ criteria as laid down in *Kali und Salz*.⁴⁰² This approach is disappointing in the sense that again the Commission seemed to use every opportunity it got to ‘mistreat’ the failing division defence at the expense of the more established failing firm defence⁴⁰³ and by so doing,

³⁹⁷ Cf. *Kali und Salz* (note 9 above) par. 71 where it was held that the burden of proof lies on the merging parties.

³⁹⁸ *Ibid.*

³⁹⁹ *NewsCorp/Telepiu* (note 14 above) par. 212. See also *Bertelsmann/Kirch/Première* (note 128 above) L53/14 par. 71.

⁴⁰⁰ See Bavasso and Lindsay (2007)(note 12 above)191.

⁴⁰¹ *NewsCorp/Telepiu* (note 14 above) par. 212 (the onus of proof was framed within the context of the lack of causality principle).

⁴⁰² *NewsCorp/Telepiu* (note 14 above) pars. 213 (that the alleged failing firm would in the near future, exit the relevant market), 216 (that there is no less anti-competitive competitor) and 218 (that the assets would inevitably disappear from the relevant market or that the acquiring firm would acquire the exiting firm’s market share).

⁴⁰³ This approach is also similar to the one employed in the US where the courts despite acknowledging the existence of the related failing division defence, still assess mergers involving failing divisional assets using the more established failing firm doctrine. See *United States v Lever Brothers Co.* 216 F. Supp. 887 (1963); *United States v Reed Roller Bit Co.* 274 F. Supp. 573 (1967); *FTC v Great Lakes Chemical Corp.* 528 F. Supp. 84 91981); *United States v Blue Bell Inc.* 395 F. Supp. 583 (M.D. Tenn. 1975). See also Wait AL ‘Surviving the Shipwreck: Proposals to revive the Failing Division Defense’ (2003) 45(1) *William and Marry Law Review* 429.

missing the opportunity to clarify whether the failing firm defence and the failing division defence are one and the same.

What emerged clear from this decision and others where this aspect arises is that regardless of the label that one places on these two concepts, the bottom line is that it must be demonstrated that the deterioration of the market conditions as a result of the merger, be it of the entire or part of an undertaking, is at least no worse than that which would have occurred in the absence of the merger. In other words, the lack of causality principle must be met.

The Commission, after concluding that the parties had failed to meet the first two of the three set requirements, considered it unnecessary to take the final test, namely that there are no less anti-competitive alternative purchasers.⁴⁰⁴ This clearly shows that the criteria must be cumulatively met.⁴⁰⁵ Thus even if the last requirement was met the result was not going to change as the criteria was still going to be regarded as not having been met. It follows that even if a single requirement of the criteria is not met, the lack of causality requirement would still not be satisfied and the defence will fail. This only serves to show how difficult it is to successfully invoke the failing firm defence in the EU let alone the failing division defence with the additional higher burden of proof attached to it.

On a lighter note, despite the merger failing to clear the rigorous requirements for meeting the failing firm defence, the Commission importantly employed the balancing act approach to clear it, noting that

[The] risk of Stream exiting the market, if it were to materialize, would be a factor to take into account when assessing the present merger. The Commission further considered that an authorization of the merger subject to appropriate conditions will be more beneficial than a disruption caused by a potential closure of Stream.⁴⁰⁶

It is submitted that this rule of reason approach is a welcome move in assessing mergers involving failing firms and as such it is one area that Zimbabwe must seriously consider. To suggest that Zimbabwe must consider applying the rule of reason approach in assessing mergers

⁴⁰⁴ *NewsCorp/Telepiu* (note 14 above) par.220. See also *Reed Roller Bit Co.* (note 350 above) 584 n1.

⁴⁰⁵ See note 291 above.

⁴⁰⁶ *NewsCorp/Telepiu* (note 14 above) par. 211.

involving failing firms might be somehow misleading as one might think that the current approach treats mergers as *per se* prohibited. Mergers in Zimbabwe are not *per se* prohibited,⁴⁰⁷ they are treated under the rule of reason approach. However, due to lack of literature and probably accessibility of information on merger regulation in general, it is suggested that in developing a framework for analyzing mergers involving failing firm claims, the responsible authorities need to expressly state that the balancing act associated with the rule of reason approach will be a determining factor. This approach takes into account the implications of either allowing or prohibiting a merger on a consumer welfare basis and this supports the reasoning that the ultimate goal of competition law and merger regulation is the enhancement of consumer welfare.⁴⁰⁸

6.4.6 After the Commission's *Kali und Salz* criteria: development of the failing firm doctrine in the EU

The above discussion has made three observations relevant to this study, namely;

- (a) That the criterion for establishing the failing firm defence in the EU is narrow and strict,
- (b) that the lack of causality requirement is at the core of any appraisal for a 'rescue merger,' and
- (c) that there is no practical distinction between the criteria for establishing a failing firm defence and that for the related failing division defence.

With this in mind, this section will now briefly highlight some of the jurisprudential developments following the Commission's laying out of the *Kali und Salz* criteria. Due to the limitations of space, focus will be on particularly the refining of the *Kali und Salz* criteria by the

⁴⁰⁷ Section 32 (4) of the Zimbabwean Competition Act of 1996 provides that in determining whether or not a merger is contrary to public interest, the Competition and Tariff Commission (CTC) must assess (a) whether or not the merger is likely to substantially lessen or prevent competition, or (b) result in a monopoly situation that is contrary to public interest. The provision makes use of a probable effect on competition thereby implying that a merger is not to be treated as *per se* contrary to public interest before examination.

⁴⁰⁸ See Bavasso and Lindsay (2007)(note 12 above) 189 on the application of the counterfactual to assess the concentration's impact on consumer welfare. See further Caffara C & Coscelli A 'Merger to monopoly: *NewsCorp/Telepiu*' [2003] *E.C.L.R.* 625, 626 and Baccaro (2004)(note 12 above) 18 and 19.

ECJ in the appeal decision in *France v Commission*,⁴⁰⁹ *BASF/Eurodiol/Pantochim*⁴¹⁰ and the decision in *Ernst & Young France/Andersen France*.⁴¹¹

6.4.6.1 *France v Commission (the Kali und Salz Appeal)*

The Commission had conditionally approved the merger to require, *inter alia*, that the links between Kali+Salz and SCPA be eliminated.⁴¹² These links included the control of a joint venture in Canada, Potacan; the co-operation of Kali+Salz, MdK and EMC/SPCA through Kali-Export GmbH, an export cartel and the arrangements allowing SCPA to procure almost all of Kali und Salz's supplies in France.⁴¹³ In essence, this finding was premised on the principle of collective dominance, a reasoning that was disputed by the French government upon appeal before the ECJ.⁴¹⁴

Upon appeal, the Commission's decision to conditionally approve the merger was annulled.⁴¹⁵ The Court found that the Commission's decision was premised on a negative assessment of the competitive effects of the transaction in question⁴¹⁶ hence incorrect legal standards were employed leading to the conclusion that the concentration would give rise to a collective dominant position between Kali+Salz, MdK and SCPA.⁴¹⁷

However, the Court upheld the Commission's finding on the failing firm defence.⁴¹⁸ The ECJ rejected the French Government's contentions on the inclusion of the criterion that it must be shown that in the event of exit, the exiting failing firm's market share would accrue to the

⁴⁰⁹ *France v Commission* (note 17 above).

⁴¹⁰ *BASF/Eurodiol/Pantochim* (note 9 above).

⁴¹¹ Case No. COMP/M. 2816 *Ernst & Young France/Andersen France*, Commission decision of 5 September 2002.

⁴¹² *Kali und Salz* (note 9 above) L186/53 par. 97 and L186/48 par. 63.

⁴¹³ *Ibid*, L186/47 pars. 58, 60 and 61.

⁴¹⁴ *France v Commission* (note 17 above).

⁴¹⁵ *France v Commission* (note 17 above), pars. 259 and 256 (1).

⁴¹⁶ *Ibid*, par. 258.

⁴¹⁷ *Ibid*, par. 248. The ECJ found that the Commission's claims were not supported by factual evidence (pars. 241, 243, 245 and 246) and as such it had failed to show that there are no effective competitive results that can outweigh the alleged anti-competitive grouping. See also Kokkoris (2006) (note 3 above) 499.

⁴¹⁸ *France v Commission* (note 17 above), pars. 119 and 124.

acquiring undertaking.⁴¹⁹ The Appellant had argued that since that criterion was not part of the US failing firm doctrine formulation, it must not be considered in the EU as well.⁴²⁰ It also contested the Commission's findings on the absence of a less anti-competitive alternative purchaser.⁴²¹ The ECJ noted that the French Government's disputing of the method used to prove lack of an alternative anti-competitive purchaser was unsubstantiated.⁴²²

The ECJ further stressed that the inclusion of the contested criterion that should the failing firm exit the relevant market, its market share would be absorbed by the acquiring undertaking, did nothing more than give impetus to the lack of causality principle in EU merger control.⁴²³ The ECJ stated that

The criterion of the absorption of market shares, although not considered by the Commission as sufficient in itself to produce any adverse effect of concentration on competition, therefore helps to ensure neutral effects of the concentration as regards the deterioration of competitive structure of the market. This is consistent with the concept of causal connection set out in Article 2(2) of the Regulation.⁴²⁴

The ECJ authoritatively stated that the requirement is in line with the EU merger control principle of lack of causality, if used in the context of the failing firm arguments, which requires a demonstration that

[t]he existence of a causal link between the concentration and the deterioration of the competitive structure of the market can be excluded only if the competitive structure resulting from the concentration would deteriorate in similar fashion even if the concentration did not proceed.⁴²⁵

This essentially means that even if the merger is prohibited and the failing firm is to exit the relevant market, the consequences of either of these scenarios on the said market structure would be similar.⁴²⁶ In other words, the competitive market structure would deteriorate in similar

⁴¹⁹ Ibid, par. 113.

⁴²⁰ Ibid.

⁴²¹ Ibid, par. 121.

⁴²² Ibid, par. 122.

⁴²³ Ibid, par. 116.

⁴²⁴ *France v Commission* (note 17 above), par 116.

⁴²⁵ Ibid, par. 115. See also *Blokker/ Toys 'R' Us* (note 294 above) par.111.

⁴²⁶ *BASF/Eurodiol/Pantochim* (note 9 above) par.139.

fashion be it as a result of blocking the merger and allowing the failing firm to exit the market or as a result of the merger proceeding.⁴²⁷

The ECJ's approach to particularly the above requirement widens the Commission's *Kali und Salz* criteria.⁴²⁸ However, there appears nothing to celebrate regarding this wider approach as there is nothing to imply a material departure from the fact that the doctrine remains strict and narrow and is underpinned by a jealously guarded lack of causality requirement.⁴²⁹

6.4.6.2 BASF/Eurodiol/Pantochim:⁴³⁰ refining the *Kali und Salz* criteria

The *BASF/Eurodiol/Pantochim* decision has been described as a significant step towards the development of the failing firm doctrine in the EU.⁴³¹ The decision preceded the current *Horizontal Merger Guidelines* and refined the Commission's *Kali und Salz* criteria by paving the way for a four-pronged test for the failing firm defence⁴³² which is currently being utilized by the *Horizontal Merger Guidelines*.⁴³³

Having found that the notified concentration raised some serious competition concerns, *inter alia*, resulting in the combination of the only two producers of NMP on the EEA market which in turn resulted in the establishment of a strong market position and depriving customers of choice,⁴³⁴ the Commission was called to determine whether the failing firm defence was applicable.⁴³⁵ It stated that for merging parties to successfully invoke the failing firm defence they needed to show, as a preliminary requirement, that the target firm is a failing firm and that

⁴²⁷ *NewsCorp/ Telepiu* (note 14 above) par. 207.

⁴²⁸ *Ibid.* See also *BASF/Eurodiol/Pantochim* (note 9 above) par 139. See further Kokkoris (2006)(note 3 above) 499;Bavasso and Lindsay (2007)(note 12 above) 186.

⁴²⁹ Cf. Levy N 'The Control of Concentrations Between Undertakings' (2001) in Korah V (eds.,) *Cases and Materials in EC Competition Law* (2nd Ed.,) 614 (the wider approach has restrictive effects that is capable of permitting all monopolies but prohibiting transactions giving rise to less concentrated markets).

⁴³⁰ *BASF/Eurodiol/Pantochim* (note 9 above).

⁴³¹ Kokkoris I and Olivares-Caminal R *Antitrust amidst Financial crises* (2010) 124.

⁴³² *BASF/Eurodiol/Pantochim*,(note 9 above) par.142. See Kokkoris (2006)(note 3 above) 127; Bavasso and Lindsay (2007)(note 12 above) 187.

⁴³³ Par. 90 of the *Horizontal Merger Guidelines*.

⁴³⁴ *BASF/Eurodiol/Pantochim*,(note 9 above) par. 118.

⁴³⁵ See generally *BASF/Eurodiol/Pantochim*,(note 9 above) pars. 135-163.

the merger is not the cause of the deterioration in the market conditions.⁴³⁶ This could be shown by a demonstration to the effect that

(a) absent the merger, the target firm would be forced out of the relevant market in the near future; and

(b) there is no less anti-competitive alternative purchase.⁴³⁷

However, the Commission considered the possibility of third parties' involvement as potential acquirers of the failing firm and added a third requirement that

(c) the failing firm's assets that are the subject of the acquisition would exit the relevant market in the absence of the merger.⁴³⁸ This third requirement refined the *Kali und Salz* criteria⁴³⁹ which only made reference to the absorption of the exiting firm's market share.⁴⁴⁰ In setting out the refined criteria the Commission stated that

[Nor] can it expected that BASF would absorb merely all of Eurodiol's market shares since their main competitors are likely to gain significant parts of this share as well. However, the Commission recognizes that the assets of the failing firm would definitely lead to a considerable deterioration of market conditions, to the disadvantage of the customers. The Commission considers that these elements are equally relevant for the application of the rescue merger concept.⁴⁴¹

The criteria thus was formulated as requiring a showing that

(a) The alleged failing form would in the near future be forced out of the relevant market if not taken over by another undertaking.⁴⁴²

(b) There is an alternative purchaser posing a less threat to competition than the proposed acquiring firm.⁴⁴³

⁴³⁶ Ibid, par. 140.

⁴³⁷ Ibid.

⁴³⁸ Ibid, par. 141.

⁴³⁹ Ibid, par. 142.

⁴⁴⁰ *Kali und Salz* (note 9 above) L186/50 par. 78.

⁴⁴¹ *BASF/Eurodiol/Pantochim*, (note 9 above) par. 151.

⁴⁴² This retained the first criteria set out in *Kali und Salz*. However for a critique of this requirement see, Bavasso and Lindsay (2007) (note 12 above) 187 n 26.

(c) The failing firm's assets, forming part of the merger, would inevitably exit the market if not taken over by another firm⁴⁴⁴ or its market share would accrue to the acquiring firm.

(d) The post-merger deterioration of the competitive structure of the market would not be any worse than that in the absence of the merger.⁴⁴⁵

Another important aspect of the decision is that the Commission arrived at its decision by performing a critical balancing act.⁴⁴⁶ The Commission concluded 'that the deterioration of the competitive structure resulting from the notified operation will be less significant than in the absence of the merger'⁴⁴⁷ for exit of failing firm's assets would have compounded the serious capacity shortage problem.⁴⁴⁸ Thus the market conditions favoured approving the merger and securing the retention of the failing firm's assets as prohibiting it would have worsened the conditions.⁴⁴⁹ However, although the Commission was unwilling to accept partial accrual as satisfying this requirement,⁴⁵⁰ the defence was nonetheless accepted. This illustrates the flexibility of the EU approach.⁴⁵¹ This is an important lesson for Zimbabwe for it avoids a formalistic approach to appraising mergers involving failing firms but approaches each case on its merits taking into account the prevailing circumstances and conditions. It is submitted that

⁴⁴³ *BASF/Eurodiol/Pantochim*, (note 9 above) pars. 142 and 143.

⁴⁴⁴ *Ibid. NewsCorp/ Telepiu* (note 14 above) par. 207-8.

⁴⁴⁵ *BASF/Eurodiol/Pantochim*, (note 9 above), Pars. 142-143; *NewsCorp/ Telepiu* (note 14 above) par. 207; Case COMP/M. 2621 *SEB/Moulinex* [2003], Commission decision of 11.11. 2003 par. 41 (where the failing firm argument was dismissed on the basis that absent the merger, third parties might have acquired some of the alleged failing firm's assets (Moulinex's brand) thereby restoring all or part of its capacity, a situation that ensures that no competition would be lost. Thus the anti-competitive merger would result in a deterioration of the competitive market conditions more than what the exit of the failing firm's assets would achieve); Case T-119/02 *Royal Philips Electronics NV v Commission* [2003] E.C.R. II-1433 par. 346. See Kokkoris (2006) (note 3 above) 127.

⁴⁴⁶ See generally on the balancing exercise in merger control, Goldberg AH 'Merger Control' in Dhall V (eds.), *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007) 93-107, 94.

⁴⁴⁷ *BASF/Eurodiol/Pantochim*, (note 9 above) par. 163.

⁴⁴⁸ Par. 151. .

⁴⁴⁹ Par. 163. Cf. the *Kali und Salz* (note 9 above) L186/56 par. 80 criteria requiring that the failing firm's market share should accrue in its entirety to the acquiring firm and not only a part thereof.

⁴⁵⁰ *BASF/Eurodiol/Pantochim*, (note 9 above) par. 151.

⁴⁵¹ See Bavasso and Lindsay (2007) (note 12 above) 187.

although the current approach utilized in Zimbabwe also adopts the case-by-case notion, there is simply not enough mechanisms in place to make it more effective hence the need for reconsideration of the whole regulatory environment supporting the principle.

6.4.6.3.1 The *Ernst & Young France/Andersen France* decision: not only an alternative purchaser but a competition enhancing one.

This discussion will deliberately focus on the above decision only and refers to the other related decisions in the series⁴⁵² as and when necessary. The focus here is to concentrate on the alternative purchase requirement⁴⁵³ and see how the Commission's approach in this regard can be of any use to the writer's endeavor of suggesting a regulatory model within the failing firm doctrine context for strengthening the current merger regulatory model for Zimbabwe.

This decision involved the proposed acquisition of Andersen France (Andersen), a member of the global network of audit, accounting and profession services, the Andersen Worldwide, by Ernst & Young France (Ernst & Young), a member of the global Ernst & Young network of audit, accounting and professional services.⁴⁵⁴ Ernst and Young Global and Andersen Worldwide were two of the then famed 'Big Five' firms in the audit, accounting and professional services network.⁴⁵⁵ The other three were Pricewaterhouse Coopers (PWC), Deloitte & Touché Tohmatsu (DTT) and KPMG.

The proposed transaction involved a series of agreements⁴⁵⁶ culminating in the merger of Ernst & Young and Andersen France.⁴⁵⁷ The Big Five network exclusively serviced the audit and

⁴⁵² Case COMP/M.2810, *Deloitte & Touché/Andersen UK* 01.07.2002 and Case COMP/M 2824, *Ernst & Young/Andersen Germany* 27.08.2002. See also Areeda PE, Hovenkamp H & Solow JL, *Antitrust Law*, 2nd (1998) (Vol. IVA par. 963a3.

⁴⁵³ On the lack of causality requirement in these cases, see generally Bavasso and Lindsay (2007)(note 12 above) 190.

⁴⁵⁴ *Ernst & Young France/Andersen France* (note 411 above) par.3.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*, pars. 5-8.

⁴⁵⁷ *Ibid.*, pars. 9 and 10.

accounting market for large and listed companies.⁴⁵⁸ Thus the proposed transaction would have led to the reduction of the market participants from five to four, a situation that *prima facie* constituted a loss in competition particularly the risk of collective dominance amongst the remaining firms.⁴⁵⁹

In appraising the competitive effects of the proposed transaction, the Commission used the lack of causality principle as the benchmark⁴⁶⁰ and concluded that there was no causal link between the proposed concentration and the ensuing deterioration in the relevant market conditions, being the reduction of the market participants from five to four with a risk of collective dominance.⁴⁶¹ The exclusion of the proposed concentration as the cause of the resultant deterioration was based on Andersen's status as a viable competitor⁴⁶² in the relevant market and the inevitability of its market share being absorbed by the remaining rebranded 'Big Four' following Andersen's inevitable exit.⁴⁶³

The aftermath of the Enron scandal in the US⁴⁶⁴ had seen, *inter alia*, the change in the firm's fortunes, in particular its battered image, integrity and status as a trusted provider of audit and

⁴⁵⁸ Ibid, par. 41. However see *Ernst & Young /Andersen Germany* (note 452 above), particularly par. 39 where it was noted that the Germany set up was distinct in that there were fewer listed companies with mainly privately owned businesses that were also served not necessarily by the Big Five, but by smaller so-called second tier firms.

⁴⁵⁹ Ibid, par. 90.

⁴⁶⁰ See *Blokker/Toys 'R' Us* (note 294 above) par.111.

⁴⁶¹ *Ernst & Young France/Andersen France* (note 400 above) par. 90.

⁴⁶² For an in-depth elaboration of Andersen Worldwide's status, see *Deloitte & Touché/Andersen UK* (note 452 above) pars. 45-46 (the damaged reputation of Andersen left it at the path of collapse).

⁴⁶³ Ibid.

⁴⁶⁴ In 2002, Enron, A Texas based multibillion dollar energy corporation, filed for bankruptcy and subsequently collapsed. The subsequent collapse was attributed to failed audits by Arthur Andersen who was held liable for helping to cover Enron's financial status. See Conrod A 'International Agreed Principles of Corporate Governance and the Enron Case' (2004) *UNCTAD G-24 Discussion Paper Series NO.30* (New York, 2004) 30, available at <http://unctad.org/en/docs/gdsmdpgh2420046.en.pdf>, (accessed 18 September 2012). Conrod stated that Andersen had failed 'to fulfill its professional responsibilities in connection with its auditing of Enron's financial statements or its obligations to bring to the attention of Enron's Board 9or the Audit Committee) concerns about Enron's internal contracts and the late-party transactions.'

accounting services.⁴⁶⁵ It thus follows that following all the drama surrounding Andersen's indictments and convictions in the US, it could be asked who could trust such a convicted party as the provider of such sensitive professional services? For its role in the Enron scandal, Andersen was convicted in the US.⁴⁶⁶ Although the guilty verdict was overturned, albeit, on a technicality by the US Supreme Court,⁴⁶⁷ this did not remedy the damage already inflicted on the firm's reputation. Its world-wide network rapidly deteriorated.⁴⁶⁸ It is submitted that the combined effects of a battered reputation and a disintegrating network rendered Andersen an ineffective competitor.

6.4.6.3.2 The rapid disintegration of Andersen's network and prospects of an alternative acquisition

The Commission observed that Andersen's world-wide network had not only disintegrated, but did so at a rapid pace.⁴⁶⁹ The effect thereof was that its exit from the market serviced by the 'Big Five' was a matter of time hence it was inevitable that the 'Big Five' could become the 'Big Four.'⁴⁷⁰ The question that was to be considered was whether there existed the possibility that the market vacuum that the departing Andersen was to leave could be filled without a net loss to competition.⁴⁷¹ This issue in essence was an inquiry as to whether there existed a possibility of an alternative purchase to that proposed acquisition.

In addressing the above matter, the Commission's first port of call was reiterating the peculiar nature of the market that was serviced by the 'Big Four.'⁴⁷² It was concluded that the specialized nature of the market rendered it impossible for an acquisition by a second-tier firm, that is, those

⁴⁶⁵ See *Ernst & Young /Andersen Germany* (note 440 above) par.39 where the Commission alluded to the fact that even if the Germany market set-up did not necessarily require a 'Big Five' auditing firm to audit the listed firm for the former's reputation, the trust between the auditing firm and the private owners and controlling shareholders was paramount.

⁴⁶⁶ *United States v Arthur Andersen LLP*, 374 F.3d. 281 (5th Cir. 2004).

⁴⁶⁷ *Arthur Andersen LLP v United States*, 544 U.S. 696 (2005).

⁴⁶⁸ *Ernst & Young France/Andersen France* (note 411 above) par.77.

⁴⁶⁹ *Ernst & Young France/Andersen France* (note 411 above) par.77.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*, par. 80.

seemingly smaller firms outside the ‘Big Five,’ to recreate the ‘Big Five.’⁴⁷³ Secondly, Andersen had disintegrated in a flash and its exit was inevitable.⁴⁷⁴ It is the first point that is of interest here.

By noting that an acquisition by any firm outside the ‘Big Four’ would not have recreated the ‘Big Five,’ the Commission effectively put paid to any possibility of the market being the same again. The concern was to ensure how competition could, in the absence of one of the major participants, be maintained as the exit of Andersen was inevitable. Could it be maintained by (a) the acquisition of Andersen by one of the remaining ‘Big Four,’ (b) prohibiting the acquisition and letting Andersen exit, or (c) considering the acquisition by a smaller entity in the hope of recreating the ‘Big Five’?⁴⁷⁵ The Commission concluded that the competitive effects of the first two scenarios were the same, that is, the market conditions would deteriorate either way.⁴⁷⁶ In considering the viability of the third option suggested here, it must be borne in mind that merger regulation is not principally about which theory to apply or what option best affects competition but rather about how effective competition can be maintained. As such, the consideration of an alternative purchase should be underpinned, as it was, on this aspect.

The Commission discounted firms in the second tier as not being alternative purchasers to one of the ‘Big Four.’⁴⁷⁷ The reason being that even if their acquisition of Andersen was to be accepted it could not have saved competition in the relevant market.⁴⁷⁸ They were simply not up to the task of taking over the market shares left by the departing Andersen and as such, it was inevitable that the said market share would have accrued to one of the ‘Big Four.’⁴⁷⁹ In other words, the acquisition would not have resuscitated or recreated the ‘Big Five’ and competition would not have been maintained.⁴⁸⁰

⁴⁷³ Ibid, pars. 78 and 80.

⁴⁷⁴ Ibid, par.77.

⁴⁷⁵ The first two were considered in *Deloitte & Touché/Andersen UK* (note 452above) and reiterated *in casu*, par. 80.

⁴⁷⁶ *Ernst & Young France/Andersen France* (note 411above) par. 80.

⁴⁷⁷ Ibid, pars. 78 and 80

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid, par 77.

The above observation means that in order to meet the alternative purchase requirement, it must be demonstrated that any would-be candidate for the acquisition of the failing firm outside the concentration in question, must not only meet the failing firm's business profile but also its market status.⁴⁸¹ It is thus submitted that the alternative acquisition must restore the competitive status that the exit of the failing firm might have altered by creating a merged entity that is able to stand up to the competitive demands dictated by the remaining firms. If this can be done, then there is no alternative purchase to talk about.

It is submitted that a firm does not necessarily have to be considered as an alternative purchaser simply because it can meet the asking price for the failing firm's business. Neither must it be an alternative purchaser on the basis that it is an option to the incumbent buyer. It becomes an alternative if the results of its acquisition are that effective competition in the relevant market is maintained. In other words even if its acquisition can raise some competitive concerns, such concerns must either be less or equal to those of the incumbent. In this way it becomes a lesser evil. This observation to an extent might suit the incumbent acquirer if it can be demonstrated that even if there are other third party potential purchasers, they cannot meet the profile of the market required to sustain its competitive structure. As such, it is submitted that the issue is not whether there are other potential purchasers, but rather whether there are others who can maintain effective competition in the relevant market.

However, the above conclusions must not be taken to mean that the alternative purchaser requirement is also met when the acquirer is deemed to be the only one meeting the seller's requirement of possessing sufficient knowledge of a particular market and having the necessary infrastructure.⁴⁸² Such claims can only point to the fact that the seller selected the strongest acquirer and hence in the absence of all other factors, the proposed acquisition can only strengthen the acquiring firm's market position.⁴⁸³

It is submitted that the Commission's approach in the above case is commendable. This is one aspect that must be seriously taken into account in suggesting an effective merger regulatory framework for Zimbabwe. That is to say, competition is neither promoted nor maintained by

⁴⁸¹ Ibid, pars. 78 and 80.

⁴⁸² *Blokker/Toys 'R' Us* (note 294 above) par.113.

⁴⁸³ Ibid.

merely encouraging as many market participants as possible but that even though many market participants must not be discouraged, the focus should be on ensuring that there are effective competitors capable of positively influencing the competitive structure of the market.

The decisions discussed above constitute just a selected handful of cases where either the failing firm or the failing division defences were applied in the EU. As clearly stated at the beginning of this Chapter, the aim thereof is not attempting to provide an exclusive discussion and analysis of all aspects relating to merger regulation in the EU. As much as this might sound tempting to enable this writer to come up with what might be said to be a reasoned and informed perspective as to conclusions on which aspects to adopt for Zimbabwe, the purpose of this entire study and this chapter included, is not to merely transplant on Zimbabwe the approaches of other jurisdictions. The study's aim is to identify within its own context, the Zimbabwean merger regulatory framework's shortcomings and only then consider how other comparable jurisdictions, especially those with established regimes, deal with the same. This explains the use of only selected jurisdictions in the first place and relevant here, a number of decisions dealing with some selected aspects of the failing firm and failing division defences in the EU, in particular the utility of the lack of causality principle in the failing firm defence as well as the EU approach to the failing division defence.⁴⁸⁴ Whatever decisions that might have been left out of this discussion, such an omission is not a mere oversight but rather an intentional one for it is this writer's view that the ones discussed have managed to capture the intended aspects and draw necessary conclusions for lessons for Zimbabwe. These lessons will be highlighted below.

6.5 Using the EU approach to develop an effective regulatory framework for Zimbabwe

Having discussed the EU approach to the failing firm doctrine, this Part will use what this writer views as the salient elements of the approach to try and suggest ways in which Zimbabwe can employ the failing firm doctrine to ensure an effective merger regulatory framework. The Part will equally highlight areas where it is felt that the current EU approach cannot be applied to Zimbabwe without amendments.

⁴⁸⁴ There are still many decisions that can be used to demonstrate the EU approach to both the failing firm and failing division doctrines. See for instance *Rewe/Meinl* (note 294 above); Case IV/M. 890, *Boeing /McDonnell Douglas*, [199] OJ L336/16; *Blokker/ Toys 'R' Us* (note 294 above).

(a) An effective supporting regulatory structure

The EU approach to the failing firm doctrine is ably supported by an effective regulatory framework. Of significance to this study is that the framework provides for a flexible and efficient notification procedure.⁴⁸⁵ The ECMR introduced a ‘one-stop-shop’⁴⁸⁶ system for notification of concentrations having a community dimension. This gives the Commission exclusive jurisdiction to deal with such concentrations except for specified circumstances.⁴⁸⁷ Although this is not foreign to Zimbabwe as provision is made that the CTC is the principal merger regulatory authority,⁴⁸⁸ what makes the EU approach more favourable is that it acknowledges the possibility of having multiple notifications given the number of national jurisdictions and the difficulties that might pose in advancing the goals of an integrated market hence the need for a ‘one-stop-shop’ to speed up the assessment process.

The EU merger notification procedure also promotes flexibility necessary not only for an effective regulatory framework but also in assessing mergers involving failing firms. This flexible approach is illustrated by a simplified requirement that concentrations with a community dimension must be notified prior to implementation rather than having a time period in which it must be notified.⁴⁸⁹ Although this might raise issues of interpretation as to when a merger is deemed to have been implemented, it is submitted that such issues can be resolved through the development of case law jurisprudence and Zimbabwe can still make use of clear provisions to illustrate when a merger is deemed to have been implemented. Crucially, if a concentration is notified as required, a determination on whether or not to approve such a concentration must be

⁴⁸⁵ Article 4(1) of Regulation 4064/89 required that all concentrations having a community dimension be notified to the Commission not more than one week of (a) conclusion of the merger agreement, (b) announcement of a public bid or (c) acquisition of a controlling interest. Now article 4(1) of the ECMR requires that such a notification be made to the Commission prior to implementation.

⁴⁸⁶ Par. 8 of the Preamble to the ECMR.

⁴⁸⁷ Article 9, L24/12 of the ECMR provides for a system of referrals from the Commission to national competition authorities of Member States.

⁴⁸⁸ Section 3(3) of the Competition Act of Zimbabwe require sectorial regulations established under any statutes to regulate matter under that statute to make applications to the CTC for authorizations of mergers within those sectors.

⁴⁸⁹ See note 485 above.

made without undue delay.⁴⁹⁰ This promotes speedy determination of mergers and is useful in dealing with failing firm claims where delaying the determination might as well mean condemning the merger.

(b) *A sound and solid approach*

It has been demonstrated that the lack of causality requirement plays a pivotal role in the assessment of mergers involving failing firms. Parties seeking merger clearance even when relying on the failing firm defence, must show that any likely deterioration of the competitive structure of the market would not be a result of the proposed merger as the deterioration would happen in any case even in the absence of the merger.⁴⁹¹ This aligns the failing firm defence with the founding principles of the EU merger regulations⁴⁹² and helps not only to legitimize the doctrine but also to promote the very foundations of the EU merger regulation.

However, the employment of the lack of causality requirement in assessing mergers involving failing firms raises a number of issues. One such concern arises from the cumulative nature of the failing firm criteria. In *NewsCorp/Telepiu*, the ugly side of the cumulative nature of the criteria was shown when the Commission, after determining the first two criteria and holding that they were not met, went on to state that there was no need to take the last test.⁴⁹³ This means that the merger is not given a second chance if it fails to clear one of the three legs of the set criteria. Regardless of the above concern, there are however, instances where even a failure to show all the requirements of the failing firm criteria was condoned on the basis that ultimately there was no causal link between the proposed merger and the deterioration in the market conditions that would follow.⁴⁹⁴ Thus the lack of causality requirement promotes flexibility.

If the lack of causality requirement is the litmus test, is there any need to prove the other requirements? One of the criteria for the failing firm defence is a showing that should the failing firm exit the relevant market, its market share would automatically accrue to the acquiring

⁴⁹⁰ See for instance Art. 9 of the ECMR dealing with referrals from the Commission to Member States.

⁴⁹¹ See note 6 above.

⁴⁹² Article 2(2) of the ECMR and par. 89 of the *Horizontal merger guidelines*.

⁴⁹³ *NewsCorp/Telepiu* (note 14 above) par.220.

⁴⁹⁴ See generally *Arthur Andersen* cases (note 452 above).

firm.⁴⁹⁵ This requirement seems to be the same as the one requiring a showing that there are no other alternative purchasers to acquire the failing firm's failing assets in an acquisition that poses less competition than the contemplated merger.⁴⁹⁶ Surely, if it can be shown that there are no other alternative purchasers, it might as well mean that in the event of failure, the proposed acquirer is the only party to take over the vacant market share of the failing firm. It is submitted that no other alternative purchaser simply means there is no other competitor except the proposed acquirer. This entails that the requirement that the market share would have gone to the acquiring firm is simply a confirmation of the lack of other alternative competitors. It is thus submitted that it becomes academic to insist on a showing of both these criteria.

The other illustration is the requirement that parties must show that absent the merger, the failing firm would inevitably exit the market.⁴⁹⁷ 'Inevitably' denotes a probability rather than a mere possibility.⁴⁹⁸ As such merging parties not only need show likelihood of failure but have to prove that it is undoubted that it will fail. This raises the burden of proof from a 'simple balance of probability' used in civil proceedings in which merger regulation falls under to a 'beyond reasonable doubt' standard used in criminal proceedings as if anti-competitive mergers are unlawful.⁴⁹⁹ Even if it is insisted that the standard of proof remains a balance of probabilities, it is suggested, to avoid any doubt, that Zimbabwe needs to simply provide for a clear provision that expressly provides that the standard of proof is on a balance of probabilities. Given the lack of judicial precedents to support interpretation of some concepts in Zimbabwe, this might come in handy as merging parties will be able to know the exact extent to which they have to prepare their arguments for failing firm claims.

Lastly, if all the criteria currently utilized in the EU can be summed up by the lack of causality requirement, it is suggested that Zimbabwe should avoid the cumbersome criteria and adopt a

⁴⁹⁵ *Kali und Salz* (note 9 above) L186/50 par. 78.

⁴⁹⁶ Par. 90 of the *Horizontal Merger Guidelines*.

⁴⁹⁷ Par. 90 of the *Horizontal Merger Guidelines*.

⁴⁹⁸ Bavasso and Lindsay (2007)(note 12 above) 191.

⁴⁹⁹ *Ibid*,193. Although there are serious concerns that can be result from anti-competitive mergers, for instance, post-merger collusion, generally anti-competitive mergers are 'wrongful' as opposed to being 'unlawful' and the sanctions for implementing such a merger are mostly enforced through civil proceedings. Cf section 7 of the US Clayton Antitrust Act which use the term 'illegal' to denote the US attitude towards anti-competitive mergers.

single criterion that focuses exclusively on the likely effects of the proposed merger involving a failing on the competitive structure of the market that is, a lack of causality requirement.⁵⁰⁰ This approach is not alien to Zimbabwe where the lack of causality requirement is a principle employed in both criminal law and the law of delict in determining factual causation.⁵⁰¹ Although its use has been subjected to a lot of academic criticism mainly on the basis that the ‘but for test’ which employs an elimination method to determine the event that causes the result in question is nothing more than a confirmation that that event is the cause of the result,⁵⁰² it remains useful and as such adopting the lack of causality requirement as the exclusive criterion would not be seen as a departure from the current Zimbabwean general legal practice.

(c) *A flexible approach*

By employing the lack of causality requirement as criterion in assessing the failing firm defence, the EU promotes a flexible approach. A flexible approach is essential for effective merger regulation where the rule of reason approach is the exclusive yardstick in determining the fate of mergers.⁵⁰³ This flexible approach is evidenced where the Commission employed a balancing act in determining whether or not to approve a merger and ended up approving mergers that otherwise failed to pass the set criteria.⁵⁰⁴

(d) *Failing division defence*

Decisions where the Commission considered the acquisitions of an alleged failing division (the failing division defence)⁵⁰⁵ acknowledge the reality that business is divisible and as such a

⁵⁰⁰ Ibid, 195.

⁵⁰¹ See generally *Zimbabwe Banking Co. v Pyramid Motor Corporation* (1985) 4 SA 553 (ZSC) and Feltoe G *Guide to the Zimbabwean Law of Delict* 3rd ed., (2006) 169.

⁵⁰² On the criticism of the but for test, see Neethling J and Portgieter JM *Neethling-Portgieter-Visser Law of Delict* 6th ed., (2010) 180-183; Van der Walt JC and Midgley JR *Principles of Delict* 3rd ed., (2005) 199 fn 8; Visser PJ ‘Condition Sine Qua Non’ (1989) 52 *THRHR* 558-569, Snyman CR *Criminal Law* 5th ed., (2008) 82-83. See also *OK Bazaars (1929) v Standard Bank of South Africa Ltd* 2002 SA 688 (SCA) 697 (disregarding the hypothetical elimination method).

⁵⁰³ See note 215 above.

⁵⁰⁴ *NewsCorp/Telepiu* (note 14 above) par. 211.

⁵⁰⁵ See for instance, *Bertelsmann/Kirch/Première* (note 128 above); *NewsCorp/ Telepiu* (note 14 above); *Rewel Meinl* (note 294 above); *Aerospatiale-Alenia/de Havilland* (note 128 above)..

merger can involve the sale and acquisition of part of a healthy entity's failing division. This is a very important lesson for Zimbabwe where the Competition Act both in its definition of a merger and the provision relating to the failing firm doctrine as a factor in the assessment of a merger acknowledges the divisibility aspect of a firm.⁵⁰⁶ However, it is submitted that the EU approach to the failing division defence is not one that Zimbabwe should adopt. The reasons are that in the EU, there seems to be no distinction between the failing firm defence and the failing division defence as the latter is treated merely as an ancillary defence to the former. The only distinction, in theory, is exhibited in numerous Commission decisions where it stressed that in cases of a failing division defence, the burden of proof is very high without actually explaining what this high burden entails.⁵⁰⁷ This again raises the question as to whether the burden of proof needs to be varied.

It is suggested that Zimbabwe needs to continue recognizing the distinction between the failing firm doctrine and the related failing division doctrine. There is thus need for clarity, legislative or administrative, to the effect that the two doctrines are different. Such an approach will be in conformity with the Competition Act's definition of a merger as including the acquisition of control of part of a business of another as well the provision laying the foundation for the failing firm defence as the actual or likelihood of failure of the whole or part of a business of a party to a merger.⁵⁰⁸

(e) Failing firm doctrine as a defence

Establishing that a party to a proposed merger is facing financial difficulties and in the absence of the merger would inevitably exit the market for there are no other less competitive alternative constitutes an absolute defence to an otherwise anti-competitive merger in the EU. However, in

⁵⁰⁶ Section 2(1) of the Zimbabwean Competition Act of 1996 defines a merger as meaning 'the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, and customer of other person...' Section 32 (4a) further provides that 'in determining whether or not a merger is likely to substantially lessen or prevent competition, the Commission shall consider any of the following factors, as may be relevant- (h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.'

⁵⁰⁷ See *NewsCorp/Telepiu* (note 14 above) par. 212; *Bertelsmann/ Kirch/ Première* (note 128 above) L53/14 par. 71.

⁵⁰⁸ See note 506 above.

Zimbabwe, section 32(4a) of the Competition Act recognizes such a finding as merely one of the many factors that must be taken account in assessing whether a merger is likely to substantially lessen or prevent competition.⁵⁰⁹ Thus it may be concluded that the failing firm doctrine in Zimbabwe is not an absolute defence to an otherwise anti-competitive merger but a mere factor in assessing the effects of a merger on competition.

The rationale for making it an absolute defence as demonstrated by the application of the lack of causality requirement is that there is a possibility that the post-merger competitive structure of the market will deteriorate. Thus the merger is either inherently anti-competitive or will create an anti-competitive market structure. There is thus a need to subject it to a strict scrutiny in order to ensure that competition within the internal market is not distorted.⁵¹⁰ This observation justifies a strict approach to the failing firm defence in the EU to ensure that only cases involving genuinely failing firms get approval. However, the question that this study begs is whether the same results cannot be achieved by interpreting the failing firm doctrine as a factor rather than an absolute defence in merger assessment?

The South African competition authorities in a handful of their decisions have demonstrated that it is possible to promote and maintain a competitive market structure by employing the failing firm doctrine as a factor in assessing the likely competitive effects of a merger.⁵¹¹ This interpretation and approach is in line with the goals of competition law and policy in South Africa as well as Zimbabwe where the merger regulation statutes mirror the countries' socio-economic and political historical developments. As such, if treating the failing firm doctrine as a factor can achieve the same results as treating it as defence, it is suggested that Zimbabwe should only adopt those aspects relating to making the approach more flexible and effective and retaining the current approach where the failing firm doctrine is not an absolute defence but rather a mere factor in merger assessment. In this respect, it is submitted that the South African approach provides a better model.

⁵⁰⁹ Ibid.

⁵¹⁰ Article 2 of the ECMR.

⁵¹¹ See *Iscor/Saldanha Steel* (note 1 above); *Santam Ltd/Emerald Insurance Co. Ltd and Emerald Risk Transfer (Pty) Ltd* 57 LM/Aug02; *Schuman Sasol/Price's Daelite (Pty) Ltd* 23/LM/May01; *Phodoclinics/Protector Group Medical Services* 122/LM/Dec05.

It is only after considering changes to the current regulatory framework in Zimbabwe, which changes are meant to address some shortcomings within the *status quo* that one can then consider whether there is a need to adjust the approach to the failing firm doctrine in the face of a changed business operating environment, that is, during an economic crisis period. It is submitted that the standard for merger regulation must not be lowered in the face of a changed business operating environment. The rationale behind maintaining the *status quo* is that it is flexible and effective enough to deal with any such changes in the business operating environment.⁵¹² However, as it stands, the *status quo* in Zimbabwe is not adequately suited for effectively regulating mergers and acquisitions in general and those involving the failing firms in particular. Thus there is a need for developing an effective merger regulatory framework and it is submitted the application of the failing firm doctrine in the EU can be adopted and adapted as suggested to formulate such a framework.

6.6 Conclusion

In the EU a merger which would have the effect of materially impeding effective competition in the internal market or a substantial part thereof as a result of particularly creating or strengthening a dominant position will be declared incompatible with the internal market and hence prohibited.⁵¹³ However, establishing that a party to such a merger is a failing firm whose acquisition by another would not in any way be said to be the cause of a post-merger deterioration in the competitive structure of the market can result in the otherwise anti-competitive merger being declared compatible with the internal market.⁵¹⁴ Thus the failing firm doctrine is treated as an absolute defence to an otherwise anti-competitive merger.

⁵¹² See Jenny F 'Foreword' in Kokkoris I and Olivares-Caminal R *Antitrust Law amidst Financial Crises* (2010); Calvino N 'Brussels: Part of the Problem or Part of the Cure?' *EU Competition and Public Law Report, Brussels focus* (2009), available at http://abreuadrogados.com/xms/files/05_Comunicacao/Artigos_na_Impreusa/Iberia_Lawyer_Artigo-MMP_fEB.2009.PDF, (accessed 23 October 2010) (Nadia Calvino is the Deputy Director General of the Directorate General Competition of the EU.)

⁵¹³ Article 2(3), L24/7 of the ECMR.

⁵¹⁴ Par 89 of the *Horizontal Merger Guidelines*. See also Commission Communication *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C31 of 5 February 2004, 5-18. available at

However, in order to rely on the failing firm defence, parties are required to cumulatively show that the allegedly failing firm would in the near future exit the relevant market in the absence of the merger due to financial difficulties and that there are no other alternative solutions to these problems except the notified merger.⁵¹⁵ It must also be shown that in the event of the failing firm exiting the relevant market; its market share would automatically fall to the acquiring firm for there are no any other competitors to take over.⁵¹⁶ Thus ultimately, the deterioration in the competitive structure of the market that follows the merger cannot be said to have resulted from the said merger.⁵¹⁷ It is submitted that the lack of causality requirement becomes central to a successful failing firm defence and this brings a degree of flexibility to a rather narrowly interpreted doctrine.

The lack of causality requirement, though promoting a narrow approach to the failing firm defence in the EU, crucially ensures that the doctrine is applied in a flexible manner. Given the central role that this requirement plays in EU merger regulation, its application to the failing firm defence raises the question of whether it cannot be regarded as a single criterion in the place of the currently cumbersome one that is not only narrow in scope but difficult to prove. It is suggested that this question is crucial in drawing lessons for Zimbabwe from the EU approach to the failing firm doctrine. Though appreciating the hugely positive element of the EU approach, it is argued that Zimbabwe needs a provision that reflects its unique position and thus adopting a single and simple criterion in the mould of the lack of causality requirement is not alien to the current legal system. Thus in developing an effective merger regulatory framework for Zimbabwe, the EU approach can be a useful model but needs to be adapted to the Zimbabwean environment.

http://ec.europa.eu/competition/mergers/legislation/noticies_on_substantance.html#hor_guidelines, (accessed 20 November 2012).

⁵¹⁵ Par. 90 of the *Horizontal Merger Guidelines*.

⁵¹⁶ See *Kali und Salz* (note 9 above) L186/50.par. 78.

⁵¹⁷ Par. 89 of the *Horizontal Merger Guidelines*.

Chapter 7: The Failing Division Defence: lessons from the US

7.1 Introduction

Section 32(4a) of the Zimbabwean Competition Act¹ requires the Competition and Tariff Commission² when determining whether or not a merger is likely to substantially lessen or prevent competition to consider ‘whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.’³ This consideration, commonly referred to as the failing firm doctrine, is accepted as an integral part in modern day merger regulation regimes although interpreted and applied differently in different jurisdictions.

In Zimbabwe it forms part of a non-exhaustive list of factors that is provided to determine the likely effects of a merger on competition. This means that the doctrine is only relevant in assessing whether or not a given merger is likely to substantially lessen or prevent competition in the relevant market. The merger must still pass any other assessment criteria that might be provided by the statute. This position is similar to South Africa⁴ where the failing firm doctrine is given express statutory recognition albeit as a factor in merger assessment.⁵ However, in the

¹ Zimbabwean Competition Act[Chapter 14: 28] (No. 7 of 1996) as amended by the Competition Amendment Act No. 29 of 2001 (herein ‘the Zimbabwean Competition Act of 1996.’)

² The Competition and Tariff Commission as established and constituted under section 4 of the Zimbabwean Competition Act of 1996, is the competition authority in Zimbabwe. This provision was amended by section 4 of the Competition Amendment Act 29 of 2001 to repeal the previous provision that refer to the authority as the Industry and Trade Commission.

³ Section 32 (4a) (h) of the Zimbabwean Competition Act of 1996.

⁴ Sections 12A (2) (g) of the South African Competition Act 89 of 1998 (herein after ‘the South African Competition Act’) provides that in determining whether a merger, including a proposed merger, is likely to substantially lessen competition, the authorities, that is the Competition Commission, Competition Tribunal and Competition Appeal Court, must consider whether the business or part thereto of any of the merging parties is has failed or is likely to fail. See also section 90 (3) of the Canadian Competition Act consolidated as (R.S.C., 1985, c.C-34) and codified as L.R.C., 1985, ch.C-34) (herein after ‘the Canadian Competition Act’), contains a similarly worded provision to both the South African and Zimbabwean statutes relating to the failing firm doctrine.

⁵ Ibid.

US, the failing firm doctrine is an absolute defence to a merger that might otherwise be prohibited as being anti-competitive.⁶

Although the doctrine which has its origins in the US is not given express statutory recognition in the US, it has nonetheless been accepted and applied by the courts and has been given further impetus through administrative guidelines.⁷ The US *Horizontal Merger Guidelines* provide that if the failing firm defence can be established, a merger in which a party thereto is a failing firm ceases to violate section 7 of the Clayton Antitrust Act⁸ since it is unlikely to enhance market power that substantially lessens competition or creates a monopolistic situation.⁹ The guidelines

⁶Section 11 of the US Department of Justice Antitrust Division and the Federal Trade Commission *Horizontal Merger Guidelines* (2010). See *International Shoe Co. v FTC*. 280 U.S 291, 302, 50 S.Ct.89, 74 L Ed.431 (1930). *United States v. Diebold Inc.*, 369 U.S.654, 655 (1962) and *Citizen Publishing Co., v United States* 394 US 131, 22 L Ed 2d 148, 89 S Ct 927(1969). See Campbell TJ ‘The Efficiency of the Failing Company Defence’ (1984) 63 *Texas Law Review* 251 (the failing company defence allows a competitor to acquire a firm that is facing grave financial difficulties even if the acquisition will reduce competition.)

⁷ The failing firm or company defence as it is known in the US was first accepted by the US Supreme Court in 1930 in *International Shoe Co.* (note 6 above)280 U.S 302. It has been applied in a number of cases in various formulations. See for instance, *Brown Shoe Co. United States*, 370 U.S 294, 8 L Ed. 2d 510, 82 S Ct. 1502 (1962) 331 and 346 where the Supreme Court held that evidence that one of the merging parties is failing is a ‘mitigatory factor’ that serve to sanitize an otherwise anti-competitive merger. The Supreme Court modified the original formulation of the failing firm doctrine as established in *International Shoe Co.* In *United States v. General Dynamics Corporation*, 415 U.S 486, 504 39 L Ed 2d 530, 94 S Ct. 1186 (1974) when it held that a weakened firm with depleted resources render it an insignificant factor in the market and an ineffective future competitor despite past and even current statistical evidence showing its market share. As such, a merger involving such a firm would not violate antitrust laws. The United States Department of Justice and the Federal Trade Commission (herein ‘the agencies’), two federal agencies responsible for antitrust enforcement (competition law in US parlance) recognize the failing firm defence as part of their administrative guidelines firstly under section 5 of the 1992 *Horizontal Merger Guidelines* that were revised in 1997 and most recently in 2010. See DOJ and FTC 1992/97 *Horizontal Merger Guidelines* par 5 and section 11 of the *Horizontal Merger Guidelines* (2010). Reference to Merger guidelines in this context unless indicated otherwise; refer to the Horizontal merger guidelines issued in 2010.

⁸ Clayton Antitrust Act Chapter 323 38 Stat.730 (1914) (Codified as amended at 15 U.S.C sections 12-27). The Clayton Act of 1914 as amended by the Celler-Kaufman Amendment to the Clayton Act Ch.1184, 64 Stat.1125 (Codified as 15 U.S.C sec. 18, 1982 Supp. 11 1984) of 1950. For a discussion of this provision and the history of the amendment, see *Brown Shoe Co.* (note 7 above) 370 US 304-315.

⁹ Section 11 *Horizontal Merger Guidelines*.

also set out criteria that merging parties claiming a failing firm defence must meet in order to successfully invoke it.¹⁰ These criteria are largely a product of judicial decisions where the courts have considered the doctrine.¹¹

Importantly, and of relevance to this Chapter, is the fact that the US, in addition to recognizing the failing firm defence in merger regulation, also recognize the reality that a merger might not only involve the failure of the entire business but that it may also only concern a failing division only of a rather healthy business. Accordingly, the *Horizontal Merger Guidelines* provide the criteria for meeting this variation commonly known as the ‘failing division defence.’¹² However, the ‘failing division defence’ is even more difficult to prove than the failing firm defence.¹³

This study has so far analysed and discussed how the failing firm doctrine has been interpreted and applied in South Africa where merger regulating provisions similar to those existing in Zimbabwe obtains. It has been shown that treating the doctrine as a factor in determining the likely effect of the merger on competition rather than as an absolute defence to an otherwise anti-competitive merger enables the competition authorities to ensure that the competitive market structure is maintained as well as promotes the broader objectives of the competition system recognised as part of specified public interests. It is submitted that this is crucial to the development of an effective merger regulatory framework in Zimbabwe. However, although the

¹⁰ Section 11 of the *Horizontal Merger Guidelines*.

¹¹ Although it has been suggested that the failing firm doctrine was expressed in the language of legislative texts leading to the enactment of the current amended section of the Clayton Act in 1950, the final product does not provide for the doctrine. It is only in the judicial decisions and the merger guidelines that the doctrine can be found. See for the passage of the amended section 7 of the Clayton Act, H.R. REP. No. 1191, 81st Cong. 1st Sess. 6 (1949) and S.REP.No. 1775, 81st Cong. 2d Sess. 7 (1950). See on that the doctrine is a product of case law jurisprudence, Ferguson CG ‘No other prospective purchaser requirement of the Failing Firm Defence’ (1970) 22 *South Carolina Law Review* 91; Kokkoris I and Olivares-Caminal R *Antitrust amidst Crises* (2010)172.

¹² Section 11 of the *Horizontal Merger Guidelines*.

¹³ See *FTC v Harbour Group Investments, L.P.* No. CIV A.90-2525, 1990 WL 198819, 1 (D.D.C. Nov. 19. 1990) (when considering the failing division defence, the agencies will strictly construe the guidelines criteria for the defence); *FTC v Lancaster Colony Corp.* 434 F.Supp. 1088 (S.D. N.Y. 1977). See generally Wait AL ‘Surviving the Shipwreck: A Proposal to Revive the Failing Division Defense’ (2003) 45(1) *William and Mary Law Review* 429; Schlosberg RS ‘Mergers and Acquisitions: Understanding the Antitrust Issues’ *ABA Section of Antitrust Law 2ed* (2004) 213.

wording of the South African provision relating to the failing firm doctrine envisages situations where a merger not only involves the entire business of a firm failing but also part thereof, there is no jurisprudence on the ‘failing division’ doctrine.

Chapter 6 discussed the EU approach to the failing firm doctrine as well as the ‘failing division’ doctrine. It has been shown that although the EU Commission had considered cases in which the facts pointed to a failing division rather than failure of the entire firm,¹⁴ the Commission treated those cases in the same way it would treat a the failing firm, that is, applied the criteria established for the failing firm defence to assess cases of failing division claims. The only distinction that the Commission made was to emphasise that in cases of failing divisions, the burden of proving the criteria, which is that of the failing firm, is very high.¹⁵ The Commission did not develop a separate criterion for failing division claims.

As stated, the principal objective of this study is to develop and suggest a suitable and effective merger regulation model for Zimbabwe that would be able to promote beneficial corporate restructuring transactions without unnecessarily sacrificing the effectiveness of the merger regulatory framework. As such, it is imperative that all relevant aspects of the failing firm doctrine be explored including in its variations. This Chapter accordingly aims at exploring the approaches and practices of the US on the failing division component of the doctrine. The objective is ultimately to draw lessons, if any, for Zimbabwe. Thus the Chapter begs the question as to whether the approach in the US is suitable for Zimbabwe and if not, to what extent Zimbabwe can adapt the US approach to the ‘failing division’ doctrine in order to advance an effective merger regulatory framework.

In order to explore the above question and any related matters, Part II of this Chapter will present a brief overview of the US legislative and administrative merger regulatory framework. Here focus will be on the principal merger regulating statute, section 7 of the Clayton Antitrust Act of

¹⁴Case COMP/M.2876 *NewsCorp/Telepiu* [2004] OJ L110/7; Case No. 1V/M.993 *Bertelsmann/Kirch/Première* [1999] OJ L53/1; Case No. IV/M.1221 *Rewe/Meinl* [1999] OJ L274/1; Case No. IV/M. 053 *Aerospatile-Alenia/de Havilland* [1991] OJ L334/42.

¹⁵See *Bertelsmann/Kirch/Première* (note 14 above) L53/14 par.71; *NewsCorp/Telepiu* (note 14 above) par. 212. See also Bavasso A and Lindsay A ‘Causation in the EC Merger Control’ (2007) 3(2) *Journal of Competition Law and Economics* 181,193.

1914 as amended and section 11 of the 2010 *Horizontal Merger Guidelines* which provide the analytical framework for assessing both the failing firm and division defences. Part III presents a discussion of selected court decisions to illustrate the US approach to the failing division defence. A discussion of selected landmark decisions of the US Supreme Court on the failing firm defence will precede a discussion on the failing division defence. The purpose thereof is to lay the foundation for an understanding of the courts' approach to the application of the related but distinct failing division defence and how the latter is influenced by the former and the implications of such influence on both the development and application of the failing division defence.

The Chapter will show why the US approach needs to be adapted to suit the Zimbabwean situation given the latter's current merger regulatory state that is not effective hence there is no effective competitive merger regulatory framework capable of promoting beneficial corporate transactions as well as maintaining effective competition. It will be emphasized that merger regulation, although it might exhibit some extraterritorial qualities, is primarily a domain of domestic statutes and as such it is common that these statutes reflect the relevant country's policy priorities that vary from jurisdiction to jurisdiction hence the unsuitability of 'air lifting' and implanting other jurisdiction's provisions and practices.¹⁶ Accordingly, it will be argued that although the need to maintain a competitive market structure can justify a strict approach to the application of the failing division defence just as the case is with the failing firm defence, and that a wholesale adoption of the US approach to the doctrine is neither suitable nor appropriate for Zimbabwe.

¹⁶See generally, Kovacic WE 'Competition Policy, Economic Development, And the Transition to Free Markets In the Third World: The Case of Zimbabwe' (1992-93) 61 *Antitrust Law Journal* 250-270, 261. However see Fox EM 'Economic, Development, Poverty and Antitrust: The Other Path' (2007) 13 *Southwestern Journal of Law and Trade in the Americas* 211, 214. Fox also suggested that developing countries need not to radically depart from their developed counterparts because the principles underlying competition regulation have been established and are well articulated to such an extent that trying to reinvent them is not only difficult but also costly. She further noted that 'though developing countries might want to explore a path more sympathetic to their context, not to discount or run contrary to that which rely on matters and critical to economic welfare.' See also on the development of universal norms, Delrahim M 'The Long and Winding Road: Convergence in the Application of Antitrust to intellectual Property' (2005) 13 *George Mason Law Review* 259. (Remarks at George Mason Law Review Symposium, October 6, 2004).

7.2 The US merger regulatory framework

An understanding of the US merger regulatory framework is paramount in laying the basis for appreciating the foundations for the failing division doctrine. This Part will present a general overview of the US merger regulatory framework with the focus on the federal statutes that regulate various aspects of corporate mergers as well as the current guidelines used by the competition regulatory agencies.

7.2.1 The general overview of the US merger regulation

In 1890, the US Congress¹⁷ enacted the Sherman Antitrust Act (herein after ‘the Sherman Antitrust Act’).¹⁸ The enactment of this legislation ushered in an era of formal antitrust business regulation.¹⁹ The Sherman Antitrust Act was the Congress’ response to public outcry against business trusts that dominated the 1870s and 1880s.²⁰ The industrial boom of these periods saw the formation of large trusts that engaged in various anti-competitive practices ranging from gentlemen’s agreements to informal collusive arrangements that not only stifled competition but also dictated commercial trade and prices.²¹ Congress thus responded by passing the Sherman Antitrust Act in 1890.

¹⁷ The US Congress is the supreme federal law making body equivalent to the Zimbabwean House of Assembly or parliament. In other words, it is the legislative arm of government tasked with enacting, amending and repealing legislation.

¹⁸ Sherman Antitrust Act Ch. 647, 26 Stat.209 (1890) (Codified as amended at 15.U.S.C sections 1-7 (1892) in 1890. See for a discussion of the passage of this statute Thorelli HB *The Federal Antitrust Policy: Origination of an American Tradition* (1954) 143-60; Letwin W ‘Congress and the Sherman Antitrust Law: 1887-1890’ (1955) 23 *University of Chicago Law Review* 221,247-255 and generally Bradley RL Jnr., ‘On the Origins of the Sherman Antitrust Act’ (Winter 1990) 9(3) *CATO Journal* 737.

¹⁹Hovenkamp H *Federal Antitrust Policy: The Law of Competition and its Practice* 2 ed., (1999) 46. Ramirez CD and Eigen-Zucchi C ‘*Understanding the Clayton Act of 1914: An Analysis of the Interest Group Hypothesis*’ (2001) 106 (1/2) *Public Interest* 157.

²⁰ Ramirez and Eigen-Zucchi (note 19 above) 157; Tholleli (note 18 above) 58-62 and Letwin (note 18 above) 232-33.

²¹Ramirez and Eigen-Zucchi (note 19 above) 157; Porter G *The Rise of Big Business* (1973) 57; Fox EM and Sullivan LA ‘Antitrust-Retrospective and Prospective: Where Are We Coming From? Where Are We Going?’ (1987) 62 *New York University Law Review* 936,937-38.

The Sherman Antitrust Act declares illegal all contracts, combinations and conspiracies which unreasonably restrain trade.²² Section 1 of this Act prohibits any business combinations that creates monopolistic situations or enhances single firm dominance. Section 2 applies to already dominant firms. This statute with its broadly worded provisions remains the most significant antitrust legislation in the US²³ and lays the foundation upon which subsequent antitrust improvement statutes are built.

It is usually stated that a broadly formulated statute has higher chances of capturing a wide range of commercial activities.²⁴ This reasoning is believed to have underpinned Congress' intentions in formulating the Sherman Antitrust Act.²⁵ However, this broadness has also been critiqued as the source of the statute's shortcomings. As indicated, this Act declares illegal all contracts or business combinations that restrain trade. This implies that all contracts are illegal given that they restrain trade in one way or the other.²⁶ This unrealistic postulation not only created some interpretational challenges, but contributed to the ineffectiveness of the statute as evidenced by its inability to regulate mergers that occurred during its passage.²⁷

The perceived ineffectiveness of the Sherman Antitrust Act led to the enactment of the Clayton Antitrust Act in 1914 (hereinafter 'the Clayton Act').²⁸ The Clayton Act was sponsored by

²² www.usdoj.org 1999.

²³ DePamphilis D *Mergers and Acquisitions and other Restructuring Activities: An Integrated Approach to Process, Tools, Cases, and Solutions* 5ed (2009) 59.

²⁴ Ibid. Gaughan PA *Mergers, Acquisitions and Corporate Restructurings* 4ed (2007) 103.

²⁵ DePamphilis (note 23 above) 59.

²⁶ Ibid.

²⁷ The fact that the greatest merger wave occurred between 1902 and 1904 and followed by financial crises of 1902 and 1907 and 08 after the passage of the Sherman Antitrust Act is regarded as an indication that the Act was largely ineffective in regulating corporate activities that perpetrated an anticompetitive business environment. The Act was deemed ineffective in preventing financial crises for it failed to curb monopolies that were perceived as being responsible for these crises. See Ramirez and Eigen-Zucchi (note 19 above) 158 and Hovenkamp H 'Clayton Act (1914)' <http://www.enotes.com/clayton-act-1914-reference/clayton-act-1914>, (accessed 11 April 2012). For a further discussion of the merger waves see, Gaughan (2007) (note 24 above) chapter. 2 and generally Mitchell M and Mulherin JH 'The Impact of Industrial Shocks on Takeovers and Restructuring Activity' (1996) 41 *Journal of Financial Economics* 193-229.

²⁸ Clayton Act (15 U.S.C ss 12-27).

Alabama Congressman Henry DeLamar Clayton and was adopted as an amendment aimed at strengthening the Sherman Antitrust Act.²⁹ Importantly, it prohibited stock purchases by one corporation of another that resulted in corporate combinations having the effect of significantly reducing competition or creating a monopolistic situation within a relevant industry.³⁰ However, this prohibition was only limited to the acquisition of stock and not to assets of firms in the same line of business,³¹ that were direct competitors.³² The Act also proscribed conduct such as tying contracts,³³ price discrimination,³⁴ and interlocking directorates.³⁵

Another important improvement introduced by the Clayton Act related to its enforcement. Whereas the Sherman Act relied on federal penalties for enforcement,³⁶ the Clayton Act is primarily a civil statute that allows both federal agencies and private parties to litigate antitrust violations.³⁷ The right of private parties to sue for antitrust violations is an important mechanism

²⁹ Ramirez and Eigen-Zucchi (note 19 above) 158.

³⁰ Section 7 of the Clayton Act of 1914.

³¹ *Brown Shoe Co.* (note 7 above) 311. See also *Arrow-Hart & Electric Co. v Federal Trade Commission* 291 U.S. 587, 78 L Ed 1007, 54 S Ct. 532 (1934); *Federal Trade Commission v Western Meat Co.* 272 U.S. 554, 71 L Ed 405, 47 S Ct. 175 (1926); *United Sates v. Celanese Corporation of America*, 91 F Supp. 14 (D.C. S.D NY 1950); 1 FTC 541, 542, 33 Op Atty General 225, 241.

³² *Brown Shoe Co.* (note 7 above) 311; FTC Annual Report 6,7 (1929); ‘Statement by General Counsel Kelly in Hearings before Subcommittee 3 of the House Committee on the Judiciary on HR 2734’ 81st Congressional 1st Session, 38. However, compare the approach in *United Sates v E.L. Du Pont De Nemours & Co.* 353 U.S 586, 1 L Ed 2 d 1057,77 S Ct. 872 (1961) where the Supreme Court opined that the FTC’s view that section 7 was not applicable to the application of stock between non-competitors as incorrect.

³³ Section 2 of the Clayton Act. Tying contracts occurs where firms refused to sell certain important products to customers unless the latter purchases another product from that seller.

³⁴ Section 2 of the Clayton Act.

³⁵ *Ibid.*

³⁶ Section 2 of the Sherman Antitrust Act criminalizes actual or attempts to monopolise, section 3 outlaws trusts and section 6 provides for forfeiture mechanism in respect of property in transit as a way of enforcing the statute.

³⁷ Section 4 of the Clayton Act empowers private parties to sue for violations of the statute for treble the damages, section 16 provides for injunctions including the power to force defendants to divest assets of any violation. See *California v American Stores Co.* 495 U.S. 271 (1990). See also Kintner EW and Joelson MR *An International Antitrust Primer* (1974) 20.

for an effective merger regulatory regime.³⁸ Although the US agencies are well resourced and equipped, Congress saw it fit to supplement their mandate by allowing private actions to be brought against antitrust violators.³⁹

Before focusing on section 7 of the Clayton Antitrust Act regulating corporate mergers and acquisitions and the *Horizontal Merger Guidelines*, it is important to note three further statutes that have a particular bearing on merger regulation in the US. These are the Celler-Kaufman Amendment to the Clayton Act of 1950,⁴⁰ the Federal Trade Commission Act of 1914⁴¹ and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁴²

The Celler-Kaufman Act of 1950 through amendment to the Clayton Act empowered the Federal Trade Commission to block asset and stock purchases where particularly large mergers were believed to result in enhanced market concentration.⁴³ It is believed that the reason for Congress to adopt this stance against large mergers was nothing more than a continuation of the crusade against corporate entities amassing economic and political power.⁴⁴ The Federal Trade Commission Act not only established the Federal Trade Commission as one of the agencies

³⁸See *Granader v Public Bank*, 281 F. Supp. 120 (E.D Mich. 1967) (were a failing firm defence was brought by a private party). Private enforcement plays a crucial role in antitrust enforcement for it assist in the protection of the competitive market structure through filling in the gaps that public enforcement agencies might leave. This also relieve burden from the public agencies. Crucially, private parties are stakeholders of the competition system and as such might be involved in it. This means that they might bring to the system very important information as evidence of violation of which such evidence cannot be readily available to public enforcement agencies and the involved parties might not be willing to testify as witnesses.

³⁹*Ibid.*

⁴⁰ Celler-Kaufman Amendment to the Clayton Act of 1950 (15U.S.C section 18, 1982 Supp.11 1984).

⁴¹ Federal Trade Commission Act of 1914 (15 U.S.C. ss 41-58).

⁴² Hart- Scott-Rodino Antitrust Improvement Act of 1976 (15. U.S.C. s 18a).

⁴³ Section 41 of the Federal Trade Commission Act 15 U.S.C. s41 established and constitutes the FTC. See <http://www.ftc.gov/ftc/turns100/index.shtm>, (accessed 20 March 2013); Handler M and Robinson SD 'A Decade of Administration of the Celler-Kaufman Antitrust Act' (1961)61 (4) *Columbia Law Review* 629.

⁴⁴ Fox and Sullivan (note 21 above) 940. Congress' fear of 'rising tide of economic concentration' and the need to localize control, over industry as well protecting small business was identified as being behind the 1950 amendment to the Clayton Act in form of the Celler-Kaufman Act in *Brown Shoe Co.*(note 7 above) 315.

mandated with the antitrust enforcement in the US⁴⁵ but also sought to strengthen antitrust regulation.⁴⁶

As the norm in modern day merger regulation, US federal law requires parties to mergers involving acquisition of firms meeting prescribed sizes to notify the agencies before implementation.⁴⁷ Generally the Hart-Scott-Rodino Antitrust Improvements Act requires merging parties to file for notification to the agencies prior to consummation of the transaction.⁴⁸ This pre-notification requirement is meant to afford the agencies sufficient time to scrutinize and challenge acquisitions deemed anti-competitive before they are completed.⁴⁹ The rationale behind this reasoning is that once mergers are implemented, unscrambling them is not only difficult but also costly.⁵⁰

⁴⁵ Section 41 of the Federal Trade Commission Act of 1914.

⁴⁶ Ramirez and Eigen-Zucchi (not 19 above) 158.

⁴⁷ Section 7A of the Clayton Act as amended by the Hart-Scott –Rodino Antitrust Improvement Act of 1976.

⁴⁸ In order to determine whether a transaction requires reporting, two tests are employed by the agencies, namely, the size-of-the transaction test and the size-of-person test. In terms of the former, a transaction requires reporting if the as a result thereof, the acquirer will hold voting securities or assets in the acquired person exceeding \$68.2 million. The former test requires the parties to report the transaction if the value of the securities and assets held as a result of the transaction is between \$66.2 million and \$272.8 million on condition that either the acquirer has an annual net sales or his total assets amounts to at least \$13.4 million and the other party to the merger's annual net sales amounts to at least \$13.6 million. These filing thresholds are revised annually to take into account changes in the country's national product. See Premerger Notification Rules, 16 C.F.R 801-803 (2008) and Jones Day 'Antitrust Alert: US Merger Notification and Interlocking Directorates Threshold Increased' (January 2012). Available at <http://www.jonesday.com/us-merger-notification-and-interlocking-directorates-thresholds-increased-01-25-2012/>, (accessed 11 May 2012) and International Competition Network 'Merger Notification and Procedures Template: United States' (March 31, 2011), available at <http://www.internationalcompetitionnetwork.org/uploads/templates/merger/united%20states%20-%20march%202011.pdf>. (Accessed 11 May 2012).

⁴⁹ DePamphilis (2009) (note 23 above) 60.

⁵⁰ DePamphilis (2009)(note 23 above) 64;Hamner KJ 'The Globalisation of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China' (2001-2002) 11(2) *Journal of Transnational Law and Policy* 385,392.

In addition to the above noted federal statutes, the US merger regulatory framework also encompasses the *Horizontal Merger Guidelines*.⁵¹ Although the name of these guidelines denotes only one type of merger, that is, where the transaction involves the acquisition of stock or assets of a direct competitor,⁵² they equally apply to vertical mergers.⁵³ However, due to the prevailing belief amongst the US antitrust agencies that conglomerate mergers rarely pose anti-competitive threats,⁵⁴ it is submitted that the agencies do not have the intention of extending the ambit of the guidelines to conglomerate mergers. These guidelines provide an analytical framework for merger regulation in the US.

The *Horizontal Merger Guidelines* were first issued by the Department of Justice in 1968.⁵⁵ They were meant to provide clarity on the provisions of the federal antitrust laws, in particular the Sherman and Clayton Acts. Accordingly, the guidelines were largely an indication of the federal government's intentions to oppose certain mergers.⁵⁶ The quantitative guidelines provided definitions for specific market share percentages as well as concentration ratios that were acceptable.⁵⁷ The latter were defined using the top four or eight firms' market shares in a

⁵¹ See note 7 above.

⁵² See *Brown Shoe Co.* (note 7 above) 541;

⁵³ DePamphilis (2009) (note 23 above) 72.

⁵⁴ See generally Kolasky WJ 'Conglomerate Mergers and Rage Effects: It's a long way from Chicago to Brussels' (2001), address by then Deputy Attorney General of the Antitrust Division of the US Department of Justice before George Mason University Symposium, Washington D.C. (November 9, 2001), available at http://www.justice.gov/atr/public/speeches/9536.htm#P39_1971, 9 accessed 12 November 2011). Cf. *FTC v Proctor & Gamble Co.* 386 568(1967) (an example of an early case where a merger of potential competitors was considered as a conglomerate merger posing a competition threat). However, such mergers are classified as horizontal mergers and as such appraised under the guidelines. See *U.S v SBC Communications*. No. 1:99 CV00715 (D.D.C. Filed March 23, 1999 and settled by a consent order).

⁵⁵ US Department of Justice 1968 *Horizontal Merger Guidelines*, available at <http://www.justice.gov/atr/hmerger/1124.pdf>.

⁵⁶ DePamphilis (2009) (note 23 above) 66.

⁵⁷ 1968 Merger Guidelines, section 5 provided that the agencies would challenge a merger which would result in the four largest firms controlling 75 per cent of the market. This was based on the Four Firm Concentration Ratio (CR4) premised on the assumption that the fewer the firm and higher the concentration in a market, the more likely the anti-competitive the merger is. See Garza DA 'Market Definition, the New Horizontal Merger Guidelines, And the Long March Away from Structural Presumptions' (October 2010) *ABA The Antitrust Source 1*, available at

particular industry.⁵⁸ However, this method was rigid and unsatisfactory.⁵⁹ The major challenge was that its reliance on quantitative techniques means that it failed to appreciate the equally important role of qualitative factors in merger regulation.⁶⁰ In particular, there was no room for consideration of efficiencies that might result from corporate mergers despite the transactions enhancing market shares.⁶¹

The shortcomings of the 1968 guidelines and the changing regulatory environment necessitated the adoption of revised guidelines in form of the 1992 *Horizontal Merger Guidelines*.⁶² These guidelines that were issued jointly by the DOJ and the FTC were evidence of the federal government's determination to regulate corporate transactions that either created or enhanced market power irrespective of any efficiency claims in such transactions. The 1992 guidelines, in a bid to give effect and clarity to section 7 of the Clayton Act of 1914, defined market power as entailing any situations where the combined firms would be able to maintain prices above the acceptable competitive levels for a significant period of time.⁶³ This implied that any mergers

http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct10_Garza10_21f.authcheckdam.pdf, (accessed 11 May 2012).

⁵⁸ The use of either a selected number firms' market shares in order to predict the concentration ratios is known as the Concentration Ratio (CR) method. For instance if the top four firms are used, it is known as the CR4, if eight firms are used it became CR8.

⁵⁹ DePamphilis (2006) (note 23 above) 66 and Garza (2010) (note 57 above) 2 noted that the use of the CR4 would mean that the agencies would even challenge a merger which results in a slight increase in market concentration. The origins of this approach could be traced to court decisions where the legislative intent in enacting the Clayton Act was perceived to be to protect small businesses and curbing the rising tide of large business concentration. See for instance *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). See also Williamson O 'The Merger Guidelines of the U.S. Department of Justice—In Perspective' Remarks at the 20th Anniversary of the 1982 Merger Guidelines (June 10, 2002), available at, <http://www.justice.gov/atr/hmerger/11257.htm>.

⁶⁰ DePamphilis (2009) (note 23 above) 66 (qualitative data allows the consideration of such factors as the financial viability of the potential mergers as well as the enhanced competitiveness of the merging entities both domestically and internationally). See also Garza (2010) (note 57 above) 2- 3.

⁶¹ *Ibid*.

⁶² US DOJ and FTC 1992 *Horizontal Merger Guidelines*.

⁶³ Section 1.0 of the 1992 Horizontal Merger Guidelines provides that a merger is unlikely to significantly lessen competition unless it enable the merging parties to significantly increase concentration resulting in a concentrated market that negatively affect competition. Market power thus can be defined market as a situation that results from

that create such a situation was in the eyes of the agencies, anti-competitive and subjected to challenges irrespective of any efficiency gains from such transactions.⁶⁴ On the contrary, mergers that had no effect of enhancing market power were deemed *prima facie* harmless to competition hence acceptable.⁶⁵ The drawback to this approach was that it was also rigid.⁶⁶

The 1992 guidelines were refined through the issuing of revised guidelines in 1997.⁶⁷ Crucially, the 1997 guidelines recognized that efficiency gains can outweigh the anti-competitive effects of a merger over a period of time.⁶⁸ This business approach was not only a mere reflection of reality but also fortified the need for a flexible regulatory framework that was not cast in some rigid formulation.⁶⁹ It is submitted that the effect of this business approach was that even mergers enhancing market power could be acceptable if they could be shown to provide some efficiency gains that offset the effects of increased market power.

The current guidelines issued in 2010⁷⁰ repealed the 1992/97 guidelines. It is submitted that the recent guidelines which represent the general salient features of the analytical framework are largely a product of the quest for a more refined and effective framework. Importantly and relevant to this study is the fact that the revised guidelines exemplifies a flexible approach that is founded on economic reasoning. This is particularly evidenced by the desire shown therein to balance such issues as the anti-competitive effects of the merger against efficiency gains.⁷¹ The agencies importantly recognize the reality that there are situations that mitigate the increase in

the combined firms' ability to profitably maintain process above the competitive levels for a significant period of time. This implies that mergers that do not increase market power are *prima facie* acceptable as not being anti-competitive.

⁶⁴ Garza (2010) (note 57 above) 2-3.

⁶⁵ Ibid.

⁶⁶ DePhamhilis (2009)(note 23 above) 69.

⁶⁷ US DOJ and FTC 1997 *Horizontal Merger Guidelines*. The 1997 Guidelines revised the 1992 Guidelines especially section 4 relating to efficiency. Besides this section, the rest of the guidelines remained unchanged. As such, the revised guidelines will be referred to as the 1992/97 *Horizontal Merger Guidelines*.

⁶⁸ Section 4 of the 1992/97 *Horizontal Merger Guidelines*.

⁶⁹ See note 64 above.

⁷⁰ *Horizontal Merger Guidelines* (2010).

⁷¹ Section 10 of the *Horizontal Merger Guidelines*.

market power.⁷² These situations are catered for under efficiency considerations and under the failing firm and division defences.⁷³ The interaction of the latter and section 7 of the Clayton Antitrust Act will be explored in depth below.

7.3 Regulating mergers involving failing divisions: section 7 of the Clayton Antitrust Act and the *Horizontal Merger Guidelines*

Having provided an overview of the US merger regulatory framework, this section will focus on the actual statutory provisions regulating corporate mergers and how they interact with the administrative guidelines relating to the failing division defence.

7.3.1 Section 7 of the Clayton Antitrust Act

Section 7 of the Clayton Antitrust Act provides that

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital [...] or the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce, in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.⁷⁴

This provision is at the heart of merger regulation in the US. It is submitted that the provision is broadly worded to ensure that the regulators capture as many transactions as possible. The intention to subject a wide range of transactions to section 7 is evident in the frequent use of such words and phrases as ‘any;’ ‘commerce or any activity;’ ‘directly and indirectly;’ ‘any line of commerce;’ or ‘any section of the country.’⁷⁵ The provision also applies to both natural and juristic persons as the term ‘person’ used therein is given its legal meaning to denote a legal

⁷² Sections 10 and 11.

⁷³ Ibid.

⁷⁴ Section 7 of the Clayton Act of 1914 headed ‘Acquisitions by one corporation of stock of another.’ This section is as amended by the Celler-Kaufman Amendment to the Clayton Act of 1950. The original version of the section only applied to acquisition of stock between direct competitors and excludes acquisition of assets as well as of stock between non-competitors. See *Brown Shoe Co.* (note 7 above) 311. See note 32 above and authorities cited therein.

⁷⁵ Ibid.

entity.⁷⁶ The section also applies to acquisitions involving both small and large firms as long as it has one of the two envisaged effects.⁷⁷

The introductory words to the provision clearly spell out the section's purpose. The section intends to prohibit acquisitions by one entity of the stock, share capital or assets of another. However, this prohibition is premised on the acquisition having one of the two envisaged results namely (a) the acquisition must substantially lessen competition or (b) the acquisition must tend to create a monopoly.

For a merger to constitute a violation to section 7, it must not only lessen competition but must do so to a substantial degree.⁷⁸ It follows that competition can only be deemed to have been substantially lessened if the post-merger market structure is materially altered.⁷⁹ Thus the provision extends to situations where a merger would worsen the prevailing market conditions or inhibit competition therein.⁸⁰ Although the provision provides for two separate effects on competition, it is submitted that both instances have the effect of diminishing competition within the specified market. Substantial lessening of competition implies the removal of an effective competitor which reduces competition and affects consumer choices.⁸¹ Furthermore, there is a possibility that the remaining fewer market participants can engage in anti-competitive practices including price maintenance and increase.⁸² It must be emphasized that the provision envisages

⁷⁶ Section 12 of the Clayton Act of 1914 as amended.

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⁷⁸ *International Shoe Co.* (note 6 above) 298; *Standard Fashion Co. v Magrane-Houston Co.* 258 U.S 346, 357, 66 1 Ed.653,658, 42 Supp. Ct. Re.360 (1922).

⁷⁹ OECD 'Substantive Criteria Used for Horizontal Assessment of Mergers' (October 2002) 295, available at <http://www.oecd.org/dataoecd/54/3/2500227.pdf>. (accessed 14 May 2012)

⁸⁰ *Ibid.*

⁸¹ The impact on consumer choices has been interpreted within the broadly to imply the effect of the merger on public interest, that is, a merger is deemed to substantially lessen competition if it results in injury to the public, in this case the consumers. See *Standard Fashion Co. v Magrane-Houston Co.* (note 78 above) and *International Shoe.* (note 6 above) 298.

⁸² In *Federal Trade Commission v H.J Heinz Inc.* 246 FJD 708 (D.C Cir.2001); 2001-2 CCH Trade Cs. 73,441 (D.C.2001) in an appeal against a decision of the United States District Court for the District of Columbia, before both the District Court and the United States Court of Appeals for the District of Columbia Circuit, the FTC challenged the merger between Heinz and Beech-Nut, two of the three major baby food manufactures in the US. The

the possibility that a merger can result in the lessening of competition. It is thus irrelevant to show that competition has already been lessened pre-merger for the use of the word ‘may’ merely denotes that there is a possibility that, as a result of the merger, competition can diminish.⁸³

Mergers violate section 7 if they tend to create a monopoly.⁸⁴ The inclusion of this proviso is not surprising given the history of antitrust regulation in the US. As shown above, the early antitrust statutes were designed primarily to curb the perceived anti-competitive behaviour of trusts.⁸⁵ As such, regulation of monopolistic conditions formed the core of subsequent antitrust statutes.⁸⁶ The Clayton Antitrust Act simply reiterated this position by prohibiting mergers that tend to create monopolies. Again this prohibition was premised on the presumption that monopolies are anti-competitive as they are likely to engage in anti-competitive practices that are detrimental to consumer welfare.⁸⁷

The purpose of section 7 is thus to regulate mergers that are anti-competitive hence the qualification that the acquisition of the stock, share capital or assets of another person by another must either result in substantial lessening of competition or tend to create a monopoly for it to

third producer was Geber. The merger would have seen Heinz and Beech-Nut combining to form a single entity. This would mean that the market would be left with only two competitors from the current three. The court accepted the FTC’s submission that the three producers provided effective competition and removing one of them through the proposed merger would significantly reduce the number of market participants and in turn lower the intensity of competition in the baby food market. Price maintenance occurs where firms in a given market collude to retain prices of a certain commodity or service at a certain level for a given period regardless of market determinants. Price increases generally denotes a situation where market participants increase the prices of their products without regards to any such factors as production costs or supply and demand trends.

⁸³ Kokkoris and Olivares-Caminal (2010) (note 11 above) 58.

⁸⁴ Section 7 of the Clayton Act. See also *United States of America and State of New York v Twin American LLC, Coach USA Inc., City Sights LLC and City Sights Twin Inc.*, 12 CV8989 (2012) par. 4(‘In March 2009, Coach and City Sights formed the Twin America joint venture, the creation of which eliminated the intense head-to-head competition between Coach and City Sights, gave them a monopoly with an estimated 99 percent of the market, and enabled them to implement and sustain a price increase of approximately 10 percent.’)

⁸⁵ See note 20 above.

⁸⁶ Ibid.

⁸⁷ See Whish *Competition Law* 6th ed., (2009) 6-7.

constitute a violation. The courts have advanced this notion by holding that the purpose of the section, as the case in other antitrust legislation, is to promote and maintain competition for the greater public interest good⁸⁸ and not to stifle economic and commercial activities under the guise of merger regulation.⁸⁹ Hence provision is further made to expressly exclude from the application of the section 7 economic and commercial activities that, although they may constitute a merger in one way or the other, do not result in substantial lessening of competition.⁹⁰

Although section 7 prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly, the judiciary, in interpreting and applying this provision, has however acknowledged the reality that there are instances where *prima facie* prohibited mergers can be justified on the basis that the circumstances of the merging parties might mitigate against the perceived violations. This recognition is in found in the acceptance of the ‘failing firm defence.’⁹¹ Although not expressly recognized by Congress,⁹² this defence is well developed

⁸⁸ In *International Shoe Co.* (note 6 above) 297 the Supreme Court in discussing the history of the merger regulatory provisions noted that antitrust laws were intended for the protection of the public against perceived evils flowing from undue restricting of competition. See also *Standard Oil Co. v Federal Trade Commission*, 282 Fed. 81, 87 where the court applied the public interest test in determining whether unduly restriction of competition or obstructing of trade would prejudice the public interest. The Supreme Court in *Federal Trade Commission v Sinclair Refinery Co.* 261 U.S 463, 467, 67 L Ed. 746, 754, 43 Supp. Ct. Rep. 409 (1923) stated that the greater purpose of both the Clayton Act of 1914 as amended and Federal Trade Commission Act of 1914 was to advance public interest aimed at affording equal opportunities for participation in economic activities by competing players for a honest end.

⁸⁹ See for instance *International Shoe Co.* (note 6 above) 298 and 302 where the Supreme Court noted that acquisition of a corporation whose business is facing grave probability of failure will not violate antitrust laws but rather serve to promote an array of public interest benefits such as those of the stockholders and the general community in which it operates.

⁹⁰Section 6 exempts from the ambit of the statute, activities of labour unions and agricultural organisations. Section 6 states that ‘labour of a human being is not a commodity or article of commerce , and permit(ing) labour organisations to carry out their legitimate objectives’ An express exemption is made relating to the activities of the National League of Baseball (NBL) due to its national heritage status. See *Federal Baseball Club of Baltimore Inc., v National League of Professional Baseball Clubs and others* 259 U.S. 200 (1922).

⁹¹ See *International Shoe Co.* (note 6 above) 302.

⁹² See note 11 above.

through judicial decisions and the antitrust regulatory agencies have given it further impetus through guidelines. A crucial aspect of the defence is that its development has influenced other jurisdictions as well.⁹³ In this context, the development of model approaches and guidelines in many jurisdictions around the world need to take heed of the principles developed in these decisions and adopted in these guidelines. One such area as outlined earlier is the variation of the failing firm defence in the form of the failing division defence. The provisions of the *Horizontal Merger Guidelines* relating to the failing division defence will now be discussed.

7.3.2 The *Horizontal Merger Guidelines* and the failing division defence

The US courts acknowledged that there are circumstances in which mergers that enhance market power or amount to monopolies nonetheless do not constitute a violation of section 7 of the Clayton Antitrust Act.⁹⁴ Thus the courts accept that the financial circumstances of any party to the merger can, in exceptional circumstances, provide a defence to justify an otherwise anti-competitive merger.⁹⁵ One such exceptional circumstance is if it can be shown that a division of a firm is failing hence the merger, although raising competition concerns, would be necessary to rescue it.⁹⁶

The *Horizontal Merger Guidelines* provide that ‘a merger is unlikely to cause competitive harm if the risks to competition arise from the acquisition of a failing division.’⁹⁷ However, the antitrust agencies are clear on the need for parties intending to rely on the failing division

⁹³ For instance, in the EU the European Commission accepted the failing firm defence in Case IV/M.308 *Kali und Salz/Mdk/Treuhand* (I), [1994] OJ L186/38 albeit in a modified version of the US *International Shoe* criterion. See also the South African Competition Act of 1998 in section 12A(2)(g) giving express recognition to the doctrine and in *Iscor Limited/Saldanha Steel(Pty)Ltd* 67/LM/Dec01. Acknowledging that the doctrine originated from the *International Shoe Co.* decision. In Zimbabwe, section 32(4a)(h) also give the doctrine express statutory recognition.

⁹⁴ See *International Shoe Co.* (note 6 above) 302.

⁹⁵ *Ibid.*

⁹⁶ Section 11 of the *Horizontal Merger Guidelines*.

⁹⁷ Section 11. This provision resembles section 5.2 of the 1992/97 *Horizontal Merger Guidelines*.

defence to meet the set criteria before the claim is credited.⁹⁸ The parties are thus required to meet both legs of the criteria⁹⁹ which are as follows:

(a) The division must be failing

The first requirement is that the division must be failing.¹⁰⁰ In order to determine whether or not a division is failing such that its assets will exit the market in the near future, parties must demonstrate that the specific division has a persistent negative cash flow.¹⁰¹ This needs to be established using established and sound economic principles, in particular those which clarify the financial predicament of the allegedly failing division.¹⁰² Thus the guidelines require the parties to employ cost allocation rules to reflect the real economic situation of the division separate from the parent company.¹⁰³

The parties must ‘sufficiently show’ that the division is experiencing persistent negative cash flow.¹⁰⁴ This negative cash flow situation must be shown to be unjustifiable if one takes into account the prevailing market situation as well as both the parent firm and the division under review’s market reputation which under normal circumstances must portray better economic fortunes.¹⁰⁵ In other words, the division should continue to perform badly irrespective of favourable market conditions.

As the case with the failing firm defence,¹⁰⁶ it is upon the parties invoking the failing division defence to satisfy the antitrust agencies that the division is failing and such a failure would mean

⁹⁸ Section 11 of the *Horizontal Merger Guidelines*.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Section 11 n 17.

¹⁰² Ibid.

¹⁰³ Section 11.

¹⁰⁴ Section 11 of the *Horizontal merger guidelines*.

¹⁰⁵ Section 11 n 17.

¹⁰⁶ See *General Dynamics Corp.* (note 7 above) 507. The merging parties must in the affirmative, allege the applicability of failing firm defence to a charge that the merger violates section 7 of the Clayton Act. See *Joseph Ciccone & Sons Inc. v Eastern Industries Inc.*, 537 F.Supp.623.628 (E.D.Penn. 1982); *United States v M.P.M. Inc.*, 397 F.Supp.78, 95 9D.Colo.1975)

that its assets will exit the market in the near future.¹⁰⁷ It is easy for the merging firms to prepare reports and plans that demonstrate that the division under question persistently experiences negative cash flow problems hence the antitrust agencies require more than such plans.¹⁰⁸ It is submitted that such a requirement is difficult to meet as the regulatory agencies might suspiciously treat any plans and reports as being made exclusively to justify failing division claims. However, it is further submitted that genuine evidence of a failing division can still be provided through the production of successive financial statements that can prove the division's poor financial performance over a period of time. Thus the persistent poor financial performance can be a sign that if allowed to continue, the division might likely fail and consequently that its assets will exit the relevant market, a situation that has negative social and economic implications.¹⁰⁹

As will be demonstrated in later parts of this Chapter, the requirement that the division must be failing has been construed and applied in a similar fashion as that of a failing firm in the case of a failing firm defence. The effect of such an approach is that should merging parties fail to establish this requirement as required under the failing firm defence, it becomes academic to try and prove that a division is likely to fail for purposes of the failing division defence.¹¹⁰

Allowing a division to fail and its assets to subsequently exit the market impacts on both the competitive structure of the market as well as social costs.¹¹¹ Firstly the failing division on its

¹⁰⁷ *General Dynamics Corp.* (note 7 above) 507.

¹⁰⁸ Section 11 n 17 of the *Horizontal Merger Guidelines*.

¹⁰⁹ Although *International Shoe Co.* (note 6 above) dealt with the failing firm doctrine, the case can be used to illustrate the point that allowing the failing business to fail and its assets to exit the relevant market can have social consequences. The Supreme Court authoritatively noted that if a failing corporation is allowed to exit the market, this will result in loss to the communities that it serves; Opinion of Advocate General Tesouro in Joint Cases C-68/94 and C-30/99 *France and Others v Commission* (delivered on 6 February 1997) 1-1405 par. 56; See further FTC 'Competition Policy in the New High-Tech, Global Marketplace' (1996) 1(3), available at <http://www.fct.gov/opp/global/report/gc.v1.pdf>, (accessed 12 October 2011) 4; Kokkoris and Olivares-Caminal (2009) (note 11 above) 170; Kokkoris I 'Failing Firm Defence in the European Union: A Panacea for Mergers' (2006) *European Competition Law Review* 494 (although allowing mergers can result in job losses, if a merger is not allowed and the firm is allowed to exit, jobs might be lost as a result of plant closure).

¹¹⁰ *Reed Roller Bit Co.* (note 171 below) 584 n1.

¹¹¹ See generally note 109 above.

own can hardly qualify as an effective competitor. However, the fact that it can be merely a component of a thriving entity still means that even if it exits the market, competition would not significantly diminish. This is too general a proposition as in reality the parent firm can have several specialist divisions. In this context, the failing division's business, although forming part of the broader parent firm's business, is still a distinct entity from the parent entity in terms of products or services offered thereby falling under a different product market.¹¹² It follows that for purposes of evaluating the competitive effects of the merger, it is not the business of the parent firm that is taken into account but rather the product market of the allegedly failing division that is relevant.¹¹³ Accordingly, the parent firm can still be healthy and competitive but the division can however be found to be failing and falling short of being an effective competitor.¹¹⁴ In such a scenario, allowing the assets of the failing division to exit the market will result in diminished competition in the relevant market.¹¹⁵

Secondly, prohibiting the merger involving a failing division of a firm resulting in its assets exiting the market might have social and economic implications. It is submitted that although the division forms part of the parent entity, it can be assumed that the employees of the failing division might only be necessary to the division's operational requirements. This entails that should the division be allowed to fail, its employees are likely to lose their jobs as the parent entity cannot be expected to absorb them. Even in the unlikely circumstances that they are absorbed, it is unlikely that each of those employees' services will be required. As such prohibiting the merger could potentially result in job losses. However, one must not over simplify and assume that rescuing the failing division through a merger will mean that there would be no job losses directly linked to the merger. It is possible that workforce restructuring

¹¹² For instance in *FTC v Great Lakes Chemicals Corp.* 528 F. Supp. 84, 86 (1981) although Velsicol Chemical Corp. was a wholly owned subsidiary of Northwest Industries Inc., and primarily produced agricultural pesticides, this changed following its merger with another of Northwest's subsidiaries, Michigan Chemicals. Following the merger, Velsicol produced bromine and bromine related products which accounted for about 7.4% of its total sales. It is clear that although these products were the subject of the acquisition in question, the remainder of the division's sales were accounted by some other products that were outside the transaction hence constituting a different product line from Northwest.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ See *United States v. Lever Brothers Co.* 216 F. Supp. 887, 899 (1963).

might entail a strategy of cutting costs associated with the failing division.¹¹⁶ Although jobs may be lost, it is submitted that the worst case scenario will prefer job losses as a result of the implementation of the merger transaction above job losses resulting from the failure of the division and consequently the exit of its assets from the relevant market. This postulation is based on a holistic balancing of employment concerns as a social cost on one hand and other benefits resulting from the merger on the other hand. Accordingly, if the merger can provide other benefits such as the continuation of services and products to the concerned community and maintenance of a competitive structure in addition to preserving a substantial number of jobs, then it is submitted that there can be cause to justify any job losses that may result from it.

The exit of the failing division's productive assets from the relevant market itself can have social implications as well. Should the division be allowed to fail and its productive assets exit the market, the relevant market will not only be deprived of a participant, effective or not, but the consuming public will be deprived of choices as fewer participants will be left in the market.¹¹⁷ There is also a possibility for the remaining market participants to engage in anti-competitive practices that are detrimental to consumer welfare, for instance output restrictions, preferential distribution and collusive pricing.¹¹⁸

Even if parties can show that the division is failing and saving it will be in the best interest of the competition process as well as consumer welfare, the merging parties are still required to demonstrate a desire to lessen the anti-competitive effects of their merger on the relevant market.¹¹⁹ The merging parties are required to show that there are no alternative purchasers to

¹¹⁶ See Gaughan (2007)(note 24 above) 19.

¹¹⁷ See *International Shoe Co.* (note 6 above) 302-303. See further Fox EA 'Antitrust and Competitiveness: Efficiencies, Failing Firm and the World Arena' (1994), available at <http://www.ftc.gov/opp/global/fox.htm>, (accessed 12 April 2010).

¹¹⁸ Output restriction is when market participants without regards to market forces such as supply and demand; reduce the quantity of products they supply onto the market. Preferential distribution is when a certain firm decides to distribute its products to a particular seller to the exclusion of others. Price fixing and hiking denotes probably the most glaring forms of anti-competitive practices whereby firms maintains prices for products and /or services regardless of the market dynamics or increases the said prices regardless of the dictates of market forces.

¹¹⁹ This desire must be demonstrated in a showing that they made an effort to consider other alternative purchasers that poses a less competitive threat than the merger in question. See section 11 of the *Horizontal merger guidelines*.

acquire the failing division besides the current acquiring firm.¹²⁰ This requirement is similar to the one required under the failing firm defence.¹²¹ The implications of this similarity will be discussed below suffice to say at this point that this has a profound bearing not only on the development of the failing division doctrine, but also on its application in relevant cases.¹²²

(b) *The Alternative Purchaser Requirement*

The second requirement is that the merging parties must prove that

The owner of the failing division has made unsuccessful good faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition that does the proposed acquisition.¹²³

This preferable alternative purchaser requirement is similar to the one required for purposes of satisfying the failing firm defence.¹²⁴ In order to determine whether or not this requirement has been complied with, certain pointers must be in place. Firstly, it must be shown that good faith efforts to elicit reasonable alternative offers were made.¹²⁵ Secondly, it must be shown the efforts

¹²⁰ Section 11 of the *Horizontal Merger Guidelines*.

¹²¹ See *Diebold Inc.* (note 6 above) U.S.654, 655 (1962); *California v Sutter Health Systems*, 130 F.Supp. 2d 1109,1136 (N.D.Cal.2001)

¹²² See generally for a discussion on the impact on the failing firm doctrine on the development of the failing division doctrine and the influence this had on court approach, Wait AL ‘Surviving the Shipwreck: A Proposal to Revive the Failing Division Defence’ (2003) 45(1) *Will & Mary L. Rev.* 429.

¹²³ Section 11 of the *Horizontal Merger Guidelines*.

¹²⁴ *Ibid.* See also section 5.2 of the 1992/97 *Horizontal Merger Guidelines* which provided for the failing firm defence expressly referred to the need to meet the ‘competitively preferable purchaser requirement’ of the failing firm defence as provided for in section 5.1 therein.

¹²⁵ *Ibid.* In *Harbour Group Investments* (note 13 above) 4 the court in dismissing claims that the merging parties had satisfied the requirements for a failing division defence noted that ‘the parties; search for an alternative purchaser was characterised by a minimal effort and designed primarily to be persecutory’ hence was done in bad faith especially given that an alternative purchaser was sought only after the parties had agreed the terms to the joint venture.

were meant to ensure that the failing division's assets remain in the relevant market.¹²⁶ And thirdly, it must be demonstrated that such efforts have not yielded any positive results.¹²⁷

An alternative offer is deemed as reasonable if the offeror offers to purchase the assets of the failing division at a price above the liquidation value thereof.¹²⁸ A liquidation value is defined as the highest value that can be fetched by the said assets outside the relevant market.¹²⁹ The antitrust agencies must thus determine whether the merging parties sufficiently pursued alternative offers.¹³⁰ It follows that the merging parties must demonstrate that they made good faith efforts to elicit such alternative offers.¹³¹ There is no formula for determining whether a good faith effort was made as each case is assessed upon its own merits taking into account its surrounding circumstances.¹³² However, there are certain general guidelines that must be met for merging parties to satisfy the good faith effort requirement, namely¹³³

¹²⁶ Section 11 of the *Horizontal Merger Guidelines*.

¹²⁷ Section 11 makes reference to 'unsuccessful good faith efforts' implying that although the parties had made such efforts, nothing materialized therefrom.

¹²⁸ Section 11 n16 defines an alternative purchase as an offer to purchase a failing firm at a price higher than the liquidation value. Although this definition is provided in the context of a failing firm, it is submitted that there is nothing to suggest that it cannot be applied to a failing division. See also section 5.2 n 39 of section 5.1 n 39 of the 1992/97 *Horizontal Merger Guidelines*.

¹²⁹ *Ibid*.

¹³⁰ Section 11 of the *Horizontal Merger Guidelines*. See also *United States v Pabst Brewing Co.* 296 F. Supp. 994, 1002 (E.D. Wis. 1969) (merging parties must make every reasonable effort to explore alternative management and merger possibilities). A reasonable effort is deemed to have been made if more than one buyer is considered. See Sotiroff P 'Federal Antitrust Laws and Mergers: An Updating of the 'Failing Company' Doctrine In The Amended Section 7 Setting' (1963) 61(3) *Michigan Law Review* 566,582. In *Citizen Publishing Co.* (note 6 above) 89 S.Ct. 927, 931, a failure to engage a broker was deemed as evidencing lack of a good faith effort.

¹³¹ *Ibid*.

¹³² Ferguson (1970) (note 11 above) 97; Bok R 'Section 7 of The Clayton Act and The Merging of Law and Economics' (1960) 74 *Harvard Law Review* 226,346 noted that 'courts cannot apply a simple rule of thumb for the particular circumstances of the failing firm and the industry within which it operates will doubtless determine whether a reasonable attempt shall include sounding out rival firms, contracting a business broker, or advertising in a financial periodical.'

¹³³ Arquit KJ 'The Failing Firm Defence and Related Issues' (1991) 16. Remarks by the Director, Bureau of Competition, Federal Trade Commission (FTC) *Before The American Bar Association*, April 12, 1991.

- (b) the merging parties must have contacted many and various firms. Those contacted might include investment groups¹³⁴ or companies from related industries;
- (c) the merging parties must provide sufficient information to companies that express interest. Any expression of such interest must be pursued seriously.

The alternative purchaser requirement presents a number of challenges both to the merging parties and the competition system in general.¹³⁵ Firstly, the question can be posed as to who will be willing to purchase a ‘sinking ship’ and for what incentive? It is submitted that the requirement that the willing purchaser can only be a preferable alternative if its offer is above the liquidation value is potentially problematic. It is not disputed that it is possible to have a purchaser who is simply interested in acquiring the assets of the failing division. However, it cannot be discounted that such acquisitions might be motivated by some ulterior motives.¹³⁶ For instance, a purchaser who will be willing to acquire assets of a failing division at a price higher than the liquidation value might be motivated by the need to acquire market power and dominance.¹³⁷ This raises the question of whether competition is promoted or maintained if a party is allowed to acquire market power simply because it is outside the proposed merger and hence offers an alternative thereto.

¹³⁴ Arquit (1991)(note 133 above) 16. In the event that an investment bank is preferred, the merging parties must demonstrate that they offered enough incentive to do a thorough research on the prospective purchasers and the general market. It is generally accepted that promising the bank compensation in form of shares following a successful transaction does not constitute an adequate incentive and ultimately might result in the effort failing short of good faith. See also *Kali und Salz* (note 88 above) par. 81.

¹³⁵ See generally, Ferguson (1970) (note 11 above) 94; Bok (1960) (note 132 above) 344-45; Wiley RA ‘The ‘Failing Company’ : A Real Defense in Horizontal Merger Cases’ (1961) 41 *Boston University Law Review* 495; Kokkoris and Olivares-Caminal (2009) (note 11 above) 173; Correia E ‘The Failing Company Defense’ (1995), available at <http://www.ftc.gov/opp/global/final.htm>, (accessed 21 October 2011).

¹³⁶ Valentine DA ‘Horizontal Issues: What’s Happening and what’s on the Horizon?’ (1995), available at <http://www.ftc.gov/speeches/other/dvhorizontalissues.shtm>, (accessed 22 March 2012) (non-market participants might only be interested in seeking a revenue stream than operating the failing division as an effective competitor.) See also Wiley (1961) (note 135 above) 582.

¹³⁷ Organization of Economic Co-operation and Development (OECD) ‘Roundtable on the Failing Firm defense- Contribution by the United States’ *DAF/COMP/WD* (2009)99 (October 2009) 179, available at <http://www.ftc.gov/bc/international/docs/failingfirm.pdf>, (accessed 14 May 2011) (US Contribution to the OECD 2009).

Secondly, it is possible that the only willing purchaser can be a party who is currently outside the market in which the failing division operates. In such a case there is no guarantee that the purchaser, though offering an alternative, will retain the assets of the failing division in the relevant market.¹³⁸ Even if this possible, the extent to which the non-market participant can continue to retain the assets in the relevant market can still not be guaranteed with any certainty. Furthermore, it is difficult to determine and predict the likely behaviour of the non-market participant once in the market, that is, whether or not it will behave competitively.¹³⁹ It is thus submitted the question will still remain as to whether the purchaser meeting the requirement qualifies as a preferable competitive alternative.

Merging parties bear the burden of proving that the criteria for the failing division defence, including the alternative purchaser requirement, have been met.¹⁴⁰ The burden of proving the applicability of the alternative purchaser criteria is even heavier in cases of the failing division defence. The merging parties do not only have to demonstrate that they made good faith efforts to elicit reasonable offers but also that there are no reasonable alternative purchasers posing a less competitive threat.¹⁴¹ Merging parties can rely on the fact that even the agencies in their investigations could not reveal alternative purchasers as evidence to persuade the court that they had made good faith efforts to elicit for reasonable alternative purchasers.¹⁴² However, such a claim can only be accredited if it can be shown that the merging parties have provided sufficient information to companies expressing interest and further that they seriously pursued any legitimate interest.¹⁴³

The good faith effort requirement requires a showing that sufficient information was supplied to any potential purchasers.¹⁴⁴ It may be asked what amounts to sufficient information for this purpose? Is it any information relating to the current status of the failing division? Is it any information including the trade secrets of the failing division and the parent company? Or is it

¹³⁸ Valentine (2005) (note 136 above).

¹³⁹ See 135 and 136 above.

¹⁴⁰ See note 106 above.

¹⁴¹ US Contribution to the OECD (2009) 179.

¹⁴² Ibid.

¹⁴³ Arquit (2001) (note 133 above) 16.

¹⁴⁴ Ibid.

limited to only information necessary for the prospective purchaser to make an informed business decision as to whether or not to purchase the failing division? Although the requirement implies that sufficient information can only be provided to a party that expresses interest, it still remains that in order for such interest to be expressed, a certain level of detail must have been provided. It is submitted that the line thus needs to be drawn between sensitive information and essential information. It is submitted that sensitive information in this context refers to internal company trade secrets. In the same breath, it is submitted that essential information refers to any information relevant for one to make a decision as to whether to purchase the failing division or not. It is accordingly submitted that the merging parties must demonstrate that they provided sufficient essential information to companies that expressed interest in purchasing the failing division.¹⁴⁵

In addition to providing sufficient information to interested parties, the merging parties must pursue any interests expressed to purchase the failing division seriously.¹⁴⁶ The efforts to solicit for alternatives offers can only be deemed to have been made in good faith if the merging parties can demonstrate that they pursued any expressed interest.¹⁴⁷ However, the interest to purchase a failing division must be legitimate. This implies that where a party expresses general interest without making a concrete offer, the merging parties are not obliged to make serious follow up efforts thereon.¹⁴⁸ In this context, an interest can only be said to be legitimate and worthy of pursuing if it is accompanied by an actual offer to purchase the assets¹⁴⁹ of the failing division.

(c) Failing division assets exiting the market

Proving that the division is failing and that there are no alternative purchasers might not be adequate if the merging parties cannot show that should the merger be prohibited, the assets of the failing division will exit the market. This requirement, which is similar to the one required of

¹⁴⁵ Arquit (2001) (note 133 above) 16.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ferguson (1970)(note 11 above) 95 (that not every inquiry constitutes an offer).

¹⁴⁹ See *California v Sutter Health Systems* (note 116 above) 1137; *United States v Culbro Corp.*, 504 F. Supp. 661, 669 (3.D.NW 1981).

the failing firm defence,¹⁵⁰ is evident from the guidelines stating that the ‘agencies do not normally credit claims that the assets of a division would exit the relevant market in the near future unless both’¹⁵¹ the criteria discussed in (a) and (b) above is met.

Thus the merging parties must ultimately demonstrate that absent the merger, the assets of the failing division would exit the market. The merger thus not only becomes necessary to keep the assets of the failing division in the relevant market, but also the only available option. This is because the merging parties need to show that should the said assets exit the relevant market, there are no other market participants to acquire them or fill in the void that the exit might create.¹⁵² However, it is submitted that the problems associated with the preferable competitive alternative purchaser requirement discussed above can also be an issue here. For instance, it cannot be guaranteed that the alternative purchaser would in the long run maintain the said assets in the relevant market or even maintain the competitive market structure especially if it is a non-market participant that simply met the above liquidation value asked of the assets.¹⁵³ Given the cumulative nature of the requirements, the challenges associated with the alternative purchaser requirement can spill over to the requirement that parties need to demonstrate that absent the merger, the divisional assets would fail and exit the relevant market. This is because even if the alternative purchaser might not be in a better position to promote the competitive market structure and keep the assets in the relevant market, it can still be the only available option to the present acquiring firm.

Having provided the legislative and regulatory framework for the failing division defence in the US, the discussion will turn to the application of the failing division defence in the US as demonstrated in case law.

¹⁵⁰ Section 11 of the *Horizontal Merger Guidelines* which are similarly worded to section 5.1 of the 1992/97 *Horizontal Merger Guidelines*.

¹⁵¹ Section 11 of the 2010 *Horizontal Merger Guidelines*.

¹⁵² See 7.3.2.(a) above.

¹⁵³ See note 135 above.

7.4 The US practice in applying the failing division defence

Before turning focus on the practical application of the failing division defence in the US, there is a need to briefly explore some fundamental features of the parent failing firm and associated defences as applied in US Federal courts. This is because the acceptance, application and subsequent development of the failing division defence, as will be shown later, has largely been influenced by either the failing firm or other associated defences. Accordingly, three landmark decisions of the US Supreme Court will be presented, namely *International Shoe Co.* (1930); *Brown Shoe Co.* (1962) and *General Dynamics Corporation* (1974).

7.4.1 Selected decisions on the failing firm defence

7.4.1.2 *International Shoe Co. v FTC* and the birth of the failing firm defence

On 6 January 1930, the US Supreme Court accepted the failing firm defence for the first time in a petition made by International Shoe Co. against the decision of the First Circuit Court¹⁵⁴ to confirm the Federal Trade Commission's challenge on a merger involving the (then) 'two of the largest shoe manufactures in the world.'¹⁵⁵

International Shoe was engaged in an extensive business manufacturing and distributing of various kinds of leather shoes in several US States.¹⁵⁶ W.H.McElwain Company was a corporation incorporated in terms of the laws of the state of Massachusetts with its principal office in Boston.¹⁵⁷ McElwain also manufactured, sold and distributed shoes in several US States.¹⁵⁸ McElwain primarily made and sold dress shoes for men and boys whereas International Shoe made and sold a line of men's dress shoes of various styles.¹⁵⁹ These products, though comparable in prices and to some extent in quality, differed entailing that the two companies thus competed only in men's dress shoes.¹⁶⁰

¹⁵⁴ *International Shoe Co. v FTC* 29F. 2d 518 (1928).

¹⁵⁵ Par Stone J dissenting in *International Shoe Co. FTC* (note 6 above) 304.

¹⁵⁶ *International Shoe Co.* (note 6 above) 295.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

Between 1920 and 1921, McElwain's business experienced financial difficulties.¹⁶¹ These were largely a result of the declining shoe market which in turn negatively affected shoe prices and sales.¹⁶² The situation was compounded by the fact that the company had made excessive commitments for purchasing raw materials used in shoe manufacturing in addition to large stocks of already manufactured shoes that were in its possession.¹⁶³ Poor sales were further aggravated by lack of new orders resulting in the company incurring inevitable losses in 1920.¹⁶⁴ By May of the same year, a surplus of about \$4 million was exhausted and within a year it was turned into a deficit of \$ 4.3 million.¹⁶⁵ Poor financial performances meant its debts mounted to approximately \$15 million in sums owed to between 60 and 70 banks and trust companies.¹⁶⁶ This was in addition to nearly \$12 million on current accounts.¹⁶⁷ By 1921, production at the company's factories sharply declined from between 38 000 to 40 000 pairs of shoes daily to between 6 000 to 7 000 pairs per day.¹⁶⁸ McElwain's balance sheet confirmed the company's factual bankruptcy where it was no longer able to meet its debt obligations as they became due.¹⁶⁹ In terms of the applicable state laws, the company was required to file for voluntary bankruptcy.¹⁷⁰

The financial conditions of McElwain were in sharp contrast to those of International Shoe. During the same period International Shoe's shoe production and sales rose by about 25 percentage points.¹⁷¹ In 1921, the demands for the company's shoes outstripped its supply.¹⁷²

With one company struggling to survive and the other failing to cope with the demand, McElwain approached International Shoe with a view of concluding a deal whereby the latter

¹⁶¹ *International Shoe Co.* (note 6 above) 299.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, 300.

¹⁶⁴ *Ibid.* In 1920, McELwain incurred losses in excess of \$6 million.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *International Shoe Co.* (note 6 above) 300.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

would acquire the former's entire capital.¹⁷³ The two companies reached an agreement in terms of which a transaction was concluded whereby International Shoe acquired McElwain's stock but not its assets.¹⁷⁴ The transaction enabled McElwain to retain its staff and at the same time enabled International Shoe to acquire already established factories rather than setting up new ones in the face of growing demand for its shoes.¹⁷⁵

The FTC challenged the acquisition. The agency concluded that the acquisition was in violation of section 7 of the Clayton Act hence prohibited.¹⁷⁶ Basing on its conclusion, the agency ordered International Shoe to divest itself of all capital stock of McElwain acquired pursuant to the acquisition.¹⁷⁷ Furthermore, International Shoe was ordered to cease and desist from the ownership, operation, management and control of all assets of McElwain acquired pursuant to the transaction.¹⁷⁸ This order was confirmed by the Circuit Court of Appeals for the First Circuit.¹⁷⁹ It is against this decision that International Shoe petitioned the Supreme Court to review and set it aside resulting in the landmark decision in 1930.

Before the Supreme Court, the US Assistant Attorney General, O'Brian argued, on behalf on the FTC that firstly, the merging firms were competitors and the transaction amounted to an acquisition of stock of one competitor by another engaged in commerce as contemplated by section 7 of the Clayton Act.¹⁸⁰ The FTC further argued that the effect of the acquisition was to substantially lessen competition between the two competitors as it would eliminate McElwain.¹⁸¹ The agency insisted that the acquisition would restrain trade in the shoe business as well as tend to create a monopoly in interstate commerce in such business.¹⁸² Finally, the FTC contended that there was not sufficient evidence to sustain the parties' claim that McElwain would go out of

¹⁷³ *International Shoe Co.* (note 6 above) 301.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Section 7 of the Clayton Act of 1914 as amended.

¹⁷⁷ *International Shoe Co.* (note 6 above) 294.

¹⁷⁸ *Ibid.*

¹⁷⁹ *International Shoe Co. v FTC* (note 154 above) 523.

¹⁸⁰ *International Shoe Co.* (note 6 above) 293.

¹⁸¹ *Ibid.*, 294.

¹⁸² *Ibid.*

business and its assets would exit the relevant market thereby terminating competition if its stock was to be acquired by International Shoe.¹⁸³

Nagel,¹⁸⁴ appearing for International Shoe, argued that the acquisition was not in violation of section 7 of the Clayton Act as no substantial competition existed between the merging parties prior to the merger.¹⁸⁵ Thus there was no basis to hold the acquisition as substantially lessening competition.¹⁸⁶ International Shoe further argued that the financial conditions of McElwain necessitated its liquidation or sale hence eliminated all present or prospective competition or restraint of commerce.¹⁸⁷

In determining whether or not the merging parties were substantial competitors before the merger, the Supreme Court noted the overlap of their products and geographical markets.¹⁸⁸ However, it went on to state that the products manufactured by International Shoe and McElwain differed materially thereby narrowing competition between the two companies only to men's shoes.¹⁸⁹ Upon evidence, it found that, contrary to the FTC and lower court's conclusions, nothing supported the conclusion that competition between the two companies was substantial to such an extent that acquisition of McElwain's stock by International Shoe would substantially lessen competition in violation of section 7 of the Clayton Act.¹⁹⁰

¹⁸³ *International Shoe Co.* (note 6 above) 291.

¹⁸⁴ Nagel C, Williamson JD and Gladney FY appeared for the petitioner, International Shoe.

¹⁸⁵ *International Shoe Co.* (note 6 above) 294

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*, 291 and 294.

¹⁸⁸ *Ibid.*, 295.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.* The Court found that despite the fact that both companies were engaged in selling dress shoes to customers for resale within limits of several same states, the two reached different markets. The two companies' products materially differed in quality, attractiveness, appearance and appealed to different customers. Cf. Stone J dissenting on 304 where the learned judge held that the two companies were competitors given that their products reached the same geographical markets thereby the same customers. He argued that to suggest that they differed in quality and hence appealed to different customers amount to mere presumptions. According to Stone, the court's approach limiting evidence to only two items served no substance in light of other suggesting companies compete in other products. It is summited that dissenting judgment's approach is plausible only if one intends to apply the state widely and in cases where one intends a narrow approach, then the majority decision is commendable. These two

Importantly, the Supreme Court considered International Shoe's submission that McElwain's financial conditions rendered it a failing firm, thus an ineffective competitor.¹⁹¹ The Court held that:

[E]vidence establishes the case of a corporation in failing circumstances, the recovery of which to a normal condition...in gravest doubt, selling its capital to the only available purchaser in order to avoid...more disastrous fate.¹⁹²

The Court also stated that although other alternatives had been mooted, it could not be considered with any degree of certainty that they might produce the desired results or would ultimately lead to the failing firms' recovery rather than final and complete collapse.¹⁹³

In conclusion and laying the foundation for the failing firm defence, Justice Sutherland stated that:

In light of the case thus disclosed of a corporation with resources so depleted and the prospects of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitors (there being no other prospective purchaser), not with the purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act.¹⁹⁴

different approaches serve different purposes considering the circumstances of each case. It is suggested that in cases involving failing firms or failing divisional assets thereof, a wider interpretation will not do any good to the plight of the firms claiming the defence.

¹⁹¹Ibid, 294.

¹⁹² Ibid, 301.

¹⁹³*International Shoe Co.* (note 6 above) 302. Cf. Stone dissenting at 306 who insisted that the failing firm must pursue other alternative that poses little threat to competition so that it would be able to continue to operate as a competitor. However, this proposition's usefulness hinges on firstly a finding that the acquisition threatens competition and secondly that the alternatives can be established with a reasonable degree of certainty. In *causa*, a finding that the two merging firms were not substantial competitors eliminated the threat the acquisition might pose to competition. Similarly, any suggested alternatives could not be confirmed with any degree of certainty that they would produce any better results than the proposed acquisition.

¹⁹⁴ Ibid, 302-303.

By recognizing that a merger can involve a firm with ‘resources so depleted’ that it faces ‘the grave probability of business failure,’ the US Supreme Court laid the foundation for the acceptance of the failing firm defence. Significantly, the language of *International Shoe Co.* provides a platform for the recognition of the failing firm defence not only as a technical doctrine relevant to merger regulation, but one whose application serves a broader public interest purpose.¹⁹⁵ The decision, it is submitted, invokes the question as to who stood to benefit from serving a failing firm. The Supreme Court expressly provided the answer to this question when holding that the primary purpose of antitrust law is public interest.¹⁹⁶ As such, a merger can only be prohibited if it can be shown that it is prejudicial to the public.¹⁹⁷ This requires a balancing exercise to determine whether serving a failing firm would serve any public benefit.

International Shoe Co. not only laid the foundation for the acceptance of the failing firm defence but also influenced the practice in relation of the application of the failing division defence as evidenced in *Reed Roller Bit Co.*¹⁹⁸ which will be discussed later. The implications of such influence forms the subject of later parts of this study suffice to say at this point that the approach adopted in *Reed Roller Bit Co.*, *International Shoe Co.* and the failing firm defence hugely contributed to the stalling of the failing division defence.

7.4.1.3 *Brown Shoe Co. v United States*: failing business as a mitigating factor

In November 1955, the United States Government instituted a civil action in the United States District Court for the Eastern District of Missouri in which it alleged that the proposed merger between Brown Shoe Company Inc., (Brown) and the G.R. Kinney Company (Kinney) would violate section 7 of the Clayton Act.¹⁹⁹ Brown was a leading manufacturer of men’s, women’s and children’s shoes as well as a retailer with over 1,230 either owned, operated or controlled

¹⁹⁵ This recognition is contained where the Supreme Court stated that should the alleged failing firm fail and exit the relevant market, the resultant loss would be to its stockholders and the community where it operated before failure.

¹⁹⁶ *International Shoe Co.* (note 6 above) 297; *Standard Oil Co.* (note 88 above) 87 and *Sinclair Refineries Co.* (note 888 above) 476.

¹⁹⁷ See *international Shoe Co.* (note 6 above) 297; *Standard Oil* (note 88 above) 87; *Sinclair Refinery Co.* (note 88 above) 754.

¹⁹⁸ *United States v. Reed Roller Bit Company* 274 F. Supp. 573 (1967).

¹⁹⁹ See *United States v. Brown Shoe Co.* 179 F.Supp. 721 (E.D.Mo. 1959).

outlets and the third largest seller of shoes in the US.²⁰⁰ Kinney was also a large shoe manufacturer and seller owning over 350 retail outlets and was considered as the eighth largest such company in the US.²⁰¹ The contemplated merger involved a stock exchange between Kinney and Brown.²⁰²

Before the District Court, the Government contended that the merger would violate section 7 of the Clayton Act as it could substantially lessen or tend to create a monopoly through the elimination of actual or potential competition in the shoe manufacturing and selling business.²⁰³ It argued that the merger would achieve this through foreclosing competition from ‘a market represented by Kinney’s retail outlets whose annual sales exceeded \$42 million’ and by enhancing Brown’s competitive advantage over other players in the shoe manufacturing, distribution and retailing business.²⁰⁴

Brown, the appellant *in casu*, contended before the District Court, *inter alia*, that there was a healthy competition in the shoe industry at both manufacturing and retail level.²⁰⁵ It argued that the merger would not ‘substantially lessen competition’ due to the existence of such vigorous competition given that Kinney manufactured only less than 0.5 per cent and retailed less than two per cent of the Nation’s shoes.²⁰⁶

The District Court rejected both parties’ broad contentions.²⁰⁷ Although the Court rejected the Government’s contention that the merging of Brown and Kinney’s manufacturing facilities would ‘substantially lessen competition’ in the shoe manufacturing business for the national market, it found that the merger would likely foreclose other manufacturers from the market represented by Kinney’s retail business hence substantially lessening competition in the

²⁰⁰ *Brown Shoe Co.* (note 7 above) 370 US 297.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, 296-7.

²⁰³ *Ibid.*, 310.

²⁰⁴ *Brown Shoe Co.* (note 7 above) 370 US 297.

²⁰⁵ *Ibid.*, 298.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, 299.

manufacturer's shoe distribution.²⁰⁸ The District Court also found that the merger could substantially lessen retail competition in areas where both Kinney and Brown stores were located.²⁰⁹

Pursuant to its findings, the District Court concluded that the merger between Brown and Kinney violated section 7 of the Clayton Act and ordered that the acquiring firm, Brown completely divest itself of all stock, share capital, assets or any interest it held in the acquired entity, Kinney, pursuant to the acquisition.²¹⁰ Kinney was to be operated as an independent entity pending completion of the ordered divestiture.²¹¹ In addition to this, Brown was restrained from acquiring or holding any interest in Kinney's business, assets or stock capital and was ordered to file a divestiture plan within a prescribed period with the Court.²¹²

However, Brown filed a notice of appeal to the US Supreme Court before submitting the divestiture plan.²¹³ Before the Supreme Court, Brown contended that the District Court had erred in failing to further subdivide the shoe market on the basis of 'age/sex' categories.²¹⁴ The Supreme Court rejected such contention as being 'impractical' and 'unwarranted' thereby affirming the District Court's conclusions.²¹⁵ Importantly, the Supreme Court held that the evidence supported a conclusion that both the vertical and horizontal effects of the merger 'substantially lessen competition.'²¹⁶ It held further that the evidence supported a finding that

²⁰⁸ *Brown Shoe Co.* (note 7 above) 370 US 299.

²⁰⁹ *Ibid.*

²¹⁰ *United States v. Brown Shoe C.* (note 199 above) 310.

²¹¹ *Ibid.*

²¹² *Brown Shoe Co.* (note 7 above) 304.

²¹³ *Ibid.* The notice of appeal was accompanied by a jurisdictional statement in which Brown sought review of the District Court's judgment. The issues relating to jurisdiction will not be discussed here as they are not of any relevance to both the study and this chapter.

²¹⁴ *Ibid.*, 327.

²¹⁵ *Ibid.*, 328.

²¹⁶ *Ibid.*, 331 (finding of an anti-competitive tying agreement) and at 332 (evidence of probability of foreclosure of individual manufacturers from the market).

the merger would probably result in the foreclosure of independent manufacturers from a market normally open to them, thereby substantially lessening competition.²¹⁷

Although the Court noted that foreclosure of a *de minimis* nature was unlikely to substantially lessen competition given the market shares involved,²¹⁸ the present case was found to involve neither a small nor a failing firm whose status might otherwise have rendered trivial the foreclosure or justify an otherwise anti-competitive tying arrangement²¹⁹ thereby sanitizing the merger.²²⁰ In dismissing the appeal, Warren CJ held that

[A]ppellant has presented no mitigating factors, such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position, nor a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets.²²¹

Although the Court did not expressly deal with the failing firm doctrine in the above case due to its inapplicability, it made reference thereto. It can be implied from the above quote that the Court accepted that should parties to a merger that is alleged to be in violation of section 7 of the Clayton Act prove the existence of business failure of one of the merging parties, such proof can work to justify an otherwise prohibited merger. The legacy of *Brown Shoe Co.* has provided a basis upon which business failure has been regarded as a mitigating factor in merger regulation.²²² Not only did the Supreme Court's acceptance of the failing firm doctrine influence this legacy but also its implications to the related failing division defence as evidenced from the *Reed Roller Bit Co.*²²³ case where in a clear case of a failing division, the parties resorted to the failing business as a mitigating factor. The implications of such an approach will be dealt with in later parts of this Chapter suffice to state here that the *Brown Shoe Co.* opinion contributed to the

²¹⁷ *Brown Shoe Co.* (note 7 above) 332.

²¹⁸ *Ibid*, 329.

²¹⁹ A tying arrangement typically forces the customer to buy a product or brand that he/she does not necessarily want so as to gain access to an essential one. See *International Salt Co. v United States* 332 US 392, 92 L Ed. 20, 68 S Ct 12(1947).

²²⁰ *Brown Shoe Co.* (note 7 above) 370 US 331.

²²¹ *Brown Shoe Co.* (note 7 above) 370 US 346.

²²² See 7.4.2.2.1 below.

²²³ *Reed Roller Bit Co.*(note 171 above).

development of lack thereof, or the failing division defence,²²⁴ a situation that this study must take note of when considering the suitability of the US approach in developing and suggesting a relevant model for Zimbabwe.

7.4.1.4 *United States v. General Dynamics Corp.* and the reformulation of the failing firm defence

In 1959, Material Services Corporation (MS), a large Midwest producer and supplier of building materials, concrete, limestone and coal, began the process of acquiring the stock of United Electric Coal Companies (United).²²⁵ Whereas United operated only strip or open-pit coal mines in Illinois and Kentucky, MS produced all of its coal from deep shaft mines which were either operated by itself or its affiliate Freeman Coal Mining Company (Freeman).²²⁶ Between 1959 and 1967, United's coal production increased from 6.9 million tons to 8.4 million tons.²²⁷ During the same period, MS' coal production tonnage increased from 3.6 million to 5.7 million.²²⁸

By 1959, MS had raised its stake in United's outstanding shares to more than 34 per cent. MS thus effectively controlled United.²²⁹ Shortly following MS's takeover of United, the former was acquired by General Dynamics Corporation (GD) as part of GD's broader expansion program aimed at diversifying its operations into commercial and non-defence activities.²³⁰ GD was a diversified corporation involved in sales of aircraft, communications and marine products to Government agencies.²³¹ By acquiring MS and, in the process, Freeman and United, GD became US's fifth largest commercial producer.²³² Through incremental direct purchases of United's

²²⁴ See generally, Wait (2003) (note 122 above).

²²⁵ *General Dynamics Corp.* (note 7 above) 415 US 488.

²²⁶ *Ibid.*, 488-89.

²²⁷ *Ibid.*, 489.

²²⁸ *Ibid.*

²²⁹ *Ibid.* The influence MS had over affairs and operations of United evidence the fact that the former was in control of the latter. The President of Freeman, MS's affiliate, was elected chair of United's executive committee. MS further initiated several fundamental changes in United's corporate structure.

²³⁰ *Ibid.*, 489-90.

²³¹ *Ibid.*

²³² *Ibid.*

stock, GD held or controlled 66.15 per cent of United's outstanding stock in 1966, making the latter its wholly owned subsidiary.²³³

In September 1967, the US Government instituted a civil antitrust action in the United States District Court for the Northern District of Illinois challenging MS's 1959 acquisition of United's stock as violating section 7 of the Clayton Act.²³⁴ The Government contended that the acquisition substantially lessened competition in the production and sale of coal hence fell foul of antitrust laws.²³⁵

In dismissing the Government's challenge, the *court a quo* held, *inter alia*, that there was no evidence to sustain the Government's contention that the 1959 acquisition of United by MS substantially lessened competition in any product or geographic market.²³⁶ This conclusion was hinged on the District Court's findings that *inter alia*, United's coal reserves were very low thus weakening its future potential and ability to effectively compete with other coal producers contrary to Government's statistical suggestions.²³⁷ Accordingly, the trial court concluded that given that virtually all of United's known coal reserves were either depleted or encumbered under long-term contracts it hamstrung its ability to compete effectively since it was largely unable to affect coal prices on the market.²³⁸ The Court concluded that the merger where United and Freeman were involved did not adversely affect competition as contemplated under section 7

²³³ *General Dynamics Corp.* (note 7 above) 415 US 490.

²³⁴ *United States v General Dynamics* 341 F Supp. (N.D.Ill.1967).

²³⁵ *General Dynamics Corp.* (note 7 above) 415 US 490.

²³⁶ *United States v General Dynamics*(note 234 above) 558-59.

²³⁷ *Ibid.* The District Court also found that, in support of its conclusion that the acquisition did not substantially lessen competition in the relevant product market; (i) although the period 1957 to 1967 witnessed a decline in the number of coal producers in the Eastern Interior Coal Province from 144 to 39, such was not a result of small producers being acquired by others but rather an inevitable result of changes in the nature of demand for coal and; (ii) Since United was predominantly involved in strip mining lacking expertise and experience in deep coal mining and Freeman being a deep mining company with no experience and expertise in strip mining, the two entities were very much complementary rather than competitors.

²³⁸ *General Dynamics Corp.* (note 7 above) 415 US 493.

of the Clayton Act and alleged by the Government.²³⁹ This decision was appealed by the Government.²⁴⁰

Before the Supreme Court, the Government sought to base its case on statistics showing that the acquisition of United by MS violated section 7 in that it materially enhanced MS's market share thereby contributing towards a trend of concentration in an already concentrated market of coal production and sales.²⁴¹ The Supreme Court, although it noted that in previous cases it had accepted such statistical evidence in finding violations of section 7 of the Clayton Act,²⁴² went on to dismiss the Governments' case, indicating that the effect of accepting statistics in determining whether a given merger substantially lessens competition is that Government is allowed to rely on a showing of even a small increase in market share or market concentration in industries or markets with already high concentrations or a showing of a trend towards such in proving a violation to section 7 of the Clayton Act.²⁴³

²³⁹*United States v General Dynamics*(note 234 above) 560.

²⁴⁰ *General Dynamics Corp.* (note 7 above).

²⁴¹ *Ibid*, 494.

²⁴² *Ibid*, 495. The acceptance of statistical market figures as evidence to show that merger would result in substantial lessening of competition due to its ability to increase market concentration was based mainly on the so-called fear of the rising tide in economic concentration in the 1980s. This tide was evidenced in the FTC's study published in 1984 which saw an increase in 'unchecked mergers', see Federal Trade Commission 'The Present Trend of Corporate Mergers and Acquisitions' (1984) *HR* 515, 300-317; Federal Trade Commission 'The Merger Movement : A Summary Report' (1984) 95 *Cong. Rec* 11500-11507. The Supreme Court's acceptance of such evidence was in line with the existing policy aimed at curbing increase in economic concentration even if it means prohibiting merger showing the slightest of such increases. See *Brown Shoe Co.* (note 7 above) 370 US 333 where the court rejected contention that the relevant market was characterized by a large number of vigorous competitions and held that the prevailing trend in the industry revealed a trend towards concentration. In *United States v. Philadelphia National Bank* 374 US 321, 368 10 L Ed 2d 915, 83 S Ct. 1715 (1963) the court stressed that 'a merger which produces a firm controlling an undue percentage shares of the relevant market, and results in concentration of firms in the market, is so inherently likely to lessen competition substantially that it must be enjoined...' See further *United States v Continental Can Co.* 378 US 441, 458, 12 L Ed 2d 953, 84 S Ct. 1738; *United States v Von's Grocery Co.* 384 US 270, 277, 16 L Ed 2d 555 (1966); *United States v Pabst Brewing Co.* 384 US 546, 550-52, 16 L Ed 2d 765, 86 S Ct. 1665 (1966).

²⁴³*General Dynamics Corp.* (note 7 above) 415 US 497. See *United States v. Aluminium Co.* 377 US 271, 84 S Ct 1283 (1964) citing *Philadelphia National Bank* (note 242 above) 321 U 364 n 42, 10 L Ed 2 D 915 where the court

The Supreme Court, in upholding the District Court's findings that Government's statistics alone could not be relied upon to reach a conclusion that the acquisition in question substantially lessened competition, stressed the importance of other factors pertinent to the coal industry and affecting GD's business in making such a determination.²⁴⁴ The Court thus relied on its own precedent in *Brown Shoe v United States*²⁴⁵ and that of *Continental Can*²⁴⁶ to caution against reliance on statistics as conclusive evidence to support claims that a given merger would substantially lessen competition in violation of section 7 of the Clayton Act.²⁴⁷ The Court authoritatively held that 'evidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.'²⁴⁸ Further it stated that although certain past market shares could be relied upon to assume that an entity with high market shares would maintain the same in future thereby justifying a finding that a merger involving such may violate section 7,²⁴⁹ in coal markets such statistical evidence were less conclusive given that United's coal reserves were committed to long-term contracts at fixed prices.²⁵⁰ This entailed that United's future as a competitive power was rather diminished as these commitments represented largely contractual obligations.²⁵¹ This rendered evidence of United's past ability to produce coal insignificant.²⁵² In line with this finding, the Court concluded that the company's ability to effect competition as an effective coal producer lies not in its past ability to do so but

noted that where concentration is already high, it became important to prevent even further slight increases so as to preserve the possibility of eventual deconcentration. This line of argument was followed by the Government before the District Court in *General Dynamics Corp.* See *General Dynamics Corp.* (note 7 above) 415 US 494.

²⁴⁴ *Ibid*, 498.

²⁴⁵ *Brown Shoe Co.* (note 7 above) 321-322.

²⁴⁶ *Continental Can Co.* (note 242 above) 458.

²⁴⁷ *General Dynamics Corp.* (note 7 above) 498.

²⁴⁸ *Ibid*, 501.

²⁴⁹ See for instance *Von's Grocery* (note 242 above) and *Pabst Brewing* (note 242 above).

²⁵⁰ *General Dynamics Corp.* (note 7 above) 415 US 501.

²⁵¹ *Ibid*. See also *FTC v Arch Coal Inc.*, 329 F.Supp. 2d. 109, 146-47 (D.D.C. 2004) (the acquired firm's financial obligations and high costs prevented it from acting as a maverick firm that would influence competition on the market).

²⁵² *General Dynamics Corp.* (note 7 above) 415 US 502.

rather in its future ability to compete effectively as determined by its coal reserves that were not committed to long-term contracts.²⁵³

The Supreme Court accepted evidence that United's future in coal production was bleak.²⁵⁴ This was because of its relatively depleted resource base, a situation aggravated by the fact that the vast majority of its coal reserves were committed under long-term contracts where processes were already fixed thereby allowing no further adjustments.²⁵⁵ United was found to lack the ability to develop deep coal reserves and was thus not in a position to increase its reserves necessary to maintain its status as an effective competitor in coal production.²⁵⁶ In holding that the acquisition was not in violation of section 7 of the Clayton Act as it did not substantially lessen competition, the Court concluded that although United was and remained a 'highly profitable' and efficient coal producer, it was a weak competitor given that its ability to effectively compete in the industry was severely limited by its depleted uncommitted resources that rendered it an insignificant factor in the coal market.²⁵⁷

The Court thus introduced the important concept of a 'weakened competitor' rather than sticking to the traditional failing company defence. This novel concept raises the important question as to whether the Supreme Court's analysis in *General Dynamics* reformulated the failing firm defence and the effect that this has on the application of the failing division defence.

(a) Some comments on General Dynamics: did the Supreme Court reformulate the failing firm defence?

In arguing its case, the Government contended that by relying on depleted and committed resources, the merging parties' argument turned on the failing firm defence.²⁵⁸ The Government argued that *General Dynamics* was supposed to meet the strict requirements of the failing firm

²⁵³ *General Dynamics Corp.* (note 7 above) 415 US 502.

²⁵⁴ *Ibid.*, 503. The District Court had found that of United's 52,033, 304 tons mineable at that time, only 4 million tons were uncommitted to long-term contracts.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*, 506.

²⁵⁷ *Ibid.*, 504.

²⁵⁸ *Ibid.*, 506.

defence as established and developed through case law.²⁵⁹ Applying the failing firm yardstick, the Government had contended that at the material time, that is, at acquisition, United was a healthy and thriving firm that could not be regarded as being at the brink of failure.²⁶⁰ Furthermore, General Dynamics had failed to show that MS was the only available purchaser.²⁶¹ In essence, the Respondents had failed to meet the criteria required to be met by a successful failing firm defence.

In dismissing the Government's contentions, the Supreme Court noted that rather than showing that United would have gone out of business but for the merger with MS, a finding of inadequacy of its resources formed the backbone of the Government's statistical *prima facie* case based on past production figures.²⁶² This, according to the Court, only served to solidify the conclusion that United, even if was to retain its market position, lacked sufficient reserves required of an effective competitor for long-term coal contracts essential in the coal market.²⁶³ The Court effectively distinguished the failing firm defence from the so-called 'weakened firm defence,' (the latter became famously known as the *General Dynamics* defence or analysis).²⁶⁴ In so doing, it held that failure by the Respondents to meet the strict pre-requirements of the failing firm defence did not render the merger a violation of section 7 of the Clayton Act.²⁶⁵

²⁵⁹ The US Supreme Court in several decisions has categorically require that parties seeking refuge under the failing firm defense in section 7 of the Clayton suit must meet the strict requirements of the said defense. The Court placed these strict requirements in such cases as *United States v. Third National Bank in Nashville*, 390 US 171, 19 L Ed 2 D 1015, 88 S Ct 882 (1998); *Citizen Publishing Co.* (note 6 above) and *United States v Great Buffalo Press*, 402 US 549, 29 L Ed 2d 170, 915 S Ct 1692 (1971).

²⁶⁰ *General Dynamics Corp.* (note 7 above) 507. In *International Shoe Co.* (note 6 above) 280 US 302 where the failing firm defence was 'born' the Supreme Court held that a firm is regarded as failing if its resources are so depleted that it faces the grave probability of a business failure.

²⁶¹ *Ibid.*

²⁶² *General Dynamics Corp.* (note 7 above) 415 US 508.

²⁶³ *Ibid.*, 508.

²⁶⁴ See generally Diamant IR 'The Failing Company Doctrine Since General Dynamics: More than Excess Baggage' (1979) 47(5) *Fordham Law Review* 872, 873 and Holden JH 'Public Interest in Merger Regulation' (2009), available at <http://www.law360.com/articles/90311/public-interest-in-merger-regulation>, (accessed 23 November 2012).

²⁶⁵ See note 257 above.

The reformulation of the failing firm defence was not accepted by the minority. The dissenting opinion of Justice Douglas²⁶⁶ supported the Government's view that the Court should simply have decided the fate of the merger using the established failing firm doctrine rather than the 'incorrect legal standard.'²⁶⁷ The dissenting view was that a finding that United, as a stand-alone entity, was not able to effectively affect competition as a result of having its mineable coal reserves committed under long-term contracts and its lack of expertise and experience in possessing and developing strip reserves, supported a failing company defence.²⁶⁸ Accordingly, it viewed the majority's analysis as having been premised on the incorrect time period thereby failing to employ the established legal standards for the doctrine.²⁶⁹

The minority regarded the time of acquisition rather than that of trial as being material.²⁷⁰ This entailed that the viability of the failing firm needed to be assessed as at the time of acquisition rather than at trial.²⁷¹ It is submitted that this approach is in line with the rationale for the failing firm defence being 'the lack of anti-competitive consequence if one of the combining companies was about to disappear from the market at any rate.'²⁷² However reasonable as this formulation might appear, there was no evidence to suggest that United would disappear from the market.²⁷³ To the contrary, evidence showed that at the time of the acquisition, which time was material in making the assessment as to the competitive effect of the merger, United was a healthy entity and only its future ability to meaningfully affect competition was doubtful.²⁷⁴ It is thus submitted one would not have expected the merging parties as well as the Court to employ the failing firm doctrine where it was clear that it was doomed.

Although the Supreme Court deviated from the traditional failing firm doctrine in *General Dynamics*, the circumstances of the case greatly warranted such a reformulation as the weakened

²⁶⁶ Justice Douglas delivered the minority dissenting opinion shared by Brennan, White and Marshall JJ.

²⁶⁷ *General Dynamics Corp.* (note 7 above) 525.

²⁶⁸ *Ibid*, 523.

²⁶⁹ Per Douglas J dissenting at 525.

²⁷⁰ *Ibid*.

²⁷¹ *Ibid*, 523.

²⁷² Per Douglas J in *General Dynamics Corp.* (note 7 above) 415 US 523.

²⁷³ *General Dynamics Corp.* (note 7 above) 504 (although United's future looked bleak, it remains profitable).

²⁷⁴ *General Dynamics Corp.* (note 7 above) 504.

position of United as a future competitor did not render it a failing firm within the strict application of the doctrine but simply ‘a weakened firm’ that was not a threat to competition. Crucially, the *General Dynamics* analysis influenced the development of the failing division defence as will be shown below.

From *International Shoe Co., Brown Shoe* to *General Dynamics*, the US Supreme Court had acknowledged and considered the financial status of merging parties in determining whether a given merger substantially lessened competition in the relevant line of business sufficiently enough to be deemed a violation of antitrust laws hence warranting prohibition. Albeit in various formulations, the failing firm doctrine cemented a significant role in US merger regulation. This significance can be seen in the courts’ acceptance and application of the related failing division defence. The ensuing section of this Part will discuss the application of the failing division defence in selected US judgments and how the doctrine’s development and subsequent application thereof had been influenced by the formulation discussed above.

7.4.2 Selected decisions on the failing division defence

7.4.2.1 *United States v. Lever Brothers Co.*²⁷⁵

In May 1957, Lever Brothers Company (Lever Brothers), a manufacturer of soap and cleaning products, entered into an agreement with Monsanto, a company largely involved in research and manufacturing of raw chemicals.²⁷⁶ In terms of the agreement, Monsanto transferred to Lever Brothers trademarks, copyrights and patents relating to a low cost detergent named ‘All’ as well as all its inventory and packaging relating thereto.²⁷⁷

Monsanto decided to manufacture and sell ‘All’ in 1953.²⁷⁸ This was a departure from its traditional business of manufacturing largely bulk raw chemicals.²⁷⁹ Between 1947 and 1952 it had only manufactured the product ‘All’ and sold it to Detergent Inc., The latter then packaged

²⁷⁵*United States v. Lever Brothers Co.* (note 115 above).

²⁷⁶ *Ibid*, 894.

²⁷⁷ *Ibid*, 888-889.

²⁷⁸ *Ibid*, 894.

²⁷⁹ *Ibid*, 895 (M traditionally engaged in research and manufacturing of ram chemicals in bulky).

and distributed it to various outlets for resale to the consuming public.²⁸⁰ The demand for 'All' increased in response to an increase in automatic washing machines.²⁸¹ Resultantly, Detergent Inc. failed to cope with the capital demands for advertising and distribution costs.²⁸²

In January 1953, Detergent Inc. was dissolved as a corporate entity and became a division of Monsanto.²⁸³ A six year period prior thereto saw the distribution costs of 'All' contributing greatly to the company's overall loss.²⁸⁴ Consequently, upon its absorption into Monsanto, the latter decided to both manufacture and distribute 'All.'²⁸⁵ However, even this policy shift could not revive the product's fortunes. 'All's direct sales to consumers declined in comparison to the company's other household consumer goods.²⁸⁶ This decline was attributed to the introduction of other low cost sudsing detergents by rival companies such as Proctor & Gamble and Colgate-Palmolive.²⁸⁷ These developments had a number of significant implications on the viability of 'All' and consequently Monsanto.

Before the Proctor & Gamble and Colgate-Palmolive launched 'Dash' and 'Ad' respectively, Monsanto's 'All' enjoyed monopoly in the low cost sudsing detergent market.²⁸⁸ Washing machine manufacturers greatly assisted its marketing cause through placing 'All' samples on their products.²⁸⁹ However, an increase in low cost sudsing detergents saw washing machine manufacturers abandoning these preferential marketing practices.²⁹⁰ 'All' samples were removed from machines.²⁹¹

²⁸⁰ *United States v. Lever Brothers Co.* (note 115 above). 894

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ 'All's sales amounted to \$1,450,000 in comparison to \$34 million for other products.

²⁸⁷ *Lever Brothers Co.* (note 115 above) 895. In June 1954, Proctor & Gamble introduced 'Dash', a low cost sudsing detergent. In the same year, Colgate-Palmolive introduced its own 'Ad.'

²⁸⁸ *Lever Brothers Co.* (note 115 above) 894.

²⁸⁹ *Ibid.*

²⁹⁰ *United States v. Lever Brothers Co.* (note 115 above) 894.

²⁹¹ *Ibid.*

The introduction of other low cost sudsing detergents onto the market and the stopping of preferential marketing practices by washing machine manufacturers meant more competition for 'All.'²⁹² In a bid to keep pace with these developments, Monsanto stepped up its advertising efforts.²⁹³ This inevitably resulted in a significant increase in the company's advertising costs.²⁹⁴ The period between 1954 and 1956 witnessed an increase in the number of automatic washing machines in use.²⁹⁵ One would assume that this rise in the number of automatic washing machines in use would coincide with a rise in sales for low cost sudsing detergents. However, whereas this was true for other products, the same could not be said of 'All.'²⁹⁶

The poor sales figures culminating in rising advertising costs were having a telling effect not only on 'All's viability but also on Monsanto's financial operations.²⁹⁷ Marketing and distribution of 'All' groped more capital compared to the company's other products combined.²⁹⁸ In 1956 Monsanto decided to reduce this expenditure to fewer than nine million dollars.²⁹⁹ However, this reduction coincided with a drop in 'All's market share by 23.9 per cent.³⁰⁰ These factors prompted the company to consider whether to either dispose of 'All' or acquire or develop another consumer product to distribute alongside 'All.'³⁰¹ The latter option proved unsuccessful leaving it with the option of disposing of 'All.'³⁰²

Monsanto's decision to dispose of the 'All' trademark was necessitated by the product's poor financial performance which was having a toll on the company's other businesses. It became necessary for Monsanto to refocus its efforts to research and manufacturing and distributing

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ The advertising cost of Monsanto's increased from \$5 million in 1953 to over \$12 in 1955.

²⁹⁵ *Lever Brothers Co.* (note 110 above) 895. There were only 11, 245 000 washing machines in use in 1954 and the figure sharply rose to 16,295, 000 in 1955.

²⁹⁶ During the 1953 to 1955 period sales of low cost sudsing detergents rose from 3,486, 000 to 7,836,000. However, during the same period, 'all's market share declined from a near monopoly in 1953 to about 55, 3 per cent in 1956.

²⁹⁷ *United States v. Lever Brothers Co.* (note 115 above). 895.

²⁹⁸ Ibid. 'All' used approximately \$12 million compared to \$ 5 million for all other Monsanto's products.

²⁹⁹ Ibid.

³⁰⁰ *Lever Brothers Co.* (note 115 above) 895.

³⁰¹ *United States v. Lever Brothers Co.* (note 115 above) 895.

³⁰² Ibid.

bulk raw chemicals, an area where it possessed considerable expertise as opposed to development and marketing of consumer products such as ‘All.’³⁰³

In an attempt to transfer the ‘All’ trademark and dispose of the raw material ‘Sterox’ used in its manufacture, Monsanto approached three companies namely General Foods Co., Purex Co. and Armour & Co.³⁰⁴ However, all these attempts failed for various reasons.³⁰⁵ Monsanto thus approached Lever Brothers as a last resort.³⁰⁶

Although Lever Brothers had had mixed fortunes in the low cost sudsing detergent industry, it was an established player in the heavy duty detergent product market.³⁰⁷ However, by 1956 its market share was waning hence the offer to acquire the ‘All’ trademark presented it with a welcome opportunity to acquire an already established product that was necessary to revive its competitive status in both the heavy duty and low cost sudsing detergents market.³⁰⁸ Lever Brothers then acquired ‘All’ and began marketing it in 1957.³⁰⁹

The Government subsequently brought an antitrust civil action before the United States District Court for the Southern District of New York challenging the acquisition and requesting that the District Court grant a permanent injunction and direct Lever Brothers to divest itself of all the trademarks, patents and other assets and rights that it had acquired pursuant to the 1957 agreement including the inventory of the ‘All’ product.³¹⁰ The Government contended that the acquisition violated section 7 of the Clayton Act as it substantially lessened competition and enhanced Lever Brothers’ dominant status within the heavy duty detergent market.³¹¹

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ General Foods called off the negotiations. Purex’s offer was rejected by Monsanto because in the latter’s view, it lacked the required capital resources to effectively market ‘all.’ Similarly, Monsanto rejected Amour & Co.’s bid citing reasons that it failed to meet its asking price for the asset.

³⁰⁶ Ibid, 896.

³⁰⁷ Ibid.

³⁰⁸ *Lever Brothers Co.* (note 115 above) 896.

³⁰⁹ Ibid.

³¹⁰ *Lever Brothers Co.* (note 115 above) 889.

³¹¹ Ibid.

In determining whether to grant the Government's prayer for a permanent injunction on the basis that the acquisition substantially lessened competition, the Court found that the acquisition by Lever Brothers of Monsanto's 'All' trademark, an intellectual property right, amounted to an acquisition of an asset.³¹² It was held that section 7 of the Clayton Act as amended, contemplates not only an acquisition of a corporeal asset, but also extends to an incorporeal asset such as an intellectual property right.³¹³ The crucial question was to determine whether such an acquisition had the effect of substantially lessening competition or the tendency of creating a monopoly within the relevant line of commerce.

In dismissing the Government's contention that the relevant line of commerce was the heavy duty detergent market and as such the acquisition of 'All' by Lever Brothers would substantially lessen competition in a concentrated market,³¹⁴ the Court, making reference to *Brown Shoe*,³¹⁵ held that a relevant line of commerce can be determined by considering whether there is a 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'³¹⁶ However, the Court further held that where well defined sub-markets may be identified within the broader market, the former can constitute product markets themselves.³¹⁷ In line with this, the Court found that the low cost sudsing detergent market have developed into a real submarket exhibiting characteristics that were distinct from the heavy duty detergent market in that the products were chemically different from heavy duty detergents, were marked and advertised separately and were utilized for a distinct purpose.³¹⁸ Accordingly, the Court held that the acquisition did not substantially lessen competition in the low cost sudsing

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*, 897. Government's argument was based on the assumption that since the heavy duty detergent industry was concentrated with only three major market participants in Proctor & Gamble, Colgate-Palmolive and Lever Brother, the acquisition of 'all' by Lever Brother would enhance the latter's dominant position in an already heavily concentrated industry

³¹⁵ *Brown Shoe Co.* (note 7 above) 370 US 325, 82 S Ct. 1523.

³¹⁶ *Lever Brothers Co.* (note 115 above) 889. In economics terms, cross-elasticity of demands generally denotes a measure of the responsiveness of the demand for a good to a change in the price of another. In casu, this entails the responsiveness of the demand for the 'All' product to a change in the price of other heavy duty detergents.

³¹⁷ *Lever Brothers Co.* (note 115 above) 889

³¹⁸ *Ibid.*

detergent market, a subdivision of the product market commonly referred to as detergent, given that there was active competition therein.³¹⁹

Following the Supreme Court *dicta* in *Brown Shoe Co.*,³²⁰ the District Court adopted a functional rather than a formalistic approach in determining whether the acquisition in question substantially lessened competition.³²¹ It is submitted that this approach took into account facts of each case in order to determine whether the acquisition at hand fitted within the legal meaning of the phrase ‘substantially to lessen competition’ as envisaged by section 7 of the Clayton Act. The Court further held that competition is deemed to have been substantially lessened if the effect of the acquisition is to materially cause injury to the competitive process rather than to individual competitors.³²²

Crucially, the Court considered the effect on competition of Monsanto’s withdrawal of the ‘All’ product from the submarket and found that if the former had done so, competition could have been substantially lessened.³²³ Transfer of ‘All’ to Lever Brothers was viewed as having saved competition in the submarket.³²⁴ This was regardless of the fact that although Lever Brothers had a rather unsatisfactory performance history in the low cost sudsing detergent industry, it had the resources, experience and expertise necessary to effectively market and promote ‘All’ thereby ensuring that the product maintains its presence on the market and in the process resulted in maintaining and promoting competition.³²⁵

The ability of Lever Brothers to maintain ‘All’ as an effective and competitive product on the submarket was a crucial consideration that the Court took into account in formulating its opinion.³²⁶ The acquisition thus preserved the competitive business of Monsanto and in the

³¹⁹ *Ibid.*

³²⁰ *Brown Shoe Co.* (note 7 above) 370 US321-22; 82 S.Ct.1522.

³²¹ *Lever Brothers Co.* (note 115 above) 891.

³²² *Ibid.*, 891. See also *Brown Shoe Co.* (note 7 above) 320.

³²³ *Ibid.*, 898.

³²⁴ *Lever Brothers Co.* (note 115 above) 898.

³²⁵ *Lever Brothers Co.* (note 115 above) 898.

³²⁶ See also *American Crystal Sugar v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (1967), *affid* 2 Cir. 259 F.2d 524 (1968).

process promoted competition.³²⁷ This situation could not have been attained if the acquisition was not done.³²⁸ This observation essentially acknowledged the failing division doctrine in merger regulation particularly where the learned Dowson J opined that:

Acquisition by one company of the particular brand of another preserved the competitive business of the other company and promoted a more active competition than if the acquisition had not been made. To decline this case by application of statistical figures, as Government urge, would subordinate reality to formulae.³²⁹

The Court further stressed that antitrust law, in particular the Clayton Act, were not intended to suppress competition but rather promote it.³³⁰ This was stated in the following terms:

[F]or this would mean that in the future a company with a failing brand could never transfer that brand to another company ready and able to market and distribute it in true competitive fashion. The brand would die, and competition would be diminished.³³¹

This formulation supports a conclusion that although the antitrust laws do not expressly provide for the failing division defence inasmuch as they do not provide expressly for the failing firm defence, the doctrine's application in mitigating mergers that might otherwise violate section 7 of the Clayton Act finds support therein. This is true given that the intention of Congress in enacting the Act was neither to prohibit any merger³³² nor to suppress corporate transactions, including transfer of part of failing business, which promotes competition.³³³

The Government had contended that by acquiring 'All,' Lever Brothers would have acquired a dominant market position within the detergent industry. However, this contention was not only

³²⁷*Lever Brothers Co.* (note 115 above) 899.

³²⁸ *Ibid.*

³²⁹ *Ibid.* See also *Brown Shoe Co.* (note 7 above) 321-22; *Continental Can Co.* (note 242 above) 458.

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *International Shoe Co.* (note 6 above) 298 where it was noted that the acquisition of stock of one corporation by another is not prohibited even if such an acquisition would result in some lessening of competition unless if such lessening is to a material degree.

³³³ *Lever Brothers Co.* (note 115 above) 899.

based on an incorrect formulation of the ‘relevant line of commerce’³³⁴ but also based on statistical formulations that were not supported by evidence.³³⁵ Evidence presented before the Court pointed to the fact that competition in the industry had actually increased due partly to the increase in market shares of small distributors outside the traditional heavy weights in Proctor & Gamble, Colgate-Palmolive and Lever Brothers. Lever Brothers did not acquire all the rights in Monsanto’s ‘All’ for the former did not eliminate the manufacture of ‘All’ but simply transferred to Lever Brothers the right to manufacture the product under that name.³³⁶ This meant Monsanto retained the right to manufacture ‘All’ and distribute it under a different name thereby maintaining competition since the product was not eliminated from the relevant market.³³⁷ The Court thus dismissed the Government’s challenge.

7.4.2.1.2 The significance of the *Lever Brothers Co.* to the failing division defence

Although Monsanto’s ‘All’ was not a failed business within the strict meaning of the word,³³⁸ the Court still found that its transfer to Lever Brothers was not in violation of section 7 of the

³³⁴Ibid, 897. The Government had argued that the acquisition would substantially lessen competition in the entire heavy duty detergent market. However, the court employing the reasoning in *Brown Shoe Co.* (note 7 above) 322 n 38 held that the facts point to an emergence of a real submarket, namely the low cost sudsing detergent market that was both distinct and separate from the heavy duty detergent market.

³³⁵Ibid, 900.

³³⁶Ibid.

³³⁷Ibid. In addition to Lever Brothers, the product ‘all’ continued to be distributed by other smaller companies namely, Climalene Co. who distributed it under the trade name ‘Spin,’ Amour & Co. under ‘Triumph’ and Swift & Co. under ‘Solar.’

³³⁸In *International Shoe Co.* (note 6 above) 302 the Supreme Court in laying the foundations for the failing firm doctrine noted that a company can be deemed to be failing if its resources are so depleted to such an extent of hampering any prospects of rehabilitation but rather place it on the brink of business failure. In *Citizen Publishing Co.* (note 6 above) 137 held that courts normally require a demonstration that the alleged failing firm will file for bankruptcy because it faces ‘the grave probability of business failure.’ See further *Michigan Citizen for an Independent Press et al v Richard Thornburg, US Attorney General et al* 868 F. 2d. 1285, 1288 (1989); *United States v. Maryland & Virginia Milk Producers Association, Inc.*, 167 F.Supp. 779, 808 (D.D.C. 1958) where the court employed the formulation in *Diebold Inc.* (note 6 above) 369 US 825 to find the defendant as being ‘hopelessly insolvent and ...deeply in debt...[and] in fact on the brink of bankruptcy.’ See also Shapiro C ‘Competition Policy in Distressed Industries’ (2009) *ABA Antitrust Symposium, Competition as Public Policy* 15 (Remarks by the Deputy Assistant Attorney-General for Economics, Antitrust Division US Department of Justice,

Clayton Act. This was because rather than substantially lessening competition or creating a monopoly, the merger actually promoted competition in the low cost sudsing detergent market.³³⁹ This observation is commendable in that it represents a material departure from the strict requirements associated with the failing firm doctrine.³⁴⁰ The failing firm doctrine requires parties invoking the defence to demonstrate that the target firm is facing ‘a grave probability of a business failure’³⁴¹ as one of cumulative criteria to meet the defence in order to justify that the acquisition in question does not violate section 7 of the Clayton Act.

However, *Lever Brother Co.* raises the question as to whether the same conclusion would have been reached had Monsanto’s ‘All’ product been transferred to Lever Brothers rather than merely the trademark therein. It is submitted that there is evidence to suggest that the Court could have reached the same conclusion, that is, that the transfer did not substantially lessen competition in the relevant product market given that the decision was based on a flexible functional rather than rigid mechanical and formalistic approach. The US courts’ jurisprudence

May 13, 2009). Shapiro distinguished between a firm that is merely facing financial difficulties and one whose conditions put its future ability to effectively compete in doubt. The former case though evidence a firm in financial difficulties, cannot qualify as a case of a failing firm since the firm might have valuable assets that can be useful in employing, inter alia, management turnaround schemes. The latter case however is one of a failing firm. In *casu*, Monsanto continued to produce and sell the product ‘All’ under a different name hence the same could not be said to have failed.

³³⁹*Lever Brothers Co.* (note 115 above) 900.

³⁴⁰ See on the strictness of the failing firm doctrine, *Citizen Publishing Co.* (note 6 above) 931 (‘we confine the failing company doctrine to its present narrow scope’). See also Scheffman D, Coate M & Silvia L, ‘20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective’ (2002) *Federal Trade Commission, Bureau of Economics* (June 4, 2002) 51 (‘The FTC has successfully challenged a number of mergers where a failing firm defense was alleged.’), available at <http://www.justice.gov/atr/hmerger/12881.pdf>, (accessed 21 September 2012); Valentine (1995) (note 136 above) (the standards of the defence ‘are strict . . . [and] rarely all satisfied, and, as a result, the defense is seldom invoked. In fact, the Supreme Court has not upheld its application since its 1930 *International Shoe* decision.’); Friedman RD ‘Untangling the Failing Company Doctrine’ (1986) *64 Texas Law Review* 1375, 1376 (‘[The failing firm defense] has often been ignored or scorned, and [is] rarely invoked with success in litigation.’) and Fina TD and Mehta V ‘The Failing Firm Defence: Alive and Well’ (2011) *The Antitrust Source* 1 (‘Despite the defence’s longevity, the stringent standards underlying the doctrine have limited its use over time. The defense has seldom been raised by merging parties in courts or before the Agencies and, when invoked, has rarely succeeded.’)

³⁴¹*International Shoe Co.* (note 6 above) 302; *Citizen Publishing Co.* (note 6 above) 137.

in supporting and advancing such an approach,³⁴² ensures that cases are determined on an individual basis having regard to each case's facts and merits rather than on a predetermined rigid formal and mechanical basis.

Although the Court's opinion was largely influenced by such celebrated cases as *Brown Shoe Co.*³⁴³ especially on rejecting statistical evidence in determining the effects of the merger on competition, it is submitted that the influence is a positive one as it does not produce absurd results. However, the Court did not fully develop the failing division doctrine in this case as nothing was mentioned relating to criteria that the merger was to meet besides simply subordinating it to the *Brown Shoe Co.* opinion. One can argue that such an oversight intended or otherwise, is merely an academic preoccupation of little practical consequence at least in this case. This however does not necessarily mean that whenever a merger involves a failing part of a business rather than the entire business the courts must resort to applying the failing firm doctrine in the place of the failing division doctrine.³⁴⁴ It is submitted that such an approach clouds the demarcation between these two related but rather distinct doctrines. The Court in *Lever Brothers* acknowledged and applied the failing division defence, albeit subtly in reaching the conclusion that the transfer of the trademark 'All' to Lever Brothers was not in violation of section 7 of the Clayton Act as the lawmaker never intended to prevent corporate transactions where a company with a failing brand could transfer such a brand to another entity which is in a better position to sustain the brand and in the process effectively maintain and promote competition within the relevant market.³⁴⁵

7.4.2.2 *United States v. Reed Roller Bit Co.*³⁴⁶

Reed Roller Bit Company (now G. W. Murphy Industries) (Reed) and American Machine & Foundry Company (AMF) entered into an agreement in terms of which Reed would acquire AMF's AMF American Iron Inc. (American Iron), a wholly owned subsidiary of AMF.³⁴⁷

³⁴² See *Brown Shoe Co.* (note 7 above) 321-22; *United States v Columbia Pictures Corp.* 189 F. Supp. 153, 196 (S.D.N.Y. 1960); *Continental Can Co.* (note 242 above) 217 F.Supp. 761.

³⁴³ *Brown Shoe Co.* (note 7 above).

³⁴⁴ See Wait (2003) (note 122 above).

³⁴⁵ *Lever Brothers Co.* (note 115 above) 899.

³⁴⁶ *Reed Roller Bit Co.* (note 198 above).

Reed was a company incorporated under the laws of the State of Texas with its principal offices in Houston, Texas.³⁴⁸ The company manufactured equipment used in oil well drilling with rock bits as its primary product.³⁴⁹ By 1965, it held approximately 12.6 per cent of the rock bit market making it the fourth largest rock bit manufacturer in the US.³⁵⁰ In addition to rock bit, it also manufactured tool joints and drill collars both used on oil well drilling equipment.³⁵¹

AMF was incorporated under the laws of the State of New Jersey and manufactured multifunctional product equipment.³⁵² These included ‘automatic pin spotting bowling machines, bicycles, bakery machinery, beverages dispensers, water purification systems, and various recreational supplies and equipment, food and tobacco processing machinery, and railroad tank and hopper cars.’³⁵³ In 1955 AMF acquired American Iron & Machinery Works Company, an Oklahoma City based corporation that manufactured drilling and product equipment used in oil fields.³⁵⁴ Following this acquisition, the latter was operated as a wholly owned subsidiary of AMF under the name AMF American Iron Inc.³⁵⁵ This entity was incorporated under the laws of the State of Delaware until it was dissolved in January of 1966.³⁵⁶ In addition to a variety of product lines,³⁵⁷ American Iron also manufactured and sold tool joints and drill collars.³⁵⁸

Following sustained periods of poor business performances on American Iron’s part, AMF became discontented and by 1960 it had retained a business broker with the aim of disposing of the former.³⁵⁹ Despite numerous expressions of interest from companies including Reed, no

³⁴⁷ Ibid, 576.

³⁴⁸ Ibid,575.

³⁴⁹ Ibid, 574.

³⁵⁰ Ibid. In 1965 Reed’s rock bit sales amounted to \$11.589.000.

³⁵¹ Ibid.

³⁵² Ibid,575.

³⁵³ Ibid.

³⁵⁴ *Reed Roller Bit Co.* (note 198 above) 576-7.

³⁵⁵ Ibid, 576.

³⁵⁶ Ibid.

³⁵⁷ Ibid. American Iron produced fluid end expandable ports, catheads, fishing tools, rig equipment, and various types of production tools.

³⁵⁸ Ibid.

³⁵⁹ Ibid,576.

concrete offers were made to purchase American Iron.³⁶⁰ However, in 1965 Reed expressed an interest in acquiring assets of American Iron from AMF.³⁶¹ Reed cited the need to expand its business so as to include the manufacturing of oil well drilling equipment as the rationale behind this change of interest.³⁶² This line was part of the two entities' non-competing businesses.³⁶³ Reed and American Iron competed in tool joints and drill collars business.³⁶⁴ In November 1965 Reed and AMF had reached an agreement and by December Reed had finalized the acquisition of American Iron assets from AMF.³⁶⁵

In June 1966, the US Government instituted a civil antitrust action in the United States District Court for the Western District of Oklahoma against Reed, AMF and American Iron, challenging the 1965 acquisition of American Iron assets by Reed from AMF.³⁶⁶ The Government contended that the acquisition³⁶⁷ violated section 7 of the Clayton Act as it substantially lessened competition in the oil well drilling market through elimination of a significant competitor and creating in its place, a dominant firm.³⁶⁸ The Government's case was based on evidence that showed that in 1965, Reed and American Iron were competitors in drill collar and tool joints manufacturing thus the horizontal merger would substantially lessen competition in that industry.³⁶⁹

In 1956, there were only four significant companies in the US that were involved in tool joint manufacturing. These were Hughes Tool Company, Reed, American Iron and National Supply Division of Armco Steel Corporation.³⁷⁰ American Iron was the third largest producer and seller

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ *Reed Roller Bit Co.* (note 198 above).

³⁶⁷ Simultaneously the Government sought an order to preliminary enjoin Reed from taking any actions which would alter the production and operations of American Iron. It also sought to have the court enjoin AMF from taking any calculated to render American Iron an independent and effective competitor.

³⁶⁸ *Reed Roller Bit Co.* (note 198 above) 579.

³⁶⁹ Ibid, 577.

³⁷⁰ Ibid.

of tool joints in the US with sales figures constituting approximately 13 percent of the market.³⁷¹ Reed was second with about 35.2 percent of the total sales.³⁷² Thus the merger between these two would have meant that American Iron, the third largest tool joint producer and seller, would be eliminated from a market with only four significant players and in its place, a new entity, Reed-American Iron, would be created with a market share of approximately 48 percent.³⁷³

In the drill collar industry, American Iron's 1965 sales figures made it the fifth largest producer and seller holding about 10.4 percent of the market share in an industry that was dominated by only seven significant producers and sellers.³⁷⁴ Reed held 19.6 percent of the total market shares based on sales making it the second highest producer and seller on the US drill collar market.³⁷⁵ Similarly, the combination of the second and fifth largest drill collar producer and seller would have seen the creation of a new dominant player with a combined market share of 30 per cent and the elimination of one of the seven significant industry participants in American Iron.³⁷⁶

In assessing whether or not the merger was to be blocked on the basis that it would substantially lessen competition or tend to create a monopoly in violation of section 7 of the Clayton Act, the Court drew comparisons with the *Philadelphia National Bank*³⁷⁷ decision where a merger involving the second and third largest banks resulting in a combined market share of 30 percent was condemned as producing 'a firm controlling an undue percentage of the relevant market, and result in a significant increase in the concentration of firms in that market...'³⁷⁸ *In casu*, the Court found that the merger between the second and third largest tool joint producers would eliminate one of only four of significant market participants and replace it with Reed-American Iron, with a combined market share of approximately 48 percent.³⁷⁹ Similarly, the Court found that the merger of two of the five largest drill collars producers and sellers in a seven player industry

³⁷¹ *Ibid*, 577. In 1965 American Iron's tool joint sales amounted to \$1,387,000.

³⁷² *Ibid*.

³⁷³ *Ibid*, 579.

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid*.

³⁷⁶ *Reed Roller Bit Co.* (note 198 above) 579.

³⁷⁷ *Philadelphia National Bank* (note 242 above).

³⁷⁸ *Philadelphia National Bank* (note 242 above) 368; *Aluminium Co. of America* (note 243 above) 277-278.

³⁷⁹ *Reed Roller Bit Co.* (note 198 above) 579.

would have the effect of eliminating one of the effective market participants and replacing it with a combined firm with approximately 30 percent of the US market share.³⁸⁰ Accordingly, the Court held that the acquisition of AMF's American Iron assets by Reed violated section 7 of the Clayton Act hence it was illegal.³⁸¹

Reed contended that although the acquisition *prima facie* suggested that competition would be negatively affected as a result of the acquisition, the fact that American Iron's business was performing poorly was a 'migratory factor' that would neutralize the transaction's illegality.³⁸² Relying on *Brown Shoe Co.*³⁸³ where the Supreme Court neutralized a finding of illegality with existence of 'mitigating factors such as business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position...',³⁸⁴ it was argued that American Iron's fate neutralized this illegality hence that it should save the merger.

It is submitted that by relying on *Brown Shoe Co.*, Reed essentially invoked the failing company defence in an attempt to justify an otherwise anti-competitive and illegal merger. The basis thereof was that American Iron was a failing business incapable of maintaining its position as an effective competitor in the market.³⁸⁵ The effect thereof would be that its merger with Reed, although creating a dominant firm, would not have eliminated an effective competitor thus it did not substantially lessen competition but rather created a vital competitor in the market.³⁸⁶

Reed argued for a broader application of the failing firm defence to include not only the traditional cases of 'officially or clear-cut insolvency or bankruptcy' but to extend to situations such as those of American Iron where a company experienced poor financial performance hence qualified for reprieve under the doctrine.³⁸⁷ The common factor in both these scenarios is that the

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ *Brown Shoe Co.* (note 7 above).

³⁸⁴ *Brown Shoe Co.* (note 7 above) 346.

³⁸⁵ See note 385 above.

³⁸⁶ See *Brown Shoe Co.* (note 7 above) 391 where the Supreme Court stated that 'a merger between a corporation which is more financially healthy and a failing one which is no longer a vital competitive factor in the market' is not a threat to competition but rather promote effective competition.

³⁸⁷ *Reed Roller Bit Co.* (note 198 above) 580.

target firm is deemed not to be in a position to effectively compete thus does not constitute a significant factor or competitor in the market.

The Government insisted on the traditional narrow and strict approach to the failing company defence arguing that Reed simply had to meet the strict criterion set by the Supreme Court in *International Shoe Co.*³⁸⁸ and followed in such cases as *Diebold Inc.*³⁸⁹ The Government's contention was that Reed needed to demonstrate that American Iron was a failing concern in that it was at the brink of bankruptcy³⁹⁰ or that it possessed inadequate resources rendering it an ineffective competitor as per *Brown Shoe*.³⁹¹

In determining whether the failing firm defence had been met, the Court found that American Iron's poor performance, although made it an unattractive subsidiary of AMF, did not render it a failing concern within the strict meaning of the term.³⁹² This finding was premised on the fact that American Iron was not on the brink of bankruptcy and further that there was nothing in evidence to suggest that it would have been so in the absence of the merger.³⁹³ On this ground alone, the failing firm defence failed.³⁹⁴

In order to successfully prove the failing firm defence, the merging parties are further required to demonstrate that the acquiring concern is the only available purchaser.³⁹⁵ This entails that there

³⁸⁸ *Ibid.*, 583. See *International Shoe Co.* (note 6 above).

³⁸⁹ *Diebold Inc.*, (note 6 above) 825. In this case the court found that the acquired firm was hopelessly insolvent and faced with imminent receivership and further that the acquiring firm was the only *bona fide* purchaser.

³⁹⁰ *Reed Roller Bit Co.* (note 198 above) 584. This element was discussed in *International Shoe Co.* (note 6 above) 302 where the Supreme Court held that for the failing firm defense to apply, the target firm must be faced with 'a grave probability of business failure.' See also *Citizen Publishing Co.* (note 6 above) 137. In *Diebold Inc.* (note 6 above) 825 the Supreme Court held that the target was a failing firm since it was hopelessly insolvent and faced with imminent receivership. See also *Maryland & Virginia Milk Producers Association, Inc.*, (note 338 above) 808.

³⁹¹ *Brown Shoe Co.* (note 7 above) 346; *General Dynamics Corp.* (note 7 above) 504.

³⁹² *Reed Roller Bit Co.* (note 198 above) 584.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ The parties must have made an effort to locate alternative purchasers. This means that the parties must follow every possible lead. In *Calnetics Corp. v Volkswagen of America Inc.*, 348 F.Supp.606, 622 9C(.D.Cal. 1972) it was held that where a company failed to hire a broker for purposes of managing the transaction and ignores possible sales leads, such fail short of making required efforts.

must be no other alternative purchasers posing a less competitive threat.³⁹⁶ The Court found that on this criterion, the defence also failed since no evidence was adduced to prove that Reed was the only available prospective purchaser.³⁹⁷ This finding was made regardless of proof that AMF had made unsuccessful attempts to entice purchasers.³⁹⁸ This illustrates that even if merging parties had made unsuccessful attempts to find alternative purchasers, they still had to prove that the acquiring firm was the only available purchaser for the failing division even, as in this case, if such an acquisition would pose a competitive threat. This makes the requirement and ultimately the defence difficult to meet.

Crucially, the Court reluctantly refused to extend the failing firm doctrine to cover situations involving failing divisions of otherwise healthy firms, in this case, AMF's American Iron, although not necessarily on the brink of insolvency, as not violating section 7 of the Clayton Act on the basis that such a concern was not an effective competitor hence an insignificant market factor. The Court's approach gives rise to two main issues:

- (a) whether it was simply an issue of the question having been raised in the wrong court, that is, a lower court? or,
- (b) whether the parties themselves erred in relying on the failing firm defence when the situation demanded a failing division defence?

Answers to these questions raise in total the question as to the significance of this decision and again explores the impact of the failing firm defence and US Court jurisprudence on the development or lack thereof of the failing division defence and how these factors combine to provide a model for Zimbabwe. These issues will be explored further below.

7.4.2.2.1 The significance of the *Reed Roller Bit Co.*: the *Brown Shoe Co.* 'curse'

³⁹⁶ *International Shoe Co.* (note 6 above) 302.

³⁹⁷ *Reed Roller Bit Co.* (note 198 above) 584.

³⁹⁸ *Ibid*,556.

The sale of the poorly performing American Iron, a subsidiary of AMF to Reed constituted a sale of a failing asset. The Court acknowledged this albeit in a footnote³⁹⁹ when it stated that

[I]f failed to establish the failing company defence criteria, becomes unnecessary and academic to decide whether the failing company doctrine extends to the sale of an unprofitable subsidiary of a prosperous parent company. It would seem that most of the justifications for the doctrine would be equally applicable to such a situation and that the doctrine if otherwise applicable should be applied.⁴⁰⁰

This approach buttresses Wait's observation that 'if the failing firm defence is considered a survivor [...], the failing divisional defence is analogous to a shipwreck.'⁴⁰¹ The significance of this observation is that the failing division defence's development has been subordinated to the failing firm defence. The failing firm defence thus became the survivor.⁴⁰² This entails that the failing firm defence is applied even where it is clear that the appropriate remedy that the litigants require in mitigating the illegality of the merger lies in the failing division defence.⁴⁰³ The fact that this defence is overshadowed by the failing firm defence even where the former is appropriate makes the litigants' task difficult.

Although the Government's case in rebutting Reed's contention for a broader application of the failing firm defence rested on the need for the courts to maintain a strict and narrow approach, one can argue that the Court being a District Court, could not be expected to pronounce upon and go beyond the boundaries set by the Supreme Court in establishing a strict and narrow failing firm defence.⁴⁰⁴ The Court correctly pointed out that until such a time as the Supreme Court approves a merger involving a poorly performing subsidiary that is not on the brink of

³⁹⁹ Wait (2003) (note 122 above) 447. Reed lamented the fact that although the concept of the failing divisional assets was novel and presenting an opportunity for the court to develop the doctrine, the latter merely addressed it in a footnote.

⁴⁰⁰ *Reed Roller Bit Co.* (note 198 above) 584 n1.

⁴⁰¹ Wait (2003) (note 122 above) 430.

⁴⁰² Wait (2003) (note 122 above) 439.

⁴⁰³ *Brown Shoe Co.* (note 7 above) 346.

⁴⁰⁴ The Government in *Reed Roller Bit Co.* (note 198 above) 583 even argued for the application of a narrow and strict failing firm defence as per tradition. The fact that the defence is strict and narrow is echoed in the merger guidelines where the parties relying thereon are required to meet the prerequisites cumulatively. See section 11 of the *Horizontal Merger Guidelines*. This means that failure to satisfy any of the set criteria renders the defence inapplicable.

bankruptcy as in the case with American Iron, the District Court was not in a position to hold that the failing firm doctrine extends to cover such claims.⁴⁰⁵

It is submitted that Reed should have relied on the failing division defense, that is, the status of American Iron as a subsidiary of AMF. By so doing, one would assume that the Court's finding would not have centred on the failing firm defense but rather on the failing division defense. However, as the Court correctly pointed out, the fact that the subsidiary was not failing within the meaning of the term⁴⁰⁶ implies that even the failing division defense could have failed. This is because even the failing division defense requires a showing that the divisional assets in question are on the brink of exiting the relevant market absent the merger.⁴⁰⁷

The reluctance of the Court in *Reed Roller Bit Co.* to develop the failing division defence was a sad and unfortunate development. As Wait noted, this 'set the stage for the courts to forestall application of the failing division defence.'⁴⁰⁸ In *Blue Bell Inc.*,⁴⁰⁹ the District Court for the Middle District of Tennessee failed to accept the failing division defense after the parties had argued that the acquisition of a poorly performing industrial laundry division did not substantially lessen competition in violation of section 7 of the Clayton Act given the former's competitive standing in the market.⁴¹⁰ Unlike in *Reed Roller Bit Co.* where the parties had relied on the failing firm defense, in *Blue Bell* the parties had claimed the failing division defense. However, the Court failed to pronounce further on it⁴¹¹ noting that even if it does exit, the mere fact that the division in question was not performing well was not enough to render it a failing concern.⁴¹² Just like *Reed Roller Bit Co.*, the *Blue Bell* decision did little to develop the failing firm doctrine besides further forestalling it.

⁴⁰⁵ *Reed Roller Bit Co.* (note 198 above) 584.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Section 11 of the *Horizontal Merger Guidelines*.

⁴⁰⁸ Wait (2003) (note 122 above) 447.

⁴⁰⁹ *United States v. Blue Bell Inc.*, 395 F. Supp. 583, 550 (M.D.Tenn. 1975).

⁴¹⁰ *Ibid.*

⁴¹¹ Wait (2003)(note 122 above) 447.

⁴¹² *Reed Roller Bit Co.* (note 198 above) 550.

Given the prominent influence of such decision as *Brown Shoe Co.* on the Court's opinion in *Reed Roller Bit Co.* and *Blue Bell*, one would be tempted to state that had *Brown Shoe* not introduced the inadequate resources aspect, and stuck to the traditional failing division defence as established in *International Shoe Co.*, litigants such as Reed would not have tried to rely on this refined version in a bid to mitigate the illegality of merger. It is submitted that although this position supports the assumption that the influence of *Brown Shoe Co* on *Reed Roller Bit Co* and *Blue Bell* is more like a curse, the traditional failing firm defence as laid down in *International Shoe Co* equally poses challenges to merging parties whose transactions involves failing divisions as opposed to failing firms.

7.4.2.3 *Federal Trade Commission v. Great Lakes Chemical Corp.*⁴¹³

This case involved a civil antitrust action brought by the Federal Trade Commission (FTC) before the United States District Court for the Northern District of Illinois in June 1981. The FTC sought a preliminary injunction⁴¹⁴ aimed at barring Great Lakes Chemical Corporation (Great Lakes) from acquiring the bromine-related assets of Velsicol Chemical Corporation (Velsicol) on the grounds that such acquisition would be in violation of section 7 of the Clayton Act in that it would substantially lessen competition in the flame retardants market.⁴¹⁵

The FTC's challenge stemmed from a proposed acquisition by Great Lakes of Velsicol's bromine-related assets being a research and development facility; a bromine and bromine derivative producing plant and Velsicol's bromine fields and bromine-related receivables.⁴¹⁶ Great Lakes, a Delaware corporation, produced electronic bromine and several bromine derivatives in Illinois.⁴¹⁷ The company's range of products included 'fumigants, solvents, lubricants and flame retardants.'⁴¹⁸ In 1980 its net sales figures exceeded 12 million dollars.⁴¹⁹

⁴¹³ *Great Lakes Chemical Corp.* (note 112 above).

⁴¹⁴ At 86. Section 13 (b) of the Federal Trade Commission Act 15 U.S.C empowers the FTC to bring such action, provides that a District Court can enjoin an acquisition if satisfied that doing so would be in public interest after considering both the positive and negative implications of granting or refusing the request.

⁴¹⁵ *Great Lakes Chemical Corp.* (note 112 above) 86.

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*, 85.

⁴¹⁸ *Ibid.*

Velsicol, a wholly owned subsidiary of a Delaware corporation, Northwest Industrial Inc. (Northwest) conducting business from Illinois, produced agricultural pesticides.⁴²⁰ Following its merger with another of Northwest's subsidiary, Michigan Chemical Corporation (Michigan) in 1976, Velsicol became a 'producer of elemental bromine and bromine derivatives.'⁴²¹

At the time of the trial, Velsicol conducted minimal research and development at its Ann Arbor facility, one of the bromine-related assets proposed for acquisition by Great Lakes.⁴²² Furthermore, its El Dorado plant, also forming part of the proposed acquisition, was temporarily closed down. The FTC challenged the proposed acquisition of these assets and sought a preliminary injunction thereto.⁴²³

In determining the fate of the FTC's challenge and whether or not to grant the requested remedy, the District Court had to pronounce on the appropriateness of the requested remedy and ultimately the question as to whether the FTC's challenge could be sustained upon merits.⁴²⁴ The latter determination related to whether the proposed acquisition would violate section 7 of the Clayton Act as having the effects of substantially lessening competition or the tendency of creating a monopoly.⁴²⁵

The question as to whether there were any prospects of the FTC succeeding on a section 7 antitrust violation suit was premised on a finding of whether the proposed acquisition of Velsicol's bromine-related assets by Great Lakes would substantially lessen competition in the

⁴¹⁹Ibid, 86.

⁴²⁰ Ibid.

⁴²¹ Ibid. In 1980 Velsicol's net sales totalled less than 7.4 per cent of the product's national market sales.

⁴²²Ibid.

⁴²³Ibid, 85.

⁴²⁴ A detailed discussion of the preliminary injunction remedy that was being sought by the FTC is beyond the scope of this study and as such no attempt will be made herein to discuss it. For a detailed discussion and analysis of this remedy, see section 13 (b) of the FTC Act requires the court to determine whether, in addition to the likelihood of the agency's success in a section 7 suit, 'the equities' favour enjoining the transaction. In *FTC v. Weyehaeuser Co.* 181-1 Trade Cases 63,974, 976, (D.D.C) , affirmed f.2D, 1981, 2 Trade Cases 64, 263 (D.C. Cir. 1981) equities were held to include public interest considerations such as export promotion and benefit to local communities. See also *United States v. G. Heileman Brewing Co.* 345 F.Supp. 117,122-24 (E.D.Mich.1972).

⁴²⁵ Section 7 of the Clayton Act of 1914 as amended.

flame retardants market in violation of section 7 of the Clayton Act.⁴²⁶ The Court stated that a finding that section 7 would be violated by the merger could be mitigated by the uncompetitive conditions of one of the merging parties.⁴²⁷ It is submitted that these conditions essentially constitutes either the ‘failing company’ or the ‘failing division’ doctrine. The Court further noted that the weakened status of one of the merging firms⁴²⁸ is an important factor in assessing whether the proposed merger would likely have a negative impact on competition within the relevant line of commerce.⁴²⁹ Relying on *International Harvester Co.*,⁴³⁰ the Court stated that ‘the declining condition and bleak prospect of Velsicol’s bromine-related operations are evidence of its weakness as a competitor.’⁴³¹ Accordingly, the Court held that this state of affairs meant that the proposed acquisition would not have the effect of substantially lessening competition.⁴³²

In reiterating that the proposed merger would not substantially lessen competition, the Court employed the Supreme Court’s analysis in *General Dynamics*⁴³³ since the FTC’s case was centred on statistical evidence showing the merging firm’s past market shares signifying their current status as effective market participants.⁴³⁴ Consequently, the Court held that the acquisition of Velsicol’s assets by Great Lakes would not substantially lessen competition given the former’s weakened status which greatly diminished its ability to compete in the flame retardants market in future.⁴³⁵

⁴²⁶ *Great Lakes Chemical Corp.* (note 112 above) 87.

⁴²⁷ *Ibid.*

⁴²⁸ See *United States v. International Harvester Co.* 564 F.Supp. 2d. 769, 773, (7th Cir. 1977).

⁴²⁹ *Great Lakes Chemical Corp.* (note 112 above) 87.

⁴³⁰ *International Harvester Co.* (note 428 above) 773.

⁴³¹ *Great Lakes Chemical Corp.* (note 112 above) 87.

⁴³² *Ibid.* *Great Lakes Chemical Corp.* (note 112 above) 87.

⁴³³ *General Dynamics Corp.* (note 7 above) 508.

⁴³⁴ *Great Lakes Chemical Corp.* (note 112 above) 87, 91.

⁴³⁵ *Ibid.* See also *General Dynamics Corp.* (note 7 above) 511. In *International Harvester Co.* (note 428 above) 773, the 7th Circuit held that evidence showing that one of the merging parties was actually in a weakened state rebut the Government’s case built on past market statistical evidence rendering such evidence insufficient to establish a prima facie case of violation of section 7 of the Clayton Act. This is because the weakened status of one of the merging parties would render it an ineffective competitor in the future.

In a classic vindication of the implications of the *General Dynamics* analysis on the traditional failing company defence as established in *International Shoe Co.*⁴³⁶ and further applied in *Diebold Inc.*⁴³⁷ and developed in *Citizen Publishing Co.*,⁴³⁸ the Court stated that although the evidence of Velsicol's deteriorating conditions in respect to its bromine-related assets rendered it a failing firm, for it to meet the criteria for a successful failing firm defence it needed to satisfy all the set requirements.⁴³⁹ The Court further noted that even if 'Velsicol is not a failing company, the debilitated conditions of Velsicol's bromine operations are an important equity to be considered [...]',⁴⁴⁰

The Court found that no evidence supported a conclusion that the acquisition of Velsicol's weakened bromine related business would substantially lessen competition in the flame retardants market.⁴⁴¹ This was because the acquisition would neither create new market entry barriers nor result in diminished competition amongst the incumbents.⁴⁴² On the contrary, the merger resulted in an intensified competition between the producers of various flame retardants.⁴⁴³ Importantly, Velsicol's future as an effective competitor was handicapped by its

⁴³⁶*International Shoe Co.* (note 6 above) 302.

⁴³⁷*Diebold Inc.* (note 6 above) 655.

⁴³⁸*Citizen Publishing Co.* (note 6 above) 136-39. The Supreme Court in *Citizen Publishing Co.* formulated the modern failing firm doctrine. The three-pronged analysis that was employed by the Supreme Court in this 1969 decision has been adopted in many jurisdictions with little variations showing the importance of the decision in the development of the doctrine. Justice Douglas set the following test: (i) the acquired company must be in imminent danger of failure, (ii) there must be little or no prospect of re-organizing the failing company and (iii) the merging parties must a good faith attempt to find no alternative purchasers who pose a less threat to competition.

⁴³⁹*Great Lakes Chemical Corp.* (note 112 above) 87.

⁴⁴⁰*Great Lakes Chemical Corp.* (note 112 above) 87. In respect to the whether or not a court can grant a preliminary injunction, see note 410 above.

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*,90.

⁴⁴³ *Ibid.* This was supported by the fact that since Great Lakes embanks upon the production of certain flame retardants variants, process of the product greatly dropped. A drop or increase in price is an important factor in determining the level of actual competition on a given market. A market that is characterized by high prices or regular increases is deemed to be anticompetitive as market participants would be in a position to effect price hikes absent determination of market forces, that is, supply and demand. Similarly, a decrease in prices is a characteristic

unwillingness to continually invest in research necessary for the development of its bromine related products.⁴⁴⁴ This was in contrast to Great Lakes who had a vibrant research policy making the proposed acquisition of an unwilling researcher by a vibrant one a competition enhancing merger.⁴⁴⁵

7.4.2.3.1 The *Great Lakes Chemical Corp*-approach and significance to the failing division defence

By stating that the proposed merger involving Great Lakes' purchase of 'only the bromine and flame retardant facilities of Velsicol, which together form a recognizable business unit independent of Velsicol's other operations,⁴⁴⁶ the Court acknowledged the failing division doctrine. However, the Court went on to subordinate the failing division doctrine to the established failing firm doctrine when it stated that 'the failing firm defence applies to a failing business such as Velsicol's bromine based operations whether or not such a failing business was a division of a larger corporation which is successful in other areas.'⁴⁴⁷ The approach adopted by the Court blurred the demarcation between these related but distinct doctrines. Although this might appear to be of little practical consequence, *Reed Roller Bit Co.*⁴⁴⁸ shows otherwise. If for instance Great Lakes had failed to demonstrate that Velsicol's business was a failing one, then its claim would have fallen short of the requirements for a successful failing firm defence. However, the application of a modified criterion in the form of the *General Dynamics* analysis had a significant bearing on the Court's legal opinion and finding of facts in that the Court found that even if Velsicol could not be said to be failing, its weakened status⁴⁴⁹ rendered it an insignificant

of a competitive market where firms in response to competition, reduces their prices in order to capture market shares.

⁴⁴⁴ *Ibid*, 91.

⁴⁴⁵ *Ibid*.

⁴⁴⁶ *Ibid*, 96.

⁴⁴⁷ *Great Lakes Chemical Corp.* (note 112 above) 96. In *Reed Roller Bit Co.* (note 198 above) 584 n1 the Court opined that the failure to satisfy the failing firm criteria entails that there is no need to consider the related failing division defense as the requirements are similar.

⁴⁴⁸ *Reed Roller Bit Co.* (note 198 above).

⁴⁴⁹ *Great Lakes Chemical Corp.* (note 112 above) 96. The Court accepted evidence showing Velsicol's persistent poor financial performance. For several years its bromine operations had persistently registered an increased in

market factor in the future thus its proposed acquisition by Great Lakes would not likely substantially lessen competition.

The application of the failing firm doctrine to cases such as *Great Lakes Corp.* entailed that the failing division doctrine can only be of use after the failing firm criteria had been met. In this case there is no doubt that the facts showed that Velsicol's bromine business was a failing division of Northwest. It is thus easy to say that the litigants could have relied on the failing division defence rather than the failing firm defence. The question then arises as to what difference it was going to make? Given that the failing firm defence (or the *General Dynamics* defence) was successful in this case, one would be tempted to simply say why be concerned after all. However, as noted above, if the Court had found Velsicol's bromine assets not failing then the grave consequences of subjecting the failing division doctrine to the failing firm one would have been apparent.

In dismissing the FTC's request for a preliminary injunction, the Court held that the acquisition of Velsicol's weakened and failing business by Great Lakes would not substantially lessen competition⁴⁵⁰ but rather promote a host of public interests⁴⁵¹ including Velsicol's shareholders,⁴⁵² promotion of trade,⁴⁵³ encouraging new market entry,⁴⁵⁴ enhancing research and

loses. Income of El Dorado declined continuously between 1976 and 1980 from a profit margin of \$1.8 million to a loss of \$13.6 million. By 1980, Velsicol's asset base showed a negative return of 11 percentage points. Since merging with Michigan in 1976, its bromine-related business had not made any profit.

⁴⁵⁰ *Great Lakes Chemical Corp.* (note 112 above) 98.

⁴⁵¹ The promotion of various public interests approach was in line with *International Shoe Co.* (note 6 above) 302.

⁴⁵² *Great Lakes Chemical Corp.* (note 112 above) 98.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

development in the industry,⁴⁵⁵ benefiting the local communities⁴⁵⁶ and promoting corporate restructurings necessary to turn around Velsicol's waning financial fortunes.⁴⁵⁷

Although the Court applied the *General Dynamics* analysis in a case that clearly exhibited failing divisional assets, one can say that such an approach was to good effect. This was because the *General Dynamics* analysis managed to rebut the FTC's contention that the proposed merger would negatively impact on competition based on the merging firms' past market shares. In essence Velsicol's poor financial showing rendered it an insignificant factor in the market incapable of affecting future competition therein. However, basing its legal opinion on the application of the failing firm doctrine was rather incorrect regardless of the fact that the result might not have changed. The danger in doing so was apparent in both *Reed Roller Bit Co.*⁴⁵⁸ and *Blue Bell Inc.*⁴⁵⁹ where a failure by the merging parties to demonstrate that one of the parties thereto was facing 'a grave probability of business failure'⁴⁶⁰ or on the brink of bankruptcy⁴⁶¹ meant they fell short of satisfying the criteria for the failing firm defence. Luckily in *Great Lakes* Velsicol met the criteria. Again the crucial question is whether in such cases parties must rely on the failing firm defence rather than the failing division defence?

It is possible that relying on either the failing firm or failing division defence can produce the same results, that is, the merger can either be cleared or blocked. If merging parties can successfully invoke the criteria for the failing firm defence then the merger can be approved regardless of its potential anti-competitive effects. Similarly, failure to meet the same criteria can mean that the merger will be blocked. If merging parties seeking to rely on the failing division

⁴⁵⁵ Ibid. Since Velsicol was not willing to invest and Great Lakes having an active research and developmental policy, the proposed acquisition would enhance research and development in the industry.

⁴⁵⁶ Ibid. Communities such as El Dorado and Kansas where the bromine –related assets were located would benefit more from the continuation of these facility as opposed to their closure.

⁴⁵⁷ Ibid. See also *G.Heileman Brewing Co.* (note 424 above)122-24 where in relation to whether or not to grant a preliminary injunction, the court held that the latter should not be granted if doing so would harm the financial positions of the alleged failing firm thereby preventing beneficial corporate restructuring transactions.

⁴⁵⁸ *Reed Roller Bit Co.* (note 198 above) 584 n1.

⁴⁵⁹ *Blue Bell Inc.* (note 409 above).

⁴⁶⁰ *International Shoe Co.* (note 6 above) 302; *Citizen Publishing Co.* (note 6 above) 137.

⁴⁶¹ *Michigan Citizen for an Independent Press* (note 338 above) 1288; *Maryland and Virginia Milk Producers Association* (note 338 above) 808.

defence are able to satisfy whatever criteria preferred for meeting such a defence, then their merger would get approval. Likewise if they fail to satisfy the same criteria their merger can be blocked. Accordingly, litigants would rather be sure than sorry. It is submitted that they would rather invoke the failing firm defence even if there is a strong showing of the failing division defence. This is because of the courts' reluctance to apply the latter.⁴⁶² It is argued that taking nothing away from the largely commendable approach exhibited in such decisions as *Lever Brothers Co.* and *Great Lakes Corp.*, in particular the positive influence of the Supreme Court's landmark decisions in *Brown Shoe Co.* and *General Dynamics Corp.*, this reluctance to consider the failing division doctrine as a stand-alone defence is not only a setback to the development of the failing division doctrine in merger regulation but hampers merging parties' chances of having their merger being cleared on only one of the two exceptions that justifies the approval of an otherwise anti-competitive merger under antitrust laws.

7.5 Concluding remarks

The primary objective of this chapter was to present a focused discussion of the failing division defense as provided for and applied in the US. This discussion was done within the context of providing a platform for developing and suggesting a suitable model approach for Zimbabwe given the lack of judicial, statutory and administrative clarity on the interpretation and application of the failing division doctrine in Zimbabwe. It has been shown that the US courts acknowledge and accept that financial circumstances of the merging parties can be important mitigating factors justifying an otherwise illegal merger in violation of antitrust laws.⁴⁶³ However, although the US has a well-developed jurisprudence on the interpretation and application of both the failing firm and failing division doctrine, making it a suitable jurisdiction for comparative purposes in a bid to develop and suggest a suitable model for Zimbabwe, its approach to the failing division doctrine raises a number of concerns that renders it unsuitable and largely inappropriate to advocate a wholesale adoption of the US approach for Zimbabwe.

It is appreciated that the primary aim of merger regulation is generally to maintain and promote competition within the economy for purposes of achieving both economic and non-economic

⁴⁶² See *Great Lakes Corp.* (note 112 above) 96; *Reed Roller Bit Co.* (note 198 above) 584 n1.

⁴⁶³ *Brown Shoe Co.* (note 7 above) 346.

goals. This is achieved through, *inter alia*, prohibiting corporate restructuring transactions such as mergers that are likely to materially lessen competition or create monopolistic situations⁴⁶⁴ that have the effects of denying the various perceived benefits of competition. However, it is equally appreciated that although this goal is shared by many jurisdictions, the regulatory frameworks originated and exist in different circumstances and environments.⁴⁶⁵ This realization is very significant for it determines the extent to which Zimbabwe can follow the US approach.

Although the Zimbabwean merger regulatory system expressly provides for the consideration of public interest in determining the effects of a merger on competition,⁴⁶⁶ the concept as indicated, is largely undefined. US courts have also considered public interest in the context of failing firms.⁴⁶⁷ However, this consideration does not mean that public interest issues are the ultimate objective of US antitrust laws.⁴⁶⁸ This calls for caution in considering the applicability of the US approach to Zimbabwe.

⁴⁶⁴ Section 32 (4a) of the Zimbabwean Competition Act of 1996 provides for factors which the Commission must take into account in determine ‘whether or not a merger is likely to substantially prevent or lessen competition...’ See also Section 7 of the Clayton Act of 1914 as amended which have a similar provision although with an additional reference to the tendency to create a monopoly.

⁴⁶⁵ The current formal competition regulation system in Zimbabwe encompassing merger regulation owes its existence from a broader socio-economic policy introduced by the Zimbabwean Government in the mid-1990s known as the Economic Structural Adjustment Programme (ESAP). See generally chapter 2 for the development of the Zimbabwean competition system and in 7.2.1 above for a brief historical development of the US antitrust system.

⁴⁶⁶ Section 32 (4) of the Zimbabwean Competition Act of 1996.

⁴⁶⁷ See *International Shoe Co.* (note 6 above) 302; *Great Lakes Corp.* (note 112 above) 98.

⁴⁶⁸ The US antitrust system has over different periods seemed to be inclined towards advancing various goals. However, what is clear is that the system does not necessarily seek to advance a single goal as such goals as the enhancement of market efficiency, consumer welfare, advancement of a broader socio-political objective through enhancing economic participation of small entities and the dismantling of entry barriers are prominent objectives of the system. See generally Rodger BJ and MacCulloch A *Competition Law and Policy in the EC and the UK* (2001)15-16; Sullivan T *The Political Economy of the Sherman Act: The First One Hundred Years* (1991) 3 (‘American antitrust law is not only law but also a socio-political statement about our society.’); Posner RA *Antitrust: Cases: Economic Notes and Other Materials* 2nd ed., (1981) 473 (the failing firm doctrine is ‘one of the clear examples in antitrust law of a desire to subordinate competition to other values.’ ; Fox (1994) (note 103 above).

It has been shown that even in cases where the US courts acknowledge, impliedly or otherwise, the failing division doctrine as a defence justifying an otherwise illegal merger, the application of the doctrine has been largely overshadowed by the related but distinct failing firm defence. In cases where the facts clearly pointed to a failing division rather than a failing firm, either the litigants⁴⁶⁹ or the court⁴⁷⁰ have tended to rely on the failing firm defence instead. This approach is not suitable for Zimbabwe as section 2(1) of the Competition Act defines a merger as involving an acquisition ‘of part of a business’⁴⁷¹ thus acknowledging that it might involve part of a firm and thus acquisition of a failing division. Further section 32(4a)(h) provides as one of the many factors that must be taken into account in assessing the effects of a merger or proposed merger on competition, the fact that ‘the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.’⁴⁷² Again the word ‘part of business’ acknowledges the failing division doctrine. Although it appears as a single factor, it is clear that the use of ‘or’ means the legislature never intended the parties relying on the doctrine to satisfy both requirements. Accordingly, there is a need for the development of a model that clearly recognizes the distinction between these related but different doctrines in accordance with the statutory provisions.

Lastly it is not in dispute that the US approach and practice relating to the failing division defence provides a useful model in developing and suggesting one for Zimbabwe. However, this does not justify a mere cutting from the US shelves and pasting onto the Zimbabwean void.⁴⁷³ The extent to which one can cut and paste certain approaches and practices in order to develop a suitable model for Zimbabwe will form part of the next chapter of this study.

⁴⁶⁹ *Reed Roller Bit Co.* (note 198 above) 579.

⁴⁷⁰ *Great Lakes Corp.* (note 112 above) 87.

⁴⁷¹ Section 2 (1) of the Zimbabwean Competition Act of 1996 defines a merger as ‘the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person...’

⁴⁷² Section 32 (4a)(h) of the Zimbabwean Competition Act of 1996.

⁴⁷³ See note 16 above.

Chapter 8: An ideal model for effective regulation of corporate mergers and acquisitions in Zimbabwe: suggestions and recommendations

8.1 Introduction

The study has analysed and discussed the current merger regulatory framework in Zimbabwe in order to assess the effectiveness thereof. An effective merger regulatory framework is one that is able to ensure the promotion and sustenance of beneficial corporate restructuring transactions implemented through mergers and acquisitions without unjustifiably sacrificing the competitive market structure.¹ In other words, it must be able to strike and maintain a balance between the promotion of beneficial corporate transactions, in particular those implemented through mergers and acquisitions on one hand and the protection of a competitive market structure on the other hand. In addition to this characteristic, it must be able to take into account where necessary, the implications of merger control on broader policy considerations. The latter requires a vigorous consideration of non-competition factors captured in mainly public interest considerations in merger control.²

An effective merger regulatory system thus advances principles of promoting and maintaining competition through rigorous assessment of corporate mergers and acquisitions.³ It is submitted that this task is accomplished by a legal system that adequately provides for merger control and is well supported by sound administrative practices and a well-structured institutional framework.

With the above in mind, this study aimed at developing and suggesting an ideal effective merger regulatory system for Zimbabwe. This Chapter will thus provide a summary for the main conclusions reached by the study. In order to achieve this task, Part II will highlight the main shortcomings of the current merger regulatory system. This will be followed by a presentation of the lessons that can be drawn from selected jurisdictions in Part III. Significantly, Part IV will use the lessons identified in Part III to develop and suggest a regulatory model ideal for Zimbabwe. In developing the said model, the guiding principle is

¹ See Chapter 3 in 3.1.

² See Lewis D 'South African Competition Law: Origins, Content, and Impact' in Dhall V (ed.) *Competition Law Today: Concepts, Issues and the Law in Practice* (2007) 340-363, 358.

³ See Goldberg AH 'Merger Control' in Dhall (eds.) (note 2 above) 93-107, 94.

to take into account the socio-economic context in which corporate mergers and acquisitions are regulated in Zimbabwe, that is, the underlying policy objectives for Zimbabwean competition law in general and merger control in particular. The Chapter will conclude by arguing that although the current merger regulatory framework in Zimbabwe is not effective to achieve a balance between the promotion of beneficial corporate restructuring transactions in a changed business operating environment hence requires strengthening, it is not recommended that the system adopts a mere cut-and paste approach from other jurisdictions. An ideal and effective regulatory model for Zimbabwe thus adopts and adapts the various relevant aspects of merger control to suit the country's socio-economic context.

8.2 Shortcomings of the current merger regulatory framework

This Part will provide a recap of the main shortcomings of the current merger regulatory framework in Zimbabwe. It must be emphasised that the section, as the case with the entire Chapter, does not aim at reproducing the entire study as provided elsewhere but simply presents a summary of the main findings. Accordingly, the section will provide an outline of the main shortcomings of the current Zimbabwe merger regulatory framework as discussed and analysed in Chapters 3 and 4 of the study.

8.2.1 An understated objective of the regulating statute

The Long Title to the Competition Act provides that the statute aims primarily at the promotion and maintenance of competition in the economy of Zimbabwe through, *inter alia*, the regulation of corporate mergers and acquisitions. This provision is the face of the statute for it provides for the first port of call in the interpretation of the law in question.⁴ As such the importance of this objective provision can never be underestimated.

⁴ The Long Title of a statute is set out at the beginning thereof and sets out its general purpose. It may be used as an interpretation aid just as the case with the preamble. See *Bhyatt v Commissioner for Immigration* 1932 AD 125, 129 ('it is settled law' that in the process of ascertaining legislative intention, it is permissible to have regard to the title of the Act.' For the use of the preamble, see section 6 of the Interpretation Act [Chapter 1:01] of 1962 as amended providing that 'the preamble to an enactment and any punctuation in an enactment shall form part of the enactment and may be used as aids to the construction of the enactment.' See also *A.G. v Prince Ernest Augustus of Hannover* 1957 AC 436, 467 ('When there is a preamble, it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing enacting provisions.');

Allen v Renfrew County 2004 69 OR 3rd 742 ('a preamble is a helpful interpretation device...'); *Colonial Treasurer v Road Water Board* 1907 TS 479, 482; *S v*

Merger control provides mechanisms to scrutinise corporate transactions in order to assess the likely effects thereof on the competitive structure of the market.⁵ It follows that an effective system should clearly aim at the protection of the competitive market structure.⁶ This is achieved through ensuring that firms behave competitively. In other words, markets participants must effectively compete in order to afford customers and consumers with the best possible products and services at economically justified prices.⁷ This is the essence of competition.⁸ The objective of competition law is thus the promotion and maintenance of effective competition on the market. Customers and consumers can only meaningfully benefit from competition if the relevant market participants are able to effectively compete. It is thus not the mere presence or the number of firms on the market that must be the preoccupation of competition law but rather the level of competition as evidenced from the effectiveness of market participants.⁹

Davidson 1988 (3) SA 252 (ZS). See generally Kellaway EA *Principles of legal interpretation of statutes, contracts and wills* (1995) 69; Madhuklu L *An Introduction to Zimbabwean Law* (2010) 170-71; Devenish GE *Interpretation of Statutes* (5th ed.,) (1992) 102.

⁵ See generally Goldberg (2007)(note 3 above) 93-94.

⁶ This objective that merger regulation or rather competition law should aim at protecting the competition process which in turn protect the competitive market structure was stated by the US Supreme Court in *Brown Shoe Co. v United States* 370 U.S. 294, 8 L ed, 2d. 510, 82 S Ct. 1502 (1962). See also Hamner KJ 'The Globalisation of Law: International Merger Control and Competition Law in the US, the EU, Latin America and China' (2001-2002) 11(2) *Journal of Transnational Law and Policy* 385, 398; Whish R *Competition Law* 6th ed (2009) 1.

⁷ Economically justified prices are those that are accepted as the right price for goods and services given the cost of production. Prices lower than the costs of production, though might appear lucrative to customers and consumers, are not competition enhancing as they have negative implications in the long run. A dominant firm can charge lower prices and still survive thereby pushing smaller competitors out of the market for they cannot cope. The dominant firm can then charge exorbitant since it will be the only producer on the market following the exit of the smaller firms.

⁸ Hamner (2001-2002) (note 6 above)402-3 ('primary purpose of antitrust is to maximise the economic welfare of consumers') ;Fox EM 'Towards World Antitrust and Market Access' (1997) 91 *American Journal of International Law* 1; Thorelli H 'The Federal Antitrust Policy: Origination of an Antitrust Tradition ' (1954) 166-70, 171 n20; Whish (2009)(note 6 above) 1 ('the rules of competition law are intended to protect the competition process in order to maximise consumer welfare'); Everest-Phillips M ' Tackling the " Tyranny of Vested Interests" ; Competition Policy as Political Governance' in Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) 43-88, 47.

⁹ See Whish (2009) (note 2 above) 17-18.

It is submitted that the objective of the competition legislation must be to promote and maintain effective competition rather than mere competition on the economy.¹⁰ The Long Title does not reflect this position. It is thus submitted this shortcoming makes it difficult to interpret such provisions as those relating to the standard of assessment of mergers. Section 32 of the Act provides that a merger shall be regarded as contrary to public interest if it 'has substantially lessened or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe.'¹¹ A merger is thus only prohibited if it has the effect of materially lessening or preventing competition on the relevant market.¹² However, although this provision clearly relates to the idea of effective competition, the same cannot be said of the founding provisions of the Act. The objective of the statute is not only at variance with the other substantive provisions of the Act, but is also understated to advance the spirit of an effective merger regulatory framework.

8.2.2 Unclear definition of a merger

Merger regulation is concerned with the likely implications of business combinations on the competitive structure of a given market.¹³ This concern is only found if the said combination constitutes a merger as defined. Section 2(1) defines a merger as meaning:

[T]he direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole of or part of the business of a competitor, supplier, customer or other person *by any means*.¹⁴

The statutory definition covers both horizontal and vertical business combinations, that is, transactions between firms in the same line of business and on the same level of production (horizontal mergers) and between entities though not necessarily in the same line of business that however share a producer-supplier relationship (vertical mergers).¹⁵ The definitional

¹⁰ See Chapter 3 in 3.2.1.

¹¹ Section 32 (4(a) of the Competition Act 1996 [*Chapter 14: 28*] (Act No. 7 of 1998).

¹² See *International Shoe Co. v FTC* 280 US 291,297 (competition is significantly lessened or prevented if the resultant post-merger competitive structure is detrimental to public interests). See also *Standard Oil Co. of New Jersey v US* 221 US 1, 81 and 89 (1911); *FTC v Sinclair Refinery Co.* 261 US 463, 467.

¹³ See *International Shoe Co v FTC* 280 U.S 291, 298 and 302, 50 S.Ct.89, 74 L Ed.431 (1930).

¹⁴ Section 2(1) of the Competition Act of 1996 (italics added).

¹⁵ See for types of mergers, Gaughan PA *Mergers, Acquisitions and Corporate Restructurings* 4ed (2007) (2007) 13 and on horizontal mergers see, *The Coca-Cola Company/ Cadbury-Schweppes* merger [2000] CTC/M&A/Dec00; *Merger of the National Insurance Company of Zimbabwe Limited (Nicoz) and Diamond Insurance Company Limited (Diamond)* [2002] CTC/M&A/May02; *Rothmans of Pall Mall (Zimbabwe)*

proviso makes reference to the acquisition of the business of ‘or other person.’¹⁶ This phrase raises the question as to whether the statutory definition of a merger extends to the third class of merger, that is, conglomerate mergers between parties with neither a vertical nor a horizontal relationship.¹⁷ In other words, non-economic related firms.¹⁸ This issue which was the subject matter of the legal opinion in *Ex parte Caledonia*¹⁹ has subjected the definition as it stands to several interpretations with the result that the Act has been accepted as not generally applicable to pure conglomerate mergers to the extent that they do not raise either horizontal or vertical effects.²⁰

Although it is generally accepted that the current statutory definition does not apply to pure conglomerate mergers,²¹ it is contended that such a ‘gap’ is merely artificial as the legislature

Limited/ British American Tobacco (Zimbabwe) Limited [1999] CTC/M&As/Sept99 (both firms were players in the cigarette manufacturing industry in Zimbabwe); *Merger of Aykroyd Insurance Brokers and Hunt Adams & Associates*, [2001] CTC/M&A/Jun01; *United States v Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 Led. 2d. 915 (1963). See generally Von Kalinowski J ‘Business Organizations’ in *Antitrust Laws and Trade Regulations* (1979) section 19.02(1). On vertical mergers see *Acquisition of Shashi Private Hospitals by Premier Services Medical Investments* [2005] CTC/M&A/Feb05 (a merger between a health care provider and a health insurer). See generally von Kalinowski (1979) section 19.02(20(a)).

¹⁶ Section 2(1) of the Competition Act.

¹⁷ See Chapter 3 in 3.3.2.

¹⁸ See generally *Falcon Gold Zimbabwe/ Cellular Systems* [2002] CTC/M&A/Oct02. See generally *FTC v Procter and Gamble Co.*, 386 US 568, 577 (1967). See also Standridge LW and Santopietro AR ‘Regulating the Pure Conglomerate Merger: Important Legislative Task or Useless Exercise?’ (1979) 30 *Syracuse Law Review* 607,608; Korah V ‘The Control of Conglomerate Mergers in the United Kingdom’ (1970) 15 *Antitrust Bulletin* 761.

¹⁹ *Ex parte: Caledonia (Africa) Limited In re: Blanket Mine (1983)(Private) Limited and Competition and Tariff Commission* (2006). (Opinion of de Bourbon AP (SC) of 9 December 2006 (unreported, on file with the writer).

²⁰ *Ex parte Caledonia* (note 19 above) 6. See also UNCTAD ‘Zimbabwe’ in *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* (2012) UNCTAD/DITC/CLP/2012/1, available at http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf (accessed 21 September 2012) (herein after ‘UNCTAD A Tripartite Report (2012)’) 182; Kububa AJ ‘Overview of Competition Law and Policy in Zimbabwe’ (2009) 4. (Presentation at the 3rd Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa (Pretoria, 3-4 September 2009), available at <http://www.compcom.co.za/assets/Uploads/events/10-year-review/paralle-la/Alex-KububaCompetition-Policy-Law-in-Zimbabwe.doc>, (accessed 20 September 2010) .

²¹ *Ibid.*

never intended to exclude conglomerate mergers outside the scope of the statute.²² However, whatever the merits or lack thereof of the debate, it is clear that the statutory definition in its current formulation creates uncertainties as to which transactions are covered by the Act. This uncertainty is a serious shortcoming on the merger regulatory system as the definition is the face of the merger provisions of the Act.²³

8.2.3 The unclarified standard for merger assessment

If a transaction constitutes a merger as defined, the next step is for the regulatory authority to determine whether or not to allow the transaction. This involves an assessment of the likely effects of the proposed transaction on the competitive structure of the market.²⁴ This process requires a standard for such an assessment. This standard is a substantive assessment test.²⁵ The question is what test is employed by the CTC to assess a merger in order to determine whether or not to approve any given merger?

There are two positions on the matter. The first is that the CTC employs the public interest test as the standard for determining mergers.²⁶ This implies that a merger that is contrary to public interest must be prohibited. The second position is that the CTC employs a three-pronged substantive assessment test consisting of a pure competition leg, efficiency and other beneficial interest leg and finally a public interest test.²⁷

A closer look at the Act shows that neither of these tests is clearly provided for therein. Although the CTC had stated that it employs a three-pronged substantive assessment test,²⁸ the fact that this position is not expressed in the statute raises a number of questions that impacts on the overall effectiveness of the merger regulatory framework.²⁹ The mere fact that there are two sides to the issue is enough to buttress the argument that the standard for merger assessment is unclear.

²² See chapter 3 in 3.3.2.

²³ Ibid.

²⁴ Section 32(1) of the Competition Act. See also generally Goldberg 92007)(note 3 above) 93-94 and Chapter 3 in 3.3.2.2.

²⁵ See Chapter 3 in 3.3.2.2.

²⁶ UNCTAD *A Tripartite Report* (2012) (note 20 above) 16.

²⁷ See Kububa (2009)(note 20 above) 4.

²⁸ Ibid.

²⁹ See Chapter 3 in 3.3.2.2.

8.2.4 Undefined public interest concept

The merger regulation in Zimbabwe in which competition policy in general and merger control in particular were mooted as a tool, not only aims at enhancing the competitiveness of the market,³⁰ but also to support a broader public interest based policy objective.³¹ It is thus not surprising that non-competition factors continue to significantly feature in merger regulation.³² In particular, the standard for substantive assessment of mergers despite itself not being clear³³ provides for the consideration of the effects of a given merger on public interest.³⁴

The significance of the public interest cannot be understated. It is logical given the origins of the merger regulatory framework that the public interest concept forms part of the system. However, the question is what constitutes 'public interest'? The Act only makes reference to the concept³⁵ but does not define it.³⁶ The slightest idea of what factors are taken into account in assessing the likely implications of public interest can be drawn from CTC decisions.³⁷ These factors include employment,³⁸ foreign exchange generation³⁹ and the

³⁰ See Chapter 2 in 2.5.2.

³¹ See generally Chapter 2.

³² See notes 37, 38, 39 and 40 below.

³³ See 8.2.3.above.

³⁴ Sections 32(1) and (4) and 36 (2) and (3). These provisions keep making reference to whether or not a merger will be contrary to public interest.

³⁵ Ibid.

³⁶ UNCTAD *A Tripartite Report* (2012) (note 20 above) 184.

³⁷ See for instance, *Merger between Dairibord Limited and Lyons Zimbabwe* merger [2001] CTC/M&A/Apr01 where a conglomerate merger involving Dairibord (a non-alcoholic beverages manufacturer) and Lyons Zimbabwe (ice cream manufacturer) was considered unlikely to create a monopoly in ice cream market since there were other competitors in the market. However, despite the merger's potential to create a dominant player in Dairibord/Lyons Maid it was approved because it would, *inter alia*, create employment. See also *Coca-Cola Company/Cadbury-Schweppes* (note 15 above)(generation of foreign current from the continued export of local products, Mazoe); *Portland Holdings Ltd /Pretoria Portland Cement* [2001] CTC/M&A/Aug01; *Rothmans of Pall Mall (Zimbabwe) /British American Tobacco (Zimbabwe)* (note 15 above)(although the merger raised a number of competition concerns through particularly the creation of a monopoly after reducing the number of big cigarettes manufacturers in Zimbabwe from 2 to a single, it was conditionally approved on grounds that it would enhance economies of scale and scope. See also *Portland Cement Holdings/Pretoria Portland Cement* (introduction of innovation that would result in efficiency in cement production in Zimbabwe and PPC had a programme to modernise the local plant thus bringing in foreign currency).

enhancement of the competitiveness of domestic industries on regional and domestic markets.⁴⁰ However, these factors are not clearly spelt out in the statute or elsewhere such as in guidelines. The effect of this position is that the merging parties are left at the mercy of the CTC for they are largely unaware of what factors the latter would consider as public interest.⁴¹

It is submitted that the undefined public interest concept is elastic. This suits the CTC and is a potential source for infiltration of the system by special interests under the guise of public interest.⁴² The CTC is placed in a position where it can decide what factors to consider as public interest. This undoubtedly weakens the effectiveness of the system hence constituting a serious shortcoming of the merger regulatory framework.⁴³

8.2.5 The inadequate failing firm doctrine

In a harsh macro-economic environment in which corporate businesses struggle to survive,⁴⁴ it is logical that these entities engage in survival strategies. These strategies are mostly corporate restructuring transactions.⁴⁵ Corporate mergers and acquisitions are generally the

³⁸ *Dairibord/Lyons Zimbabwe* merger (note 37 above);

³⁹ *Portland Cement Holdings/Pretoria Portland Cement* (note 37 above); *Coca-Cola Company/Cadbury-Schweppes* (note 15 above).

⁴⁰ *Portland Cement Holdings/Pretoria Portland Cement* (note 37 above); *Coca-Cola Company/Cadbury-Schweppes* (note 15 above); *Rothmans of Pall Mall (Zimbabwe) /British American Tobacco (Zimbabwe)*(note 15 above).

⁴¹ See Chapter 3 in 3.3.2.2 (b).

⁴² See generally Everest-Phillips (2009)(note 9 above).

⁴³ See in the recent combined application before the South African Competition Appeal Court, to challenge the Tribunal's decision in the merger between Wal-Mart and Massmart, *Wal-Mart Stores Inc./Massmart Holdings Limited* 73/LM/Nov 10, various government ministers filed for the review of the Tribunal's decision. These were the Minister of Economic Development; Minister of Trade and Industry and Minister of Agriculture and Fisheries *South African Commercial Catering and Allied Workers Union (SACCAWU), The Minister of Economic Development, The Minister of Trade and Industry and The Minister of Agriculture and Fisheries v The Competition Commission, The Competition Tribunal of South Africa, Wal-Mart Stores Inc. and Massmart Holdings Limited* 110/CAC/Jul 11 and 111/CAC/Jul 11. See for a further discussion of the implications of the case, Chapter 3 at 3.4.1.2 (b) and Chapter 5 at 5.4.1.

⁴⁴ See Chapter 1 on background to economic crisis.

⁴⁵ Kububa (2009) (note 20 above) 6 (in an economic crises environment, although a picture of depressed economic activity might be presented, mergers and acquisition activities increase because of the formation of strategic alliances). See also Jeffe HD 'Developments in Merger Law and Enforcement in 199-91' (1991) 60

preferred methods of implementing these transactions.⁴⁶ However, the fact that these transactions are implemented to rescue struggling corporate entities does not exclude them from the clutches of merger regulatory authorities. This is because of their potential to negatively impact on the competitive structure of the market.⁴⁷ There is thus a need to review mergers involving failing firm claims in such a way as to strike a balance between the promotion of corporate transactions aimed at rescuing and ensuring corporate survival and the protection of a competitive market structure. The question is whether the current merger regulatory framework is able to achieve this objective? In other words, whether the system is adequately effective?

Section 32(4a)(h) provides that in determining whether a merger is likely to substantially prevent or lessen competition, the CTC must, *inter alia*, where necessary, assess whether the business or part thereof of a party to a merger is likely to fail. This assessment is referred to generally as the ‘failing firm’ doctrine in merger review.⁴⁸ Section 2(1) also defines a merger as including a situation where a business combination involves the acquisition of a part of business of another. These two provisions thus give effect to both the failing firm doctrine and the related ‘failing division’ doctrine.⁴⁹

Besides the fact that the application of the doctrines is clearly provided for in the Act, there is nothing more to clarify how to apply them. In other words, the Act does not provide for a criterion to apply the doctrines. This situation is compounded by the lack of judicial

Antitrust Law Journal 667 (‘with the downturn in the economy, there has been a corresponding upturn in the acquisitions involving ‘floundering,’ ‘exiting’ and failing companies.’ Corporate restructuring transactions generally denote any corporate activity implemented to fully or partially reorganise the company’s business operations. See generally Gaughan (2007) (note 15 above) and DePamphilis D *Mergers, Acquisitions and other restructuring activities: An Integrated Approach to Process, Tools, Cases and Solutions* (2001) 5.

⁴⁶ See Valentine D ‘Horizontal Issues: What’s Happening and what’s on the Horizon’ (1995) available online at <http://www.ftc.gov/speeches/other/dvhorozontalissues.htm>. (accessed 28 March 2011). See also Kokkoris I & Olivares-Caminal R *Antitrust Law amidst Financial Crises* (2010) 105.

⁴⁷ See note 5 above.

⁴⁸ See generally Chapter 4 in 4.2.

⁴⁹ The failing division doctrine acknowledges that a division of an otherwise financially healthy firm might be the one experiencing financial difficulties thereby diminishing its significance as an effective competitor on the market hence its acquisition (of the division) by another will not significantly lessen effective competition on the said market. See section 11 of the US Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* (2010).

interpretation of the doctrine. This implies that merging parties have nothing to rely on when preparing their failing firm claims. The situation could have been saved by the CTC approach in decisions in which the doctrines were invoked.⁵⁰ The CTC approach could thus have been a remedy for the statutory and judicial inadequacies. However, this is not the case given the fact that the only available decisions are in the form of executive summaries and study reports.⁵¹ These sources provide only basic information mostly factual and devoid of detailed analyses of the doctrines.⁵² The CTC have not issued any form of administrative guidelines on the criteria adopted in the application of both the failing firm and failing division doctrines.⁵³

The situation presented above is aggravated by the fact that the substantive assessment test for merger review is not clear.⁵⁴ The implication of this is that it is difficult to provide a clear interpretation of the doctrine. Is the failing firm doctrine a factor in determining a leg of the test⁵⁵ or an absolute defence to an otherwise anti-competitive merger?⁵⁶ If the assessment test is exclusively the public interest standard then it is possible that the doctrine is an absolute defence. This is because saving a failing firm becomes a public interest matter.⁵⁷ However, if

⁵⁰ See Chapter 4 in 4.4.

⁵¹ See Competition and Tariff Commission of Zimbabwe (CTC) *Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe: Part (1) Mergers and Acquisitions* (2006) 31-32, (unpublished, on file with the writer) 72-75.

⁵² Ibid. See also Chapter 4 in 4.4.

⁵³ See Chapter 4 in 4.5.

⁵⁴ See 8.2.3.above and Chapter 3 in 3.3.2.2.

⁵⁵ See section 12A(g) of the South African Competition Act 89 of 1998. See also *Iscor Limited/Saldanha Steel (Pty) Ltd* 67/LM/Dec 01 par 101; *Schuman Sasol (SA) (Pty) Ltd/Price's Daelite (Pty) Ltd* 23/LM/May 01 par. 57; *Santam Ltd/Emerald Insurance Co Ltd and Emerald Risk Transfer (Pty) Ltd* 57/LM/Aug 09 par. 52 and generally *Phodoclinics/Protector Group Medical Services* 122/LM/Dec 05.

⁵⁶ See section 11 of the US Horizontal merger guidelines and par. 89-90 of the European Commission *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* OJ C31/2004 of 2004.

⁵⁷ See *Acquisition of Zimboard Products by PG Bison Mauritius*, [2005] CTC/M&A/May05; Opinion of Advocate General Tesouro in *France and Others v Commission* (delivered on 6 February 1997) 1-1405 par. 56; *International Shoe Co.* (note 12 above) 302-303; *General Dynamics* ((note 11 above) 507 (on employment); *Kokkoris* (2006)(note 6 above) 506 (although allowing mergers can result in job losses, if a merger is not allowed and the firm is allowed to exit, jobs might be lost as a result of plant closure). See also Chapter 4 in 4.4.4.

it is a multi-pronged test, then it is only a factor in assessing one leg of the test hence not an absolute defence.⁵⁸

It is thus clear that despite being statutorily entrenched, the failing firm and failing division doctrines are not adequately supported by either the statute giving them effect or the regulatory practice. This constitutes a shortcoming as it is difficult to envisage a system that is able to strike a balance between promotion of beneficial corporate restructuring transactions implemented through mergers and acquisitions and the protection of the competitive market structure.

8.2.6 A screwed institutional arrangement

The effectiveness of any merger regulatory system largely depends upon the structure of the merger regulatory authority. A well-structured institution provides a buffer against any attempts to infiltrate the regulatory system aimed at weakening such regulatory system.⁵⁹ In addition, an independent regulatory institution is a prerequisite for the effectiveness of the system in many ways.⁶⁰ Besides protecting the system from vested interests,⁶¹ an independent institution gives the system credence necessary for acceptance.⁶² However, the attainment of these characteristics requires an ideal institutional structure.

Section 4 of the Competition Act establishes the CTC as an independent competition authority.⁶³ The legislature's intention to create an independent institution is commendable. However, the question is whether the legislature actually created an independent institution.

⁵⁸ *Iscor/Saldanha Steel* (note 55 above) par. 101.

⁵⁹ See for instance, the SA institutional system where the three pronged structure has been hailed for being able to provide a much needed buffer against the potential negative implications of public interests provisions on merger regulation. See generally Chapter 5 in 5.4.1.

⁶⁰ See generally on institutional independence, Oliviera G, Machado EL and Novaes 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' in Mehta PS and Evenett SJ (eds.) (2009)(note 9 above) 285-326, 285. For a discussion of the independence aspects of the CTC, see Chapter 3 in 3.4.1.2.

⁶¹ See Zoghbi V 'Strategic Priorities of Competition and Regulatory Agencies in Developing Countries' in Mehta and Evenett (eds.) (2009) (note 9 above) 108; Oliveira, Machado and Novaes (2009) (note 60 above) 291.

⁶² Oliveira, Machado and Novaes (2009) (note 60 above) 287.

⁶³ Long Title to the Competition Act of 1996; section 4 read with section 5(3).

In other words, is the CTC in its current status independent enough to enable it to promote an effective merger regulatory system?

The Act provides that the Commission is the responsible competition authority.⁶⁴ Accordingly, provision is made for the powers and functions aimed at advancing the same.⁶⁵ However, there are a number of shortcomings in the statute that does not promote this independent principle. The first relates to the source of the CTC's funding. The CTC is principally funded from state finances.⁶⁶ The fact that the CTC is funded from the central government raises a number of issues. It potentially subjects the system to other interests.

Secondly, the Act does not reflect the practical aspect of the institutional structure. The Act provides that the Commission is the competition authority.⁶⁷ The Commission investigates, prosecutes and adjudicates matters relating to competition.⁶⁸ However, in practice, the CTC is comprised of several divisions including the merger division.⁶⁹ This internal structure is not reflected in the Act. The structure that is provided for by the Act is thus contrary to the principle of separation of powers⁷⁰ encompassing good governance. The current structure

⁶⁴ Section 2 (1) defines Commission as the Competition and Tariff Commission. Part II makes reference to the members of the CTC as being the Commission hence the Board of the CTC is the Commission.

⁶⁵ See sections 5 providing for the functions of the CTC, section 28 of Part IV (provides for the investigative powers of the CTC); section 30 empowers the CTC to negotiate with parties with a view to terminate anti-competitive activities; section 31 provides for the CTC's powers to make appropriate orders following investigations; section 35 provides for the adjudicative powers of the CTC relating to applications for authorisation of conduct that might be contrary to the statute.

⁶⁶ Part III of the Act provides for sources of finances for the CTC as being, section 23(a) moneys payable to it from moneys appropriated for purposes of the Act such as fees and penalties, (b) any other money that may be vested in or accrue to the CTC whether in terms of the Act or any source. Between 2010 and 2012, notification fees amounted to about US\$79 0838 with the only other internal income being Investment (US\$92 683) and Sundry income (US\$1 760). See UNCTAD 'Voluntary Peer Review of Competition Law and Policy: Zimbabwe Overview' (2012) *UNCTAD/DITC/CLP/2012/1*,13.

⁶⁷ Section 3(3) provides that 'where a statutory body established to regulate the activities of any person or class of persons authorises a merger between two or more such persons, such a body shall, unless the enactment establishing it expressly provide otherwise, apply to the Commission in terms of this Act for the final authorisation of the merger.'

⁶⁸ See note 65 above.

⁶⁹ Kububa (2009) (note 20 above) 5.

⁷⁰ The doctrine of separation of powers assumes that the executive, legislative and adjudicative (judiciary) functions are separated. The executive formulates policies and enforces the law as laid down by the legislature

confers upon the Commission the executive, legislative and judicial powers. Given this structure, it is difficult to imagine an independent institution capable of safeguarding and advancing the principle of separation of powers and good governance.

The screwed structural arrangement could have been saved by clear procedural provisions relating to appeals and reviews. However, currently provision is made to the effect that Commission's decisions are appealable to the Administrative Court.⁷¹ Besides providing for the composition of the Administrative Court for purposes of hearing competition appeals,⁷² the Act subordinates competition proceedings to those of the Administrative Court. Competition appeals are heard in terms of the rules and procedures of the Administrative Court.⁷³

The Act merely refers to an 'appeal.' An appeal in the ordinary sense of the term denotes a proceeding, in which litigants seek to have the decision of a *court a quo* or in this case, an adjudicating tribunal, overturned on legal merits.⁷⁴ It is thus not clear whether the term as used also extends to a review. A review seeks to overturn a decision on procedural irregularities.⁷⁵ This distinction⁷⁶ is fundamentally important for it affects the procedure that affected parties might adopt.

It is suggested that the above matters be clarified. Although there might be no reported incidents of attempts to influence the CTC,⁷⁷ the *status quo* cannot be guaranteed with any

and the judiciary interprets and applies the law. See on the doctrine of separation of powers, Montesquieu CL *The Spirit of the Law* (1748) VIII, 2.

⁷¹ Section 40 (1).

⁷² Section 41.

⁷³ Section 40 (2).

⁷⁴ See *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119, 124C-F (an appeal must be lodged against an order and not merely against the reasons for such an order.)

⁷⁵ See *S v Chamboko* 2001 (2) ZLR 269 (H) 271A (a review is aimed at setting aside the proceedings and commence them *de novo*.)

⁷⁶ See on distinction between appeal and review, *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZLR 469 (S) (proceedings are different). See further Garner B (ED) *Black's Law Dictionary* (2004) 105 and 864 respectively.

⁷⁷ However, although this statement can be true, the insertion of section 8 into the Act shows that this possibility cannot be ruled out. Section 5(1)(h) which was introduced into the Act by the Competition Amendment Act 29 of 2001 now require the CTC to conduct price control functions. It is argued that this function is largely unjustified on the part of a competition authority. It is contrary to the principles of a free market whereby market

degree of certainty. Events elsewhere had shown that even where the institutional arrangement promotes independence, attempts to influence it can still be made.⁷⁸ The independence of the CTC must be considered as non-negotiable especially given the potentially negative influence of the largely undefined public interest concept.⁷⁹

8.3 Lessons from other jurisdictions: South Africa, the EU and the US

8.3.1 The rationale for the comparative study

In order to develop and suggest an ideal model for effective corporate regulation in Zimbabwe and having highlighted the shortcomings of the current system in advancing such an effective regulatory framework, it is important to consider how comparable jurisdictions have dealt with these issues. It is only after considering how these matters are dealt with that one will be in a position to suggest ways of strengthening the current regulatory system. However, in doing so it is trite to take into account two fundamental issues. These are:

(a) Although valuable lessons can be drawn from other comparable jurisdictions, it is important to adapt these models to suit the unique Zimbabwean conditions. These conditions relate to the environment in which corporate entities operate as well as the policy underpinning merger regulation.

(b) There is no ‘one-size-fit-all’ approach to merger control. In other words, what is central to merger regulation in one jurisdiction might not necessarily be the primary consideration in another. However, at the heart of an effective merger regulatory framework must be the ability to create and maintain a balance between the need to protect the competitive market structure and advancing of each jurisdiction’s policy objectives.⁸⁰

principles of supply and demand determine prices. Free market principles underpin competition law. The additional function also places a strain on the resources of the CTC that are already strained. See also Chapter 3 in 3.4.1.1.

⁷⁸ See note 43 above and text therein.

⁷⁹ See Chapter 3 in 3.4.1.2 discussing the implications of the undefined public interest concept on the independence and effectiveness of the CTC.

⁸⁰ In South Africa at the core of merger regulation is the need to maintain and protect competition in the market as well as promotion of a selected public interests. See Preamble to the South African Competition Act 89 of 1998. In the EU merger regulation is primarily defined by the need to integrate member states through dismantling of practices and behaviour that distorts and impede competition within the internal market. See on EU, Article 2(1)(a) of the *European Council Regulation (EC) 139/2004 on the control of concentration between*

An ideal model must draw from the positives of other jurisdictions and adapt them where necessary to suit the Zimbabwean situation. This situation takes into account the policy underlying corporate merger regulation. This consideration particularly refers to the broad policy objectives which are supposed to be supported by the merger regulatory framework and the socio-economic context in which corporate entities operate, in particular the perennial economic challenges that are assumed to be the major factor in influencing corporate decisions to enter into strategic alliances such as mergers and acquisitions. The latter turns on the interpretation and application of the failing firm doctrine in merger regulation.

The failing firm doctrine has been employed in this study to highlight several fundamental aspects relating to corporate mergers and acquisitions in Zimbabwe.⁸¹ These aspects are:

- (a) The inability of the system to advance a broader policy objective without compromising the effectiveness of the competition system in general and merger regulation in particular.
- (b) The absence of adequate criteria to act as guidelines for merging parties seeking to rely on the failing firm doctrine.

Selected jurisdictions, notably South Africa, the EU and the US, have been used to suggest ways in which the above issues may be addressed. The South African approach provides valuable lessons on how a merger regulatory system can be used to advance a broader policy objective without unnecessarily compromising the effectiveness of the competition system in general and the merger regulatory framework in particular. Crucial is how the South African system had managed to deal with the public interest concept in merger regulation and how such an approach had impacted on the interpretation and application of the failing firm doctrine.⁸²

undertakings (ECMR) OJ L24/1..In the US merger control is shaped by the protection of the competitive market structure so as to enhance consumer welfare through promotion of efficiency. See on US policy, *Brown Shoe Co.* (note 6 above)

⁸¹ See generally Chapter 4.

⁸² See Chapter 5 in 5.4.

Although the South African merger regulating statute is the closest to the Zimbabwean one, the former had managed to develop jurisprudence on the failing firm doctrine.⁸³ However, the South African authorities had expressed reluctance to lay down criteria for the application of the doctrine⁸⁴ and instead utilised it albeit in a modified form.⁸⁵ The authorities had particularly expressed preference towards the criteria being employed in the EU.⁸⁶ This criterion has been developed from judicial decisions⁸⁷ and is reflected in the European Commission practice.⁸⁸ It is centred on the lack of causality principle.⁸⁹ In terms of the lack of causality principle, a merger is not the cause of the deterioration in the competitive conditions of a given market if it can be shown that such deterioration would have occurred in any event with or without the merger.⁹⁰

However, despite being preferred by the South African authorities, the EU approach to the failing firm doctrine does not necessarily provide a solution for the Zimbabwean regulatory shortcomings. The EU approach does not provide for a separate criterion for a situation in which only a division of a firm is failing, that is, the failing division doctrine. Thus the US approach to the failing division doctrine has been considered in a bid to try and develop a suitable model for regulating mergers involving failing divisions in Zimbabwe.

8.3.2 The South African approach: lessons for Zimbabwe

⁸³ See note 55 above.

⁸⁴ *Schuman Sasol/ Price's Daelite* (note 55 above) par. 59 (the failing firm doctrine 'is a term of art' hence 'the facts of each case will take precedence over the application of a devised formula.')

⁸⁵ *Iscor/ Saldanha Steel* (note 55 above) pars. 77-97, 108, 110(2), (3) and (4).

⁸⁶ *Iscor Saldanha Steel* (note 55 above) par.110 (3).

⁸⁷ Case IV/M.308 *Kali und Salz/MdK/Treuhand* (I) ,[1994] OJ L186/38 and Case IV/M. 308 *Kali und Salz/Mdk/Treuhand* (II), OJ C275/3 pars.19-24 where the European Commission ('the Commission') established a three-pronged test for the failing firm doctrine; Case IV/M. 2314 *BASF/Eurodiol/Pantochim [2001]*, Commission decision of 11.07.2001, par.163.

⁸⁸ *EC Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, [2004] OJ C31/5 pars.89-91 ('the *Horizontal Merger Guidelines*.')

⁸⁹ See on lack of causality principle in EU, par. 89 of the *EC Horizontal Merger Guidelines*. See also generally on the lack of causality in EU merger regulation, Baccaro V 'Failing firm defence and the lack of causality: doctrine and practice in Europe of two closely related concepts' [2004] *European Competition Law Review* 11; Bavasso A and Lindsay A 'Causation in the EC Merger Control' (2007) 3(2) *Journal of Competition Law and Economics* 181, 182; Kokkoris (2006)(note 57 above) 498.

⁹⁰ *Kali und Salz/MdK/Treuhand* (I) (note 87 above) par. 72.

The South African merger regulatory system is founded on the backdrop of a broader policy objective, that is, its development was shaped and continues to be influenced by broader policy considerations. These policy objectives aim at addressing the multiple imbalances resulting from the pre-1994 period.⁹¹ The Apartheid regime through its largely discriminatory policies, created an uncompetitive economic structure⁹² that impacted upon the socio-economic and political structure of the country. The post-Apartheid regime initiated several policy measures in a bid to address the ills of the erstwhile regime.⁹³ A comprehensive competition policy statute was enacted to give impetus to this agenda.⁹⁴ The current Competition Act⁹⁵ thus encompasses an array of non-competition considerations⁹⁶ such as employment,⁹⁷ advancement of businesses previously controlled or owned by previously disadvantaged groups⁹⁸ and enhancing the competitiveness of local industries on external markets.⁹⁹ Although these considerations have the potential to weaken the competition system in general and merger regulation in particular,¹⁰⁰ the South African system had demonstrated an ability to strike and maintain a balance between the promotion and maintenance of a competitive market structure and the advancement of a greater public

⁹¹ Before 1994, South Africa was under a minority Apartheid regime whose policies were mainly screwed towards the minority whites. These policies, *inter alia*, created a socio-economic imbalance that affected the competitiveness of the major sectors of the economy in general. See generally on Chetty V 'The Place of Public Interest in South Africa's Competition Legislation: Some Implications for International Antitrust Convergence' *American Bar Association Section of Antitrust Law 53rd Meeting*, Washington D.C. (March 30-April 1, 2005) 4.

⁹² *Ibid.* See Chapter 5 in 5.2.

⁹³ See generally Chapter 5 in 5.1.

⁹⁴ *Ibid.*

⁹⁵ South African Competition Act 89 of 1998.

⁹⁶ See generally Preamble to the South African Competition Act of 1998; section 12A (3) on public interests.

⁹⁷ Employment matters are also covered by a number of statutes such as the Labour Relations Act 66 of 1995; the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 53 of 1998.

⁹⁸ The advancement of businesses owned or controlled by previously disadvantaged groups is also clearly pronounced in government policy such as Broad Based Black Economic Empowerment and given statutory effect by the Broad Based Black Economic Empowerment Act 53 of 2003.

⁹⁹ Section 12 A (3) (d) of the Competition Act of 1998.

¹⁰⁰ This criticism is founded on the basis that public interests considerations are mostly prominent in merger provisions hence they have the potential to negatively influence merger regulation. See generally on the criticism of the inclusion of non-competition factors in competition enforcement, Reekie WD 'The Competition Act, 1998: An Economic Perspective' (1999) 67 (2) *South African Journal of Economics* 257, 258.

interest goal encompassed in the non-competition factors.¹⁰¹ This is the basis upon which valuable lessons can be drawn for Zimbabwe. These are highlighted below.

(a) The defined public interest concept

Unlike in Zimbabwe, the South African statute clearly defines the public interest concept. Section 12A (3) provides for a clear demarcation of factors that need to be taken into account in assessing the impact of a given merger on public interests. This approach avoids the unfortunate situation of ‘missing the tree because of the bush,’ a situation detrimental to the effectiveness of the entire system.

A clearly defined public interest concept provides a buffer against attempts to infiltrate and influence the competition system.¹⁰² An undefined public interest concept due to its elastic nature provides a conduit for infiltrating and influencing the merger regulatory system with undesired vested interests such as political and other economic interests. The public interest concept thus ends up being a special interest and weakening the system.¹⁰³

(b) The structure of the competition authority

In addition to a clearly defined public interest concept, the South African merger regulatory system is characterised by a well-structured competition authority. The structure had demonstrated its effectiveness in dealing with situations in which the merger regulatory system had been threatened.¹⁰⁴ Although the competition authority represents a single system of competition regulation, it consists of the three clearly distinct arms in the Competition

¹⁰¹ This ability had is clearly demonstrated in the merger regulatory provisions in the competition statute giving effect to both pure-competition and non- competition issues. See section 12A (1) on the substantive assessment test. The merger regulatory authorities have also emphasised on their role as being primarily the protection of a competitive market structure although they do not necessarily ignore the legislature’s intentions to include non-competition factors. See *Wal-Mart Stores Inc./Massmart Holdings Limited (Wal-Mart/Massmart merger Tribunal decision)* (note 43 above) par. 32 (‘The Tribunal’s job in merger control is not to make the world a better place, *but* only to prevent it becoming worse as a result of a specific transaction’) and Lewis (2007)(note 2 above) 358 (‘a competition statute that simply ignores the impact of its decisions on employment or securing a greater spread of black economic ownership would consign itself and the authorities that it creates to the scrap heap.’)

¹⁰² See note 43 above.

¹⁰³ See note 42 above.

¹⁰⁴ See note 43 above.

Commission,¹⁰⁵ the Competition Tribunal¹⁰⁶ and the Competition Appeal Court.¹⁰⁷ This structure provides an additional buffer against attempts to weaken the system particularly relating to the potential negative implications of the public interest concept.¹⁰⁸ This buffer has been demonstrated in a handful of decisions in which one entity had ensured that the other did not lose the competition focus.¹⁰⁹

(c) The three-pronged substantive merger assessment test

The entire South African competition system encompassing the merger regulatory framework is a complementary element of the country's broader policy objectives. These objectives aim to primarily address the country's past socio-economic and political imbalances resulting from the pre-1994 Apartheid regime.¹¹⁰ It is thus paramount that the merger regulatory framework pulls towards the attainment of these objectives. The standard for merger assessment largely reflects this agenda.

Section 12A(1) provides for the substantive assessment test for mergers. The competition authorities are enjoined to first determine the likely effects of any given merger on the competition structure of the merger.¹¹¹ This test which involves assessing a number of factors that are provided in a non-exhaustive list¹¹² is basically the pure-competition leg of the test. If following this assessment, a merger is found to have raised competition concerns, the authorities must determine whether or not the said merger is likely to result in any significant

¹⁰⁵ Part A of Chapter 4 of the Competition Act of 1998.

¹⁰⁶ Part B of Chapter 4 of the Competition Act of 1998.

¹⁰⁷ Part C of Chapter 4 of the Competition Act of 1998.

¹⁰⁸ See Chapter 5 in 5.4.1.

¹⁰⁹ See for instance *Shell South Africa (Pty) Ltd/Tepco Petroleum (Pty) Ltd* 66/LM/Oct 01 (Tribunal criticised the Commission for conditionally approving a merger on public interests grounds stating that (the Tribunal) the public interests conditions aimed at promoting economic empowerment were not economically sound in the case); *West bank, a division of First Rand Bank Ltd/Industrial Machinery Finance Book (owned by Barloworld Capital (Pty) Ltd)* [2004] 2 CPLR 337 (CT) (the Tribunal unconditionally approved a merger rejecting the Commission's attempts to introduce conditions aimed at economic empowerment).

¹¹⁰ See note 91 above.

¹¹¹ Section 12A (1) of the Competition Act of 1998.

¹¹² *Industrial Development Corporation of South Africa v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital (Pty) Ltd/Anglovaal Mining Ltd* 45/LM/Jan02 and 46/LM/Jun02; *Santam Ltd/Emerald Insurance Co.*(note 55 above) par.52; *Schuman Sasol/Price's Daelite* (note 55 above) 5.

benefits that can outweigh the identified competition concerns and that can only be attained through the merger in question.¹¹³ This second leg of the test constitutes a balancing exercise.¹¹⁴ Regardless of the results of the first two legs of the test, the statute requires that a given merger must be further scrutinised in order to determine whether or not it can be justified on substantive public interest grounds¹¹⁵ that are clearly demarcated under the Act.¹¹⁶ It is only after assessing all these legs of the test that a determination can be made.¹¹⁷

The significance of the three-pronged substantive assessment test is that it captures all the essential aspects relevant not only to merger regulation in general but to the South African society in particular. The test takes into account the traditional economic aspects of competition law including the efficiency dimension that have shaped the development of competition law in a number of jurisdictions.¹¹⁸ Notably, the legislature had managed to provide for a clear standard for merger assessment in South Africa.¹¹⁹ This is a critical lesson for it consolidates the effectiveness of the merger regulatory system to give effect to the basis of the system as well as complement the other statutory provisions.

Although the failing firm doctrine is given statutory effect¹²⁰ without further statutory expansion thereon, the statutory test is clear enough to provide an important interpretation tool. The doctrine is clearly provided as a factor to be taken into account in assessing and determining only one leg of the test, that is, the likely effects of a merger on the competitive structure of the market.¹²¹ Although the three-pronged substantive assessment test is not without reservations in respect of the application of the failing firm doctrine in merger assessment¹²² the test has proved to be a significant element in promoting and advancing a

¹¹³ Section 12A(1)(a) (i) and (ii).

¹¹⁴ The leg balances whether a finding of anti-competitiveness can be offset by the likelihood of any substantial benefits from the merger.

¹¹⁵ Section 12A(1)(b).

¹¹⁶ Section 12A(3).

¹¹⁷ Section 12A is clear that all the legs of the test must be assessed before a determination is made.

¹¹⁸ See for instances section 10 of the *US Horizontal Merger Guidelines*.

¹¹⁹ Cf. the Zimbabwean position, 8.2.3 above where the standard remains unclear.

¹²⁰ Section 12A(2) (g) of the Competition Act of 1998.

¹²¹ Section 12A(2). See also *Iscor/Saldanha Steel* (note 55 above) par. 101.

¹²² These reservations relates to the potential for producing undesirable results such as the likelihood of approving anti-competitive mergers if they can be justified on public interest grounds and the equally undesirability of blocking a competition neutral merger on the basis that it cannot be justified on public interests

flexible approach to the doctrine.¹²³ In addition to flexibility, the test promotes effectiveness since it makes it clear that the doctrine is separate and distinct from other factors that might be relied upon to justify an otherwise anti-competitive merger.¹²⁴ The three-pronged test thus promotes flexibility, enhances certainty and clarity required for the effectiveness of the competition system in general and merger regulation in particular.

(d) The overall structure of the merger regulatory statute

The South African Competition Act contains clear provisions relating to merger regulation. The Act has an entire chapter dedicated to merger regulation.¹²⁵ This enables the legislature the room to clearly pronounce on essential merger regulating issues. Merging parties are also able to easily navigate through the statute's merger regulating provisions. Most importantly, the structure of the statute enhances the effectiveness of merger regulation as it provides and promotes clarity to both the regulatory authorities and the merging parties.¹²⁶

This clarity is particularly evidenced from the fact that the statute in Chapter 3 provides a one-stop-shop for merger regulation in the competition statute. Unlike in Zimbabwe where the aspects relating to merger regulation are scattered throughout the Act,¹²⁷ the South African competition statute provides for a clear definition of a merger, clearly defined

grounds. However, practice has shown that even though these can be true in theory, the possibility of this occurring in practice remains remote if not unfounded. See Lewis (2007)(note 2 above) 360; Moodaliyar K 'Competition policy in the SADC: a South African perspective' in Drexl J, Bakhom M, Fox EM, Gal MS & Gerber DJ (eds.,) *Competition Policy and Regional Integration in Developing Countries* (2012) 69.

¹²³ See *Iscor/Saldanha Steel* (note 55 above) pars.108,110(2), (3) and (4); *Schuman Sasol/Price's Daelite* (note 55 above) 59.

¹²⁴ See *Iscor/Saldanha Steel* (note 55 above) pars.98-99.

¹²⁵ See Chapter 3 headed 'Merger Control.'

¹²⁶ On the importance of clarity in merger regulation, see Fischer AA and Lande RH 'Efficiency Consideration in Merger Enforcement' (1983) 71 *California Law Review* 1582, 1695 ('any antitrust enforcement system must, above all, be as objective and predictable as possible.')

¹²⁷ For instance, the Long Title to the Zimbabwean Competition Act of 1996 provides for merger regulation as one of the objects of the statute; section 2(1) defines a merger, section 3(3) provides that the CTC is the principal merger regulatory authority; section 5(d) proved as one of the functions of the CTC as 'to study trends towards increased economic concentration, with a view to investigation of monopoly situations' ; Part IV empowers the CTC to investigate mergers; Part IVA relates to merger notification proceedings; Part V relates to the CTC's powers to determine applications for merger authorisations and section 32 (4) and (4a) provides for the determination of mergers.

standards for merger assessment, a demarcated public interest concept as well as other issues incidental to merger regulation.¹²⁸ These are all captured under a simple but effective sequence in the statute.

The South African merger regulatory system provides a number of relevant lessons for Zimbabwe. However, it is not everything about the South African system that Zimbabwe must adopt. In other words, Zimbabwe needs to adopt and adapt those aspects relating to the overall structure of the merger regulatory statute, the clear provisions relating to the public interest concept as well as the standard for merger assessment. The structure of the competition authority in general is also another aspect that Zimbabwe must take note of as a well-structured authority is an essential element in curing any inherent statutory deficiencies and it enhances the effectiveness of the system through providing a buffer against unwelcome attempts to infiltrate and influence the system.

The South African system is the closest to Zimbabwe as they are both founded on a similar historical context and endeavour to utilise the competition system in order to promote a broader policy objective. However, the South African authorities, despite making strides towards developing a purely South African approach to the failing firm doctrine, have relied on the principles of the doctrine, as originated and developed in such jurisdictions as the US and the EU.¹²⁹ It is thus important to consider the significance of these jurisdictions on the development of an effective merger regulatory framework for Zimbabwe.

8.3.3 The EU approach and the lessons for Zimbabwe

There are basically two reasons why the study had opted for the EU approach to the failing firm doctrine as one of the comparative systems to draw lessons for Zimbabwe. Firstly, as eluded to above and elsewhere in the study¹³⁰ the South African competition law and merger regulation in particular is similar in many ways to the Zimbabwean system.¹³¹ However, the

¹²⁸ See sections 12(1) (definition of a merger), 12A(1) (substantive test for merger assessment) and 12A(3) (demarcating the public interest concept for purposes of the Competition Act) of the South African Competition Act 89 of 1998.

¹²⁹ See *Iscor/Saldanha Steel* (note 38 above) pars. 108, 110(2), (3) and (4).

¹³⁰ See 8.3.

¹³¹ Both systems are founded on a broader government policy objectives aimed at largely addressing the past imbalances created by erstwhile minority regimes. As such, the public interest consideration is a prominent feature of both systems.

South African authorities in reviewing mergers involving failing firm arguments had considered, albeit in a modified formulation, the criteria developed and adopted in such jurisdictions as the US and the EU.¹³² The authorities had particularly expressed preference for the EU approach.¹³³ The question is whether Zimbabwe should follow suit? It thus became imperative that this study explore the EU approach to the failing firm doctrine in order to identify the quality that makes it attractive to the South African authorities and consider how Zimbabwe can draw lessons therefrom.

Secondly, although the failing firm doctrine largely owes its roots to the celebrated US Supreme Court decision in *International Shoe Co.*,¹³⁴ the EU had adopted and further refined the doctrine.¹³⁵ It can be said that the EU provides a modernised approach to the failing firm doctrine. It was thus important for the study to consider such an approach for comparative purposes.

What lessons can Zimbabwe draw from the preferred and modernised approach to the failing firm doctrine? Central to EU merger control is advancing the Community objective of integrating Member States.¹³⁶ Given the diversity in EU Member States, it is crucial that any policy underlying merger control be driven by a clear and effective merger control system. This is given effect by utilising the ‘lack of causality principle’ as provided for in the regulatory statute.¹³⁷ This principle provides that any given merger cannot be regarded as the cause of the deterioration in the post-merger competitive market conditions if such conditions can occur even in the absence of such a merger.¹³⁸

¹³² See *Iscor/Saldanha Steel* (note 55 above) pars. 77-97; 108, 110(2), (3) and (4).

¹³³ See *Ibid.*, par.110 (3).

¹³⁴ *International Shoe. Co* (note 12 above) 302-03. On the origins and development of the failing firm doctrine, see Chapter 4 in 4.2 particularly note 7.

¹³⁵ See par. 90 of the EC *Horizontal Merger Guidelines*. See also *Kali und Salz/MdK/Treuhand* (note 87 above) par. 78.

¹³⁶ Note 80 above. However, given the advanced level of economic integration within the EU, it is expected that the merger policy will shift from integration oriented to include other facets of the economy such as economic stability and industrial policy.

¹³⁷ European Council (EC) *Regulation No. 139/ 2004 of 20 January 2004 on the control of concentrations between undertakings*, OJ L24/1-22 of 29.01.2004 (‘the ECMR’) art. 2(2).

¹³⁸ *Ibid.* see also *Kali und Salz* (note 87 above) L186/49 par. 72.

In the EU merger control, the failing firm doctrine constitutes an exception to the lack of causality principle.¹³⁹ This is because the deterioration in the competitive conditions of the relevant market in the case of a failing firm is not a result of the presence or absence of the proposed merger but the likelihood of failure and subsequent exit of a party to the merger.¹⁴⁰ In other words, in the event of failure and subsequent exit of the target firm, the competitive structure of the relevant market would deteriorate. Similarly, in the event of the merger proceeding, the said competitive structure would still deteriorate as a result of the creation or strengthening of dominant position.¹⁴¹ Accordingly, the deterioration would occur in either the event of a merger proceeding or, in the absence of a merger, in the event of a firm failure.¹⁴² The deterioration in the market conditions post-merger can thus not be pinned on the merger in question for such a situation would have obtained in any event.¹⁴³ Prohibiting the merger can only best be viewed as of academic importance.

However, for a merger involving a failing firm claim to be justified on the basis that the deterioration in the competitive market structure would have occurred with or without the merger, the merging parties must demonstrate that there are no other alternative purchasers besides the acquiring firm.¹⁴⁴ An alternative purchaser is not merely a party outside the proposed merger but one who possesses the quality required to meet the profile of the exiting firm as an effective competitor.¹⁴⁵ An entity can only be regarded as an effective competitor if it is able to influence the competitive behaviour of a market, that is, able to influence the pricing, production and distribution pattern of the relevant market.

The alternative purchaser requirement has been extended to include a demonstration that in the event of the target firm's failure and subsequent exit from the relevant market, its vacant market share and assets would automatically fall to the acquiring firm.¹⁴⁶ This can only

¹³⁹ *Kali und Salz* (note 87 above) L186/49 par. 72. See also Case No. IV/M.1221 *Rewe/Meinl* [1999] OJ L274/1 par. 63; Case IV/M.890 *Blokker/ Toys 'R' Us* [1998] OJ L316/1 par. 111.

¹⁴⁰ *Ibid.*

¹⁴¹ *Kali und Salz* (note 87 above) par.72.

¹⁴² *Kali und Salz* (note 87 above) par. 72; Case IV/M. 744 *Saint Gobain /Wacker-Chemie/NOM* [1997] OJ L247/1, L247/43 par. 43.

¹⁴³ *Ibid.*

¹⁴⁴ Par. 90 of the EC *Horizontal Merger Guidelines*. See also *Kali und Salz* (note 87 above) par. 70.

¹⁴⁵ See on meet qualities, see generally Case No. COMP/M. 2816 *Ernst&Young France/Andersen France*, Commission decision of 5 September 2002 and Chapter 6 in 6.4.6.3.1.

¹⁴⁶ Par. 90 of the EC *Horizontal Merger Guidelines*. See also *Kali und Salz* (note 87 above) par. 70.

happen in a situation where there are no other competitors on the relevant market. This requirement coupled by the fact that the doctrine is generally construed as an exception, makes it difficult to meet. The strict construction of the requirement is justifiable on the basis that once the failing firm doctrine is established an otherwise anti-competitive merger is approved hence there is a need to ensure that the competitive market structure is maintained in the event of failure and exit of an effective competitor.

It is the application of the lack of causality principle to the failing firm doctrine that makes the EU approach unique. Unique in the sense that the principle demonstrates a departure from the traditional criteria developed in the US as well as narrowing the doctrine making its application even stricter.¹⁴⁷ This strict approach is probably the reason why the South African authorities had expressed its preference of the EU approach. However, it is not the reason why this writer believes the EU system can be used to provide useful lessons for developing an effective model suitable for Zimbabwe.

The utilisation of the lack of causality principle in reviewing mergers involving failing firm claims is the reason why the EU approach is useful for drawing lessons for Zimbabwe. The said principle is central to EU merger control including reviewing mergers in which the failing firm doctrine is invoked. This is significant in that it demonstrates the unwavering and consistent approach to merger regulation in general and the application of the failing firm doctrine in particular. The lesson that can be drawn from such an approach is that it possible to employ a single criterion for the failing firm doctrine thereby adopting a simple but effective approach.¹⁴⁸

Although the EU approach, in particular the use of the lack of causality principle in assessing mergers involving failing firm claims, is a useful lesson for Zimbabwe, such an approach can only be utilised if modified to take into account the fact that the doctrine is not an absolute defence to an anti-competitive merger in Zimbabwe. It is thus necessary to adopt and adapt the approach. Furthermore, there appears no attempt to distinguish between the failing firm

¹⁴⁷ See generally Bavasso A and Lindsay (2007)(note 89 above).

¹⁴⁸ However, it must be noted that the EU approach as it stands does not make use of a single criteria despite it being apparent that the lack of causality requirement is principal in all merger control decisions. It is this aspect that this study believes is what Zimbabwe should adapt in developing a rather simple and effective model for reviewing mergers involving failing firm claims.

doctrine and the related failing division defence in EU merger control.¹⁴⁹ The lack of such a distinction makes it difficult for one to simply cut-and-paste the EU approach and further necessitates the need to adapt it to suit the Zimbabwean regulatory framework. This is particularly true given that the Zimbabwean statute gives effect to both doctrines in its definition of a merger as well as the provision relating to the doctrines in question.¹⁵⁰ The EU approach thus leaves unanswered the question as to how Zimbabwe can strengthen the regulatory provisions and practices in which not the entire business of a party to a merger is failing but only a part of such a business. This issue is not addressed by the South African authorities either. As such, the US as the original source of the doctrine was considered to try and come up with a model for regulating corporate mergers in which the failing division doctrine is in issue.

8.3.4 The US approach to the failing division doctrine and lessons for Zimbabwe

Any meaningful discussion of the application of the failing firm and failing division doctrines to mergers involving corporate entities in difficulties can never be complete without reference to the US approach. The US Supreme Court's decision in *International Shoe Co.*¹⁵¹ is widely credited with the origination of the failing firm doctrine.¹⁵² Similarly, the US antitrust agencies and courts have considered the applicability of the related failing division doctrine.¹⁵³ It is against this background that the study found it relevant to consider the US as a comparative jurisdiction in order to develop and suggest a suitably effective regulatory model for Zimbabwe.

(a) The failing firm doctrine

¹⁴⁹ See Chapter 6 in 6.4.5.2.

¹⁵⁰ Section 2(1) of the Competition Act of 1996 defines a merger as the acquisition or establishment of control over the whole or part of a business. Section 32 (4a)(h) requires the CTC when necessary, to assess the effects of the actual or likely failure of a business or part thereof of a party to the merger.

¹⁵¹ *International Shoe Co.* (note 12 above) 302-03.

¹⁵² See Chapter 4 in 4.2 in particular note 7.

¹⁵³ See section 11 of the US *Horizontal Merger Guidelines*. See also *FTC v Harbour Group Investments, L.P.* No. CIV A.90-2525, 1990 WL 198819, 1 (D.D.C. Nov. 19. 1990); *FTC v Lancaster Colony Corp.* 434 F.Supp. 1088 (S.D. N.Y. 1977). See generally Wait AL 'Surviving the Shipwreck: A Proposal to Revive the Failing Division Defence' (2003) 45(1) *William and Mary Law Review* 429; Schlosberg RS 'Mergers and Acquisitions: Understanding the Antitrust Issues' 2nd ed., (2004) 213.

The significance of the US approach is its flexibility. Although *International Shoe Co.* laid down the acceptability of the failing firm doctrine as an absolute defence to an otherwise anti-competitive merger, the criteria currently being employed by the agencies was a refinement of the *International Shoe Co.* decision in *Citizen Publishing Co.*¹⁵⁴ It is true to say that the original formulation of the defence in *International Shoe Co.* has been refined in several subsequent decisions.¹⁵⁵ A significant feature of these decisions is their demonstration of a sufficient degree of flexibility. This is true given that the courts have not strictly applied the *International Shoe Co.* formulation. However, this must not be construed as implying that the defence has been made easier to meet by any means for this is far from being the case. The criteria for meeting the failing firm defence in the US remains largely narrow and are strictly interpreted.¹⁵⁶

The US approach thus provides a significant lesson for Zimbabwe in that it shows that even though the criteria for meeting the defence is dauntingly difficult to satisfy, the courts have managed to adopt a commendably flexible approach thereto. This situation has been made possible regardless of the fact that the authorities had formulated potentially rigid internal merger guidelines. However, it must be pointed out that sustaining a flexible approach in the face of a somehow rigid administrative guideline largely depends on the role of the judiciary in antitrust development. The US judiciary has played a crucial role in the development of antitrust jurisprudence in general and the failing firm doctrine in particular. This means that even though the guidelines might be rigid in nature, the courts can still promote flexibility by employing a reason based case-by-case approach.¹⁵⁷ It is unfortunate that the same cannot be said of Zimbabwe. The effect of the contrasting positions is that the shield that is provided by the courts in avoiding a rigid approach due to the tendency of strict adherence to internal

¹⁵⁴ *Citizen Publishing Co. v US* 394 US 131, 137-38 (1969).

¹⁵⁵ See for instance in *Brown Shoe Co* (note 6 above) where evidence of failing was accepted as a mitigating factor to an otherwise anti-competitive merger; *General Dynamics Corp* (note 57 above) 504 (weakened firm defence).

¹⁵⁶ See note 153 above.

¹⁵⁷ Ferguson CG 'No other prospective purchaser requirement of the Failing Firm Defence' (1970) 22 *South Carolina Law Review* 91, 97; Bok R Section 7 of The Clayton Act and The Merging of Law and Economics' (1960) 74 *Harvard Law Review* 226, 346 noted that 'courts cannot apply a simple rule of thumb for the particular circumstances of the failing firm and the industry within which it operates will doubtless determine whether a reasonable attempt shall include sounding out rival firms, contracting a business broker, or advertising in a financial periodical.'

administrative guidelines is lost where there is no court intervention. It is thus critical for Zimbabwe to adopt the US approach to provide a flexible approach to the Zimbabwean approach to both the failing firm and failing division doctrines without necessarily relying on the administrative guidelines. In other words, the flexibility can still be promoted in the form of a well-crafted statutory provision that draws from the criteria provided for in the US guidelines.

(d) The failing division doctrine

The US *Horizontal Merger Guidelines* acknowledge that a merger can involve a party whose business division might be failing. The guidelines provide that in the same manner as a failing firm defence can be used to justify an otherwise anti-competitive merger, a failing division defence can be used to neutralise the anti-competitive effects of a merger.¹⁵⁸ However, despite the fact that the agencies through the said guidelines had acknowledged the failing firm doctrine, the courts had shown a reluctance to accept the same as a defence in the same breath as the failing firm defence.¹⁵⁹ Instead of developing and applying separate criteria for the failing division defence, the courts have opted to subordinate it to the more established criteria for the failing firm defence.¹⁶⁰ The effect of such an approach is that the failing division defence had remained largely on paper and its jurisprudential development stifled.¹⁶¹

The fact that the US courts have been reluctant to develop separate criteria for the failing division defence does not necessarily mean that the system's approach to the doctrine is not of use to Zimbabwe. The US *Horizontal Merger Guidelines* clearly acknowledge the failing division defence. This is a significant showing given that the agencies who are the custodians of the guidelines are the principal merger reviewing authorities. If the agencies acknowledge that the failing division doctrine is an absolute defence to an otherwise anti-competitive

¹⁵⁸ Section 11 of the *Horizontal Merger Guidelines*.

¹⁵⁹ See *United States v Blue Bell Inc.*, 395 F. Supp. 538, 550 9M.D. Tenn. 1975 ('unsatisfactory earnings' of a failing division held insufficient to establish a failing firm company); *United States v Petroleum Co.*, 367 F. Supp. 1226, 1260 (C.D. Cal. 1973); *Joseph Ciccone and Sons v Eastern Industries* 537 F. Supp. 623, 629-30 (E.D. Pa. 1982); *FTC v. Great Lakes Chemical Corp.* 528 F. Supp. 84, 96 (1981); *United States v. Reed Roller Bit Company* 274 F. Supp. 573, 584 n1 (1967).

¹⁶⁰ *Reed Roller Bit Company* (note 159 above) 584 n1. See also Wait (2003) (note 153 above) 430.

¹⁶¹ See generally Wait (2003)(note 153 above) 430 ('if the failing firm defence is considered a survivor [...], the failing divisional defence is analogous to a shipwreck.')

merger, they are in a position to accept it. Surely the agencies are not expected to ignore their own guidelines. Accordingly, they can apply the failing firm doctrine and approve a given merger if they are satisfied that the transaction in question meets the set conditions. The question is what lessons can Zimbabwe draw from the US approach to the failing division defence?

It is clear from the above discussion that the agencies and the courts seem to have adopted contrasting attitudes to the doctrine. It is thus submitted that Zimbabwe does not need to adopt the same attitude as that of the US courts but should rather adapt the attitude of the agencies. Denying the applicability of the failing division doctrine is contrary to the statutory provisions giving effect to merger control in Zimbabwe. The statute clearly defines a merger as also involving, where appropriate, the acquisition of a controlling interest *over part of a business*.¹⁶² In addition, the provision giving effect to the failing firm doctrine also makes reference to the failing division doctrine.¹⁶³ It is thus logical that in developing an effective merger regulatory system for Zimbabwe, one has to take this into account.

Even if the agencies accept the failing division doctrine in merger regulation, it must be taken into account that such an approach must not be used as a ticket to adopt the relevant US guidelines in their current state. The issue here is that Zimbabwe needs to adopt and adapt the approach only to such extent that it suits the agenda of strengthening the current regulatory system so as to promote and maintain an effective merger regulatory system. The most significant lesson for Zimbabwe thus undoubtedly lies in the acceptance by the US agencies of the failing division doctrine as a defence to justify an otherwise anti-competitive merger in the same breath as a failing firm defence. This is crucial for Zimbabwe given that both these doctrines are given statutory effect. However, one must not be distracted by the fact that the failing division doctrine has found it difficult to be accepted by the US courts. The fact does not mean that it is not of any use. It is merely a reflection of that jurisdiction's approach which is characterised by a rather strict review of corporate transactions so as to avoid any unnecessary distortion of the competitive structure of the market. It makes sense then that the courts had adopted a hard stance against failing division claims. Since Zimbabwe has to adopt and adapt the approaches applied elsewhere, the US guidelines can be a useful starting point. This does not necessarily mean that Zimbabwe should make use of administrative

¹⁶² Section 2(1) of the Competition Act of 1996 (italics for emphasis).

¹⁶³ Section 32 (4a)(h).

guidelines as well. It is still effective to adopt the essential elements of the guidelines' criteria for assessing the failing firm doctrine and adapt them into a statutory provision.

Having identified the material deficiencies in the current merger regulatory framework and having considered how comparative jurisdictions have dealt with selective aspects of merger regulation, the study will now develop and suggest an effective merger regulatory framework for Zimbabwe. It must be reiterated that an effective regulatory framework in this context refers to a system that is capable of promoting and maintaining a balance between the competition goals of the system and the advancement of the broader policy objectives that underlines the system. In particular, an effective system must be seen to be able to promote beneficial corporate transactions implemented through mergers and acquisitions without unnecessarily sacrificing the core principle of merger regulation which is the protection of the competitive structure of the market.

8.4 Towards an effective merger regulatory framework: suggestions and recommendations for a suitable model

8.4.1 Rearranging the current merger provisions

The starting point in reflecting the changes necessary to provide for an effective merger regulatory framework is rearranging the current provisions relating to merger regulation in the Act. Given that the current statute as a whole comprises merely 34 pages including two schedules,¹⁶⁴ it is thus submitted that no harm will be done if the statute is rearranged. This rearranging exercise will provide much needed clarity and legal certainty which is currently lacking. A clearly crafted statute will make it easy for merging parties and any interested party to find their way without having to flip through virtually the entire piece of legislation. It will also cater for the possibilities of future legislative processes such an amendment in form of additions.

¹⁶⁴ The two schedules relates to 'Unfair Business Practices' in the First Schedule expanding sections 2 and 42 and the 'Powers of the Commission' in the Second Schedule expanding section 5.

It is further submitted that there is a need to house merger provisions in a single part of the Act. It is suggested that all the provisions relating to merger regulation be contained in an exclusive merger regulation part clearly marked ‘Merger Regulation.’¹⁶⁵

Having dedicated a part of the statute to merger regulation, the next step is to deal with the substantive provisions relating to merger regulation within that Part. This is aimed at strengthening the current regulatory framework by way of making necessary alternations be they through additions, subtractions or substitutions. However, this exercise must be reflected by the objective of the statute. Accordingly, there is a need to restate the objective of the Act.

8.4.2 Restating the objective of the Competition Act

It has been noted that the current objective of the Act as provided in the Long Title understates the primary goal of the competition system.¹⁶⁶ The Long Title to the Act provides as the main objective of the Act ‘to promote and maintain competition in the economy of Zimbabwe.’¹⁶⁷ This provision merely refers to the promotion and maintenance of competition without qualifying the degree of competition. This does not accurately reflect the principle underlying competition law in general and merger regulation in particular. Competition law aims to protect the competitive structure of the market through, *inter alia*, the prohibition of anti-competitive practices and ensuring that where competition exists, such is maintained and where no competition exists, that competition is promoted. Merger regulation is primarily concerned with the scrutinising of corporate transactions that fall within the defined category of being a merger in order to maintain the competitive structure of the market. It follows that competition legislation must be a mechanism for the promotion and maintenance of a vigorous competition system. It is only through a vigorously competitive market structure that the intended beneficiaries of the competition system can derive any meaningful benefits therefrom. Accordingly, the competition legislation must aim at ensuring the promotion not only of competition but of effective competition in the economy.

The current objective of the Act does not seem to give effect to the promotion and maintenance of effective competition. By merely referring to competition, the Act appears to

¹⁶⁵ This approach is similar to the one adopted by the South African legislature in providing for Chapter 3 of the Competition Act of 1998 as amended. Chapter 3 is clearly marked as ‘Merger Control’ and is commonly referred to as the ‘merger provisions.’

¹⁶⁶ See 8.2.1 above.

¹⁶⁷ Long Title to the Competition Act of 1996.

be concerned with promoting a large number of competitors in the market. Although this might promote competition, it is argued that a mere large number of competitors do not necessarily translate into a competitive market. Competition can effectively be promoted even if a market is characterised by a few entities as long as these entities engage in healthy rivalry.¹⁶⁸ An oligopolistic market can be as competitive as one with many entities. Meaningful competition is only promoted if the market is characterised by intense inter-firm rivalry regardless of the number of the participants on such a market. The question is thus not about the promotion and maintenance of competition but rather *effective competition*. This is not reflected in the currently stated objective of the Act hence it is suggested that the same must be restated to read as: '[a]n Act to promote and maintain *effective* competition in the economy of Zimbabwe.'¹⁶⁹

By restating the objective of the Act, the Long Title will be in line with other provisions relating to merger regulation. Section 32 makes reference to 'whether or not a merger is likely to substantially prevent or lessen competition'¹⁷⁰ in determining the likely effects of a given merger. The provision further alludes to the assessment of 'whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail'¹⁷¹ and 'whether the merger will result in the removal of efficient competition.'¹⁷² These provisions in one way or the other qualify the degree of competition. The term 'substantive' as used in the introductory part of the provision clearly denotes that the effects of the merger in question must be material¹⁷³ rather than mere prevention or reduction.

The inclusion of both the failing firm and failing division considerations also give weight to the argument that the competition system through merger regulation is not necessarily concerned with the number of entities on the market but rather with effective competitors. This is because the competitive significance of a failing firm diminishes thereby rendering it an insignificant market participant in that it will not be able to influence effective

¹⁶⁸ See generally Gal MS *Competition Policy for Small Market Economies* (2002) and Bishop S and Walker M *The economics of EC competition law: concepts, applications and measurement* (2002) in Chapter 2

¹⁶⁹ Long title with italics added to reflect the suggested changes.

¹⁷⁰ Section 32(4a).

¹⁷¹ Section 32(4a)(h).

¹⁷² Section 32(4a)(i).

¹⁷³ See note 7 above.

competition.¹⁷⁴ This is further given impetus by a clear reference to the ‘removal of efficient competition.’ Efficient competition is only promoted by effective competitors. This has nothing to do with the number of the competitors. In any case, these provisions qualify competition thereby making it clear that the concern must not only be with competition but also with the degree thereof. It is thus argued that restating the objective of the Act will be in line with the current merger provisions hence will not do any harm to the functioning of the statute as a whole.

8.4.3 Redefining a merger and eliminating the artificial gap in the statutory definition

It has been shown that the current statutory merger definition is unclear.¹⁷⁵ This results in it being subjected to various interpretations including that the definition does not cover all types of mergers.¹⁷⁶ However, it is submitted that such an interpretation only creates an artificial ‘gap’ given that a holistic approach to the statute supports the argument that the current definition is broad enough to cover all types of mergers.

Currently section 2 defines a merger as meaning:

[T]he direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person.¹⁷⁷

The direct or indirect acquisition or establishment of a controlling interest over the business of a competitor or supplier simply denotes horizontal and vertical merger respectively. There is a clear indication of a relationship between merging parties either as in the same line of business or at different levels of production. However, it is the reference to ‘or other person’ that is a potential source of differing interpretations and the subsequent creation of an artificial ‘gap’ in the coverage of the statutory definition.

¹⁷⁴ See *International She Co.* (note 12 above) 302-303; *Brown Shoe Co.* (note 6 above) 319,346; *General Dynamics Corp.* (note 57 above) 503; *Reed Roller Bit Co.* (note 1159 above) 584 ; *Santam Ltd/Emerald Insurance* (note 55 above) par. 84; *Tiger Brands Ltd/ Ashton Canning Co. (Pty) Ltd Newco and Langeberg Foods International Ashton Canning Co. (Pty) Ltd* 46/LM/May05 par.84; Case IV /M. 053 *Aerospatiale/Alenia/de Havilland* [1991] OJ L334/42 par. 31

¹⁷⁵ See 8.2.2 above.

¹⁷⁶ See *Ex parte Caledonia* (note 19 above) 6. See also UNCTAD *A Tripartite Report* (2012) (note 20 above) 182; Kububa (2009) (note 20 above) 4.

¹⁷⁷ Section 2(1).

What did the legislature intend to be meant by inserting the phrase ‘or other person?’ Is it a mere confirmation of the fact that the definition and the statute only cover mergers between economically related parties? Or is it a catch all proviso that extends beyond the two specified types of mergers? It has been shown that both these arguments can be supported one way or the other.¹⁷⁸ It is however the first argument that the definition is only limited to horizontal and vertical mergers and only extends to pure-conglomerate mergers to an extent that they reveal the specified two types that is a potential source for weakening the effectiveness of the regulatory framework. By excluding from the coverage of the statute one of the known types of mergers, the interpretation creates a regulatory ‘gap.’ Regardless of the merits of the debate, the point is that the current definition subjects the most critical aspect of the regulatory framework to unnecessary theorisation.

It is submitted that the fact that the definition is subject to more than one interpretation is worrisome. The theorisation of this crucial element of the merger regulatory framework is not in the best interest of the system. The definition assigned to a transaction by the statute is crucial for it is only after determining whether or not a transaction amounts to a merger that all the other provisions are triggered. The definition becomes the face of the merger control provisions. Accordingly, it is submitted that the definition must be expressed in unequivocal terms to provide legal certainty and dispense with any possibilities of a gap in the coverage of the statute.

The current statutory definition thus needs to be amended to avoid unnecessary theorisation on a crucial concept. This amendment will also aid towards the strengthening of the current merger regulatory framework. It is recommended that the legislature redefine a merger by deleting the entire phrase ‘of a competitor, supplier, customer, or other person’ and substituting it with ‘of another person.’ The proposed definition should read as follows:

For purposes of this Act, a merger means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of another person.

The above proposed definition borrows, albeit with adaptations, the South African definition.¹⁷⁹ These adaptations take into account the fact that the Zimbabwean statute already

¹⁷⁸ See 8.2.2 above.

¹⁷⁹ See section 1(1)(a) of the South African Competition Act of 1998.

defines the concept of a controlling interest thereby qualifying the concept of control hence does not make reference to mere control.¹⁸⁰

The proposed definition is simple but broad enough to cater for all the known types of mergers. The phrase ‘of another person’ is wide enough to cater for a horizontal, vertical or conglomerate merger. ‘Another person’ simply denotes a party other than the acquired party. This does not take into account the type of pre-merger economic relationship between the acquiring firm and ‘another person.’

Although one can argue that Zimbabwe might not need a statute to regulate pure-conglomerate mergers,¹⁸¹ such an argument does not necessarily take into account two fundamental issues. The first is that although the current competitive market structure might not be threatened by pure-conglomerate mergers, there is no guarantee that this situation will persist for ever. By merely taking into account the current situation, the argument fails to consider a fundamental principle of competition law, namely that the business operating environment is dynamics hence firms’ competitive behaviour is not static. Merger regulation can only be said to be effective if it is equally dynamic in nature.¹⁸² An effective merger regulatory system should be forward looking hence even if conglomerate mergers pose no threat to the current competitive structure of the market, no harm is done if they are captured in the statutory definition. After all, merger regulation is not aimed at regulating the transactions *per se*, but the likely anti-competitive effects thereof.

The second is that although it is generally accepted that horizontal and vertical mergers are more likely to pose a threat to the competitive market structure,¹⁸³ pure-conglomerate

¹⁸⁰ See section 2(1) of the Competition Act of 1996 defining controlling interest as (a) in relation to an undertaking, ‘any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking’ or (b) in relation to an assets. ‘any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.’ Cf. section 12(2) of the South African Competition Act illustrating situations in which a party acquires or establishes control over the business or part thereof of another.

¹⁸¹ This argument is based on the fact that pure conglomerate merger poses the least threat to competition.

¹⁸² See Fox EM and Sullivan LA ‘Antitrust Retrospective and Prospective: Where are we coming from? Where are we going?’ (1987) 62 *New York University Law Review* 936; Ewing KP Jnr ‘Integration: Perspectives and Competition’ (2001) 69 *Antitrust Law Journal* 349; Fox EM ‘Antitrust and Regulatory Federalism: Races Up, Down, and Sideways’ (2000) 75 *New York University Law Review* 1781, 1783 (‘as the economic conditions evolves, so too evolves the antitrust enforcement system.’)

¹⁸³ See note 15 above.

mergers can be equally anti-competitive.¹⁸⁴ There is thus no justification to exclude the conglomerate mergers from the purview of merger regulation.¹⁸⁵ Furthermore, the objective of the entire statute does not distinguish between the types of mergers. The Long Title to the Act only provides that the Act is to regulate mergers. An exclusionary definition does not pull towards the realisation of the objective of the Act. It follows then that if a certain type of a merger is excluded from the scope of the system, such exclusion might threaten the effectiveness of merger regulation.

It is submitted that the proposed definition promotes the effectiveness of the merger regulatory framework in that it enhances legal certainty and eliminates any artificial ‘gap’ within the statutory definition. The proposal is in line with promoting flexibility in merger regulation in that it accounts for dynamism in the competitive structure of the market. Furthermore, a catch-all provision is simple and broad enough to enhance the effectiveness of the merger regulatory framework.

8.4.4 Defining the public interest concept

The public interest concept is not only a crucial element of the Zimbabwean merger regulatory framework but a vital consideration for the effectiveness of the competition system as a whole. The concept reflects the roots of the competition system as it mirrors the broader policy objectives inherent in the competition system. Its significance lies in the fact that it provides a mechanism for promoting a balance between the protection of the competitive structure of the market on one hand and the advancing of a broader policy objective on the other.

The public interest concept ordinarily denotes the consideration of non-competition factors in merger regulation. These non-competition factors are any considerations outside the traditional economic concerns consisting of efficiency and the likely competitive effects of a merger. The public interest concept thus provides an avenue for the promotion of the broader policy objectives underpinning merger policy in Zimbabwe. It is thus clear that the concept needs to be expressed in specific terms.

¹⁸⁴ See note 18 above.

¹⁸⁵ UNCTAD *A Tripartite Report* (2012) (note 20 above) 183.

Currently the statute only makes reference to public interest without providing any indication of what amounts to public interest.¹⁸⁶ The concept is thus largely undefined.¹⁸⁷ The only slight indication of what might constitute public interest can be deduced from the CTC's decisions.¹⁸⁸ However, although this might be a useful tool to shed light on the concept, it is submitted that the statutory shortcomings are not cured, particularly in that:

¹⁸⁶ See sections 31(2) (the CTC must determine for purposes of making an appropriate order, whether or not a merger is contrary to public interests); 32(4)(a) and (b) (a merger is contrary to public interest if it substantially lessen competition in the whole or part of the country or if it results in the creation of a monopoly situation that is in itself contrary to public interests); 36 (3) (in determining whether or not to grant an application for merger authorisation in terms of section 35, the CTC must determine the public interest compatibility of the merger).

¹⁸⁷ UNCTAD *A Tripartite Report* (2012) (note 20 above) 184

¹⁸⁸ These are (a) employment creation, See *Acquisition by Delta Beverages of 'Mr Juice' Beverage Brand and Trademark from Emmand Enterprises (Pvt) Limited*, [2003] CTC/M&As/Nov03 (about 95-130 jobs created); *Rothmans of Pall Mall/British American Tobacco* merger (note 15 above) (merged entity employed 294 workers); *Shashi Private Hospital/PSMI* (note 15 above) (unquantified additional medical staff), *Coca-Cola/Cadbury-Schweppes* merger (note 15 above) (prevented massive job losses in Schweppes Zimbabwe Limited by saving the bottling plant from closure), *Acquisition of Zimtile by PG Merchandising*, CTC/M&As/Jul03 (merger maintains stable employment) *Innskor Appliances/WRS* merger (assured job security at ailing WRS firms); (b) export earnings- *Rothmans of Pall Mall/British American Tobacco* merger facilitated the entrants onto the market of entities engaging in primarily exportation of products, *Coca-Cola/Cadbury-Schweppes* merger (development of local Mazoe and Calypso beverage brands into regional brands capable of enhancing export earnings, *Portland Holdings/Pretoria Portland Cement* merger (note 37 above) (exports to Mozambique and SA totalling 79 000 tonnes in 2001 to 103 000 tonnes in 2005, *Zimtile/PG Merchandising* merger (Zimtile become active in the export market), *Zimboard Products* (increased export volumes of both fibreboard and particleboard into the region); (c) consumer interests- *Rothmans of Pall Mall/British American Tobacco* merger saved British American Tobacco Company Zimbabwe Limited (BAT) 's local Kingsgate and Berkeley cigarette brands from exiting the market to detriment of their consumers also price stabilisation- condition that the ex-factory prices of all the cigarettes brands produced by the merging parties should not be higher than those charged immediately prior to the consummation of the merger), *Coca-Cola/Cadbury-Schweppes* merger (ensured continuation of Mazoe and Calypso brands, *Zimtile/PG Merchandising* merger (enabled wider distribution of roofing tiles throughout Zimbabwe), *Shashi Private Hospitals/PSMI* merger (increased X-Ray and medical laboratory services in the Mashonaland Central Province which was previously deprived of the facilities, *Innskor Appliances/WRS* merger (the economies of scale generated post-merger meant that WRS no longer have to rely on passing all costs to consumers thus price stabilisation); (d) indigenisation or localisation of economic control – *Rothmans of Pall Mall/British American Tobacco* merger (entity's surplus cigarette making equipment should be disposed of at fair and realistic prices to local entrepreneurs), *Coca-Cola/Cadbury-Schweppes* merger (the Coca-Cola Company acquires and modernises the Schweppes bottling plant in Zimbabwe before disposing it to indigenous parties), *Total*

(a) The decisions are not readily available to the public. They are only available in form of either internal studies conducted by the CTC¹⁸⁹ and executive summaries.

(b) Even the CTC does not have known clear policy guidelines on what to consider in assessing the public interest implications of a given merger. Even if they have such guidelines, such policy guidelines are largely unavailable to the public in general and merging parties in particular.¹⁹⁰ It remains a privilege of the CTC.

The above situation is largely unfavourable and detrimental to the effectiveness of the merger regulatory framework. Although the CTC is the custodian of the merger regulatory framework, the fact that a vital component of the system is largely undefined and a privilege of only one party is not in the best interest of the system. The effectiveness of the system is undermined in that:

(a) Merging parties are left to second-guess what factors the CTC might consider in assessing the public interest implications of the merger.

Zimbabwe/Mobil Oil Zimbabwe merger (approved on condition that the merged entity disposes to interested indigenous parties as going concern all excess depots and service stations arising from the merger), (e) promotion of foreign direct investment – *Coca-Cola/Cadbury Schweppes* merger ((Coca-Cola Company to invest considerable amounts of foreign currency and expertise in modernising the local Schweppes bottling plant), *Portland Holdings/Pretoria Portland Cement* merger (the Pretoria Portland Cement Company Limited of South Africa also to modernise Portland Holdings’ cement plant in Bulawayo and turned it into a strong regional cement exporter), *Zimboard/PG Bison Mauritius* merger (productivity of Zimboard Products’ plant restored after revamped and refurbished using PG Bison Mauritius’ foreign currency injection); (f) better quality and wide range of consumer products- *Zimtile/PG Merchandising* merger (merging parties able to offer consumers a wide range of roofing products and services), *Innskor Appliances/WRS* merger (WRS able to increase the range and volumes of television sets that it manufactures for the local market); (g) sustained or increased business to local raw material suppliers- *Coca-Cola/Cadbury Schweppes* merger (the Coca-Cola Company promote and develop Zimbabwean suppliers with respect to the necessary raw materials required to produce the local Mazoe and Calypso beverages).

¹⁸⁹ See note 51 above.

¹⁹⁰ See UNCTAD *Zimbabwe-Overview* (2012) (note 66 above) 3 par.11 (the policy document underlining competition policy in Zimbabwe cannot be located).

- (b) The undefined public interest concept is elastic and remains only the privilege of the CTC. It is a potential source of abuse as vested private interests can be easily disguised as public interest.¹⁹¹
- (c) Even if the CTC can determine what constitutes public interest, its current internal structure is not suitable for providing a buffer against infiltration and attempts to influence the system using the undefined public interest concept.¹⁹²

It is thus submitted that the decisions made by the CTC relating to public interest be used as a building block in providing clarity to the public interest concept. There is a need to amend the statute so as to give legal clarity and certainty to this vital component of the merger regulatory framework. It is recommended that the legislature amends the current provisions where the concept is referred to by inserting a proviso that reads as follows:

When determining whether or not a merger is contrary to public interest, the Commission shall take into account, where necessary, the effect of such a merger on:

- (a) Employment*
- (b) Export earnings*
- (c) Consumer interests, particularly continued availability of goods and services on the domestic market*
- (d) Indigenisation and/or localisation of control of economic*
- (e) Enhancement of economic development through generation of foreign exchange, advancement of technological development, foreign direct investment or any similar consideration.*
- (f) Any other factors that might be relevant in the circumstances.*

The main element of the above proposed provision is that it will provide a degree of certainty to the merging parties. The proposed amendments will only apply to merger regulation. This entails that section 32 which generally applies to restrictive practices, mergers or monopoly situations must be altered and accordingly rearranged so as to reflect the proposed changes.

¹⁹¹ See 8.2.4 above.

¹⁹² Ibid. See also note 30 above.

The part that makes reference to merger must be removed and placed under the merger control part as suggested above.¹⁹³

Although section 32 is headed as ‘Factors to be considered by the Commission when making orders,’ it is argued that the provision does not necessarily shed light on what constitutes public interest. What the legislature simply did was to reiterate the traditional competition factors. Furthermore, the CTC decisions are a clear demonstration that the concept goes beyond the traditional competition considerations. It is thus clear that there is a need to reflect the CTC practice in the statute hence the above proposed provisions. In order to avoid repetition, anywhere in the statute where the term appears it must be assigned the definition proposed above.

The proposed provision makes reference to the consideration of any *other relevant factor*. It is argued that this catch all provision though potentially elastic is a better evil than the currently undefined situation. The merging parties can still rely on the specified grounds to plan their transactions and anticipate what factors might be considered by the CTC.

8.4.5 Clarifying the standard for merger assessment

The critical substantive test for the merger review is not clear.¹⁹⁴ This situation is evidenced from the following:

- (a) The CTC expresses that the substantive test for merger review is a three-pronged assessment test.¹⁹⁵ The first leg is an inquiry into whether or not the merger in issue is likely to substantially lessen or prevent competition in the relevant market.¹⁹⁶ The second leg assesses whether or not there is any likelihood that the merger in issue will result in any substantial benefits capable of outweighing the competition concerns raised by the merger and such benefits could not be achieved through any other means besides the merger in issue.¹⁹⁷ Regardless of the results of the first two legs, the third leg assesses whether or not the merger can be justified on substantial public interest grounds.¹⁹⁸

¹⁹³ See 8.4.1 above.

¹⁹⁴ See 8.3.2 above and generally Chapter 3 especially 3.3.2.2.

¹⁹⁵ See Kububa (2009)(note 20 above) 4. This approach is similar to the one provided under section 12A(1) of the South African Competition Act of 1998.

¹⁹⁶ Ibid. Cf. section 12A (1) of the South African Competition Act of 1998.

¹⁹⁷ See also section 12A (1)(a)(i) of the South African Competition Act of 1998.

¹⁹⁸ See also section 12A (1)(a)(ii) of the South African Competition Act of 1998.

(b) The UNCTAD report maintains that the standard for merger review in Zimbabwe is whether or not the merger in question is contrary to public interest.¹⁹⁹

A closer look at the CTC decisions shows that although the authority expressed the three-pronged substantive assessment test as the standard for merger review, such an inquiry is conducted within the broader public interest impact assessment. The public interest concept becomes a critical component of the standard for merger assessment. The statutory provision giving rise to the submitted first leg of the test is merely an expansion of the public interest test. Section 32 provides that the Commission shall determine for purposes of making relevant orders, the public interest compatibility of any given merger.²⁰⁰ Subsection 4 further provides that for the purposes of making such orders, the Commission shall regard a merger as being contrary to public interest if it is satisfied that the merger, *inter alia*, has or is likely to substantially lessen the degree of competition in Zimbabwe or any substantial part of the country.²⁰¹ Crucially, subsection (4a) provides for a number of factors that the Commission might consider ‘when determining whether or not a merger is likely to substantially prevent or lessen competition.’²⁰² It is thus clear that the ‘substantial lessening or prevention of competition’-inquiry is provided only as a statutory extension of the public interest compatibility test. To this end, the public interest compatibility test becomes the standard for merger assessment.

However, regardless of the merits or lack thereof of the above observations, one thing is clear: the standard for merger assessment remains largely unclear. The mere fact that there are even two sides to this matter is a cause for concern. This scenario is a major drawback on the effectiveness of the entire merger regulatory framework. Accordingly, it is recommended that the legislature amends the relevant statutory provision in order to address this handicap. It is suggested that the standard for merger assessment be expressed in unequivocal terms so as to achieve legal certainty and avoid the unfortunate situation whereby more than one test are advanced as the standard. The proposed provision containing the test must read as follows:

¹⁹⁹ UNCTAD *A Tripartite Report* (2012)(note 20 above) 16.

²⁰⁰ See section 32 (1) of the Competition Act of 1996.

²⁰¹ Section 32 (4) (a).

²⁰² Section 32 (4a).

- (1) When considering a merger, the Merger Directorate or the Competition Commission must preliminarily determine whether or not the merger is likely to substantially prevent or lessen competition in Zimbabwe or any substantial part thereof, by assessing the factors set out in subsection X, and*
- (a) If it appears that the merger is likely to substantially prevent or lessen competition, then determine-*
- (i) whether or not it is likely to result in any technological, efficiency or other pro-competition benefits greater than and capable of offsetting any effects of prevention or lessening of competition that may result from the merger and whether such benefits would not be achieved if the merger is not allowed; and*
 - (ii) Whether or not the merger cannot be justified on any substantial public interest grounds by assessing the factors set out in subsection Y.*

The proposed provision is basically what the CTC has expressed as the standard for merger assessment.²⁰³ It is thus a mere reflection of the CTC practice that is not reflected in the statute. The proposal does not by any means constitute a drastic departure from the current practice neither does it depart from best practices in merger review. The latter observation is supported by the fact that the proposed provision is largely adapted from the South African statute.²⁰⁴ However, it must be reiterated that although other jurisdictional approaches to essential merger regulation concepts are critical in the development of an effective regulatory framework for Zimbabwe, this does not mean that everything about such other approach is required for such an exercise. As such, whereas the South African provision provides that after assessing the first two legs of the test, it must be determined ‘whether the merger can or cannot be justified on substantial public interest grounds,’²⁰⁵ the proposed provision deliberately omitted the word ‘can.’ This is meant to dispel any misconception that a merger that might have failed the first two legs of the test can simply be allowed on the public interest basis.²⁰⁶ It is submitted that the proposed test will give credence to the argument that the primary concern of merger regulation is competition. However, the test is broadly formulated to cater for important policy considerations underlying merger policy in

²⁰³ See note 195 above.

²⁰⁴ See section 12A(1) of the SA Competition Act.

²⁰⁵ Section 12A(1) (a)(ii) of the SA Act.

²⁰⁶ See on the ‘Janus-faced’ quality of the South African three-pronged substantive assessment test and implications for mergers involving failing firms, Chapter 5 in 5.4.2.

Zimbabwe hence the public interest leg. The proposed provision thus captures both the pure competition considerations in merger regulation as well as the non-competition factors contained in the public interest considerations.

8.4.6 Promoting and maintaining a balance between beneficial corporate transactions and the protection of a competitive market structure: strengthening the failing firm and division provisions

The Act gives effect to both the failing firm and failing division doctrines. Section 32 provides that;

When determining whether or not a merger is likely to substantially prevent or lessen competition the Commission shall consider any of the following factors as many be relevant-
(h) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.²⁰⁷

However, the provision does not provide any form of clarity on either the failing firm or failing division doctrines. It is suggested that the doctrines need to be clarified. This clarification is vital for the following reasons:

- (a) Merging parties who wish to structure their claims for justifying a merger on the basis that absent the merger either the alleged failing firm will exit the relevant market and its assets will be lost to the detriment of the competitive structure of the said market or the alleged failing division will meet with the same fate with equally detrimental competitive consequences, need to know how to structure such claims.
- (b) A clearly spelt out doctrine is crucial in strengthening the effectiveness of the regulatory framework in the face of a harsh macro-economic environment for businesses. It becomes the single most important factor in merger review.
- (c) It is only after providing for an effective merger regulatory framework that the question as to whether or not it is justified to alter the current regulatory standards in the face of a changed business operating environment can be addressed. In other words, whether or not Zimbabwe must adjust the standards of merger review in times of a harsh business operating environment in order to promote beneficial corporate restructuring transactions implemented through mergers and acquisitions.

²⁰⁷ Section 32 (4a)(h).

It is recommended that the current provisions be expanded to provide an explanation and the much needed effectiveness. This statutory expansion must encompass in the provision, the criteria for considering both the failing firm and failing division doctrines. It is suggested that in order to avoid further complicating the doctrines, a single but effective criterion will suffice. Thus the proposed statutory doctrine must read as:

In order to assess for purposes of justifying a merger on the basis that the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail, the Commission must be satisfied that the merger in question is not the cause of any post-merger deterioration in the competitive market conditions.

In relation to the alleged failure of the entire business of a party to the merger, the merging parties may demonstrate, where necessary, that:

- (a) absent the merger, the entire business, that is the assets of the allegedly failing firm, would exit the relevant market in the near future;*
- (b) there are no other means of saving the allegedly failing firm's business besides the merger in question;*
- (c) there are no alternative purchasers posing a less competitive threat outside the merger;*
- (d) rescuing the failing firm through the proposed merger would be in the public interest.*

In relation to the alleged failure of part of the business of a party to the merger, the merging parties may demonstrate that, where necessary:

- (a) absent the merger, the failing division of one of the parties to the proposed merger would exit the relevant market in the near future;*
- (b) the owner of the allegedly failing division is not able to reorganise it so that it assumes the status of a viable entity;*
- (c) there are no other alternative purchasers for the alleged failing division posing a less competitive threat besides the proposed acquirer;*

(d) rescuing the failing division through the proposed merger would be in the public interest.

In relying on either of the above, the burden of satisfying to the Commission that the relevant criterion have been met lies with the merging parties who must discharge such burden on a balance of probability.

The above proposed provisions draws from both the US and EU approaches to the failing firm and failing division doctrines.²⁰⁸ The primary consideration on the lack of causality principle is drawn from the EU approach²⁰⁹ and the accompanying criteria are a hybrid of the two jurisdictions. However, what separates the proposed model from these jurisdictions is that the model provision is statutorily entrenched whereas both the US and EU criteria are provided in administrative guidelines.²¹⁰ This provides legal certainty to the criteria as well as giving it much needed legal force not only as binding on the regulatory authority but also on both parties.

It is argued that once the provisions giving effect to the two doctrines are strengthened, attention can then be paid to the question as to whether in a changed business operating environment, Zimbabwe needs to adjust the standards for merger regulation. In other words, whether the CTC needs to adopt a lenient approach to parties seeking to rely on either the failing firm or failing division doctrines? By ‘standards’ here is meant the criteria for applying the doctrines in question. There are naturally two sides to this issue: one argues for the retention of a strict approach to merger regulation and the other justifies the adoption of a lenient approach.²¹¹

The first line of argument suggests that by adopting a lenient approach to either the failing firm or failing division doctrines, the standards for merger regulation are lowered to the detriment of the competition system.²¹² This approach is detrimental to the survival of the

²⁰⁸ See section 11 of the US *Horizontal Merger Guidelines* and articles 89-90 of the EC *Horizontal Merger Guidelines*.

²⁰⁹ Article 89 of the EC *Horizontal Merger Guidelines*.

²¹⁰ However, it must be pointed out that these administrative guidelines are a product of judicial decisions. See Chapters 6 and 7.

²¹¹ See generally Kokkoris and Olivares-Caminal (2010) (note 46 above).

²¹² See Jenny F ‘Foreword’ in Kokkoris and Olivares-Caminal (2010) (note 46 above) Calvino N ‘Brussels: Part of the Problem or Part of the Cure?’ *EU Competition and Public Law Report, Brussels focus* (2009), available at

competitive market structure despite its potential to promote corporate survival strategies. It follows that anti-competitive mergers must not be approved simply on the basis that they involve failing firms or divisions hence their approval ensures corporate survival. What is essential is ensuring the existence of a competitive market structure. Such a structure is capable of ensuring the survival of corporate businesses in the long run.

It is submitted that altering the criteria for merger regulation only provides a short term benefit. This benefit is not sustainable since competition is still required even post the harsh macroeconomic. History bears testimony to the fact that suspension of competition or lowering of enforcement standards is not a cure to a harsh corporate operating environment.²¹³

However, most proponents of retaining the existing criteria for assessing mergers involving failing firms or failing divisions base their arguments on the effectiveness and suitability of the existing systems.²¹⁴ They argue that the current systems are well equipped to deal with any changes in the business operating environment hence there is no need to alter the assessment standards in face of a crisis.²¹⁵ In other words, the systems are considered as being effective to adapt to any changed circumstances since they are dynamic. Whereas this can be true of such jurisdictions as the EU and the US, the same cannot be said of Zimbabwe. This leads to the second argument which advocates for an alteration of the standards in the face of a harsh business operating environment.

It can be argued that given the weakness inherent in the current regulatory system, the only solution to the promotion of corporate survival lies in lowering the standards of merger regulation. This supports a lenient approach to both the failing firm and failing division

http://abreuadrogados.com/xms/files/05_Comunicacao/Artigos_na_Impreusa/Iberia_Lawyer_Artigo-MMP_fEB.2009.PDF, (accessed 23 October 2010)(Nadia Calvino is the Deputy Director General of the Directorate General Competition of the EU.)

²¹³ For instance following the Great Depression in The US, the Roosevelt administration enacted the National Industrial Recovery Act (NIRA) in 1933 in a bid to deal with economic crisis as part of the programme commonly referred to as the Great Deal. NIRA *inter alia*, suspended antitrust laws. However, the effects of such a move were nothing short of a weakened antitrust enforcement system and rather a prolonged period of economic challenges. See generally Taylor J 'Cartels or Fair Competition? The Economics of the National Industrial Recovery Act' (1999) *Essays in Economic and Business History* 215, 216.

²¹⁴ See note 212 above.

²¹⁵ Ibid.

doctrines. By adopting a lenient approach, the regulator ensures that beneficial corporate transactions get approved. This can ensure the survival of ailing corporate entities. However, as alluded to above, this is but only a short term solution. The competitive structure of the market is placed at risk by approving anti-competitive mergers. It is accepted that even after the harsh period has passed, it may be difficult to restore the competitive structure of the market. The argument that a lenient approach promotes corporate survival in the face of a crisis only partially justifies such an approach. The question remains how the merger regulatory system can promote both beneficial corporate transactions implemented through mergers and acquisitions and protect the competitive structure of the market?

The answer to the above question lies in ensuring that the regulatory system strikes and maintains a balance between the promotion of beneficial corporate mergers and acquisitions on the one hand and the protection of a competitive market structure on the other. If any system in its current state is able to maintain such a balance, then one can argue that there is no need to alter the regulatory standards even in the face of a harsh business operating environment. This is because the system will be effective enough to cater for such changes. An effective system is thus adaptive to any possible changes in the business operating environment due to its flexible nature. However, the same cannot be said of the current Zimbabwean regulatory system. The system is not effective.

What Zimbabwe needs is an effective framework for regulating mergers in a harsh business operating environment. The existing regulatory system does not support a framework capable of promoting and maintaining the much needed balance. It is submitted that the proposed provision will be able to strike this balance particularly in that it will take into account the crucial factor that merger regulation in Zimbabwe although primarily concerned with the protection of the competitive structure of the market, does not have to ignore some other important non-competition factors. The model thus proposes and recommends a hybrid approach suitable for a broad-based merger regulatory system.

8.4.7 Revamping the structure of the merger regulatory authority

The Act establishes and constitutes the CTC as the principal merger regulatory authority.²¹⁶ This authority is constituted by the Board of Commissioners who are referred to as the

²¹⁶ See section 4 establishing the CTC, section 5 provides for the general functions of the CTC.

Commission²¹⁷ and the Directorate headed by a Director appointed by the Commission.²¹⁸ The Act provides that the Commission is responsible for conducting investigations, prosecuting and adjudicating transactions that might be contrary to competition.²¹⁹ The Commission is thus the investigator, prosecutor and adjudicator. Provision is made for the Directorate as a mere administrative arm of the competition authority.²²⁰ In addition to this set-up, provision is made for appeals from the decisions of the Commission to the Administrative Court.²²¹

The effect of the above structure is that it primarily provides for an authority with investigative, prosecutorial and adjudicative powers. This is contrary to the generally accepted principles of good corporate governance as contained in the doctrine of separation of powers.²²² This doctrine provides that the distinct separation of the law making, prosecuting and adjudicative powers of the state vest in distinct institutions. The current structure is thus untenable.

Although the statute provides for a Directorate as a mere administrative arm of the Commission, in practice the Directorate exercises wider functions including conducting investigations.²²³ These functions are exercised under the powers delegated to the Directorate by the Commission.²²⁴ However, this practical position is not reflected in the statute. The effect of such an anomaly is that the CTC can take away the delegated functions as it may please. The fact that there are no reported incidents of such must not be construed as a basis for justifying the *status quo*. Surely one cannot guarantee the continued existence of the composition of the current authority hence there is a need to statutorily reflect all the

²¹⁷ The Act in section 2 defines the Commission as the Competition and Tariff Commission. Part II makes reference to members of the said Commission implying the Board of the Commission.

²¹⁸ See section 17.

²¹⁹ See sections 5(1)(d) (investigation as a function of the CTC); 28 (CTC's powers to investigate); 31 (adjudicating through making orders); 35 (adjudication through determining applications for authorisations).

²²⁰ Section 17 (1) provides that the Commission shall appoint a Director who shall be responsible for administering the Commission's affairs, funds and property and performing any other activities as conferred upon him by the Commission..

²²¹ Section 57.

²²² See note 70 above.

²²³ See note 69 above.

²²⁴ See section 17 (1) provides that the Commission can confer upon the Director any functions implying that it can delegate to him to do any of the acts beyond administration.

operational structures of the CTC. Accordingly, it is suggested and recommended that the legislature make the necessary amendments to reflect the practical set-up of the authority so that it conforms to the doctrine of separation of powers.

The Act provides that appeals from decisions of the Commission lie to the Administrative Court.²²⁵ The provision only makes reference to an appeal. It is not clear whether the term appeal also covers review. The two are distinct legal proceedings despite both aiming at overturning the decisions of a court or tribunal.²²⁶ An appeal relates to proceedings aimed at attacking the merits of a decision on either incorrect or inaccurate legal principle or misapplication of facts.²²⁷ A review relates to proceedings aimed at attacking the proceedings giving rise to the decision in question.²²⁸ It is thus necessary to reflect this distinction.

The Act only confers appeal jurisdiction upon the Administrative Court. Although provision is made to constitute the said court for purposes of hearing appeals, the Act subjects competition matters to the rules and procedures of the Administrative Court.²²⁹ This means that competition matters inherit any deficiencies within the Administrative Court proceedings such as the absence of urgency applications.²³⁰ This is particularly detrimental to the effectiveness of the merger regulatory framework as time taken to determine the fate of a transaction is of the essence especially in mergers involving failing firm or failing division claims.²³¹ Although the use of the Administrative Court is not harmful to the regulatory system, it is suggested that the provision relating to appeals be amended to provide for the rules governing such proceedings.

It is recommended that the legislature alter the structure of the merger regulatory authority by providing as follows;

²²⁵ Section 40.

²²⁶ For the difference between an appeal and review in legal proceedings, *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZLR 469 (S) (proceedings are different) and generally Garner B (ED) *Black's Law Dictionary* (2004) 105 and 864 respectively

²²⁷ See note 74 above.

²²⁸ See note 75 above.

²²⁹ Section 40(2).

²³⁰ See Chapter 3 in 3.4.1.3.

²³¹ See generally Weiss V and Mayer M 'Identifying Filing Obligations And Beyond: Merger Control in Cross-Border Transactions' in Parr R and Sander R (eds.,) *The International Comparative Legal Guide to: Merger Control 2013* (2013) 15-20.

(1) *The primary authority to regulate mergers lies in the Merger Directorate, the Competition Commission and the Administrative Court.*

(a) *The Merger Directorate will have the powers to conduct investigations on cases of market concentrations and to make preliminary determinations on applications for authorisation of merger made in terms of section 35.*

(b) *The Merger Directorate will make recommendations to the Competition Commission in relation to the making of final determinations.*

(c) *The Competition Commission will make final determinations on applications for authorisations of mergers made in terms of section 35 and referred to it by the Merger Directorate. It is an independent Commission with adjudicative powers.*

(d) *Finally, the Administrative Court established in terms of the Administrative Court Act [Chapter 7:10] shall have the powers to hear both appeals and reviews from the Competition Commission.*

(e) *For purposes of hearing appeals and reviews referred to above, the Administrative Court shall be guided by rules provided under this Act.*

The proposed structure will provide much needed clarity and keep in line with the general judiciary system in Zimbabwe. It will clearly provide for both appeals and reviews in merger proceedings. In addition, the merger regulatory authority will be shared by the three distinct but related institutions. This structure not only reflects general best practices in good corporate governance but also the practical situation currently obtaining in Zimbabwe. The 'Merger Directorate' will be merely an arm of the CTC tasked with investigating and making preliminary determinations on mergers as well as recommending to the Competition Commission for final determinations. This task is currently carried out by the Directorate but is not reflected in the statute.²³²

Perhaps the most important aspect of the proposed regulatory structure is the retention of the Administrative Court as the reviewing and appellate arm. This is in line with the country's judiciary system in which the Administrative Court is provided as a specialised court whose

²³² See notes 69 and 223 above.

jurisdiction is conferred by other statutes.²³³ As such, the proposals will keep in line with this tradition albeit with modifications. The first modification relates to the need to amend the current provisions in which competition appeals are subjected to the rules of the Administrative Court and procedures.²³⁴ Given that the Administrative Court does not have original jurisdiction, it makes sense that in addition to constituting it for purposes of hearing competition matters, the Competition Act must also provide in the form of delegated legislation, rules for hearing appeals and reviews from mainstream competition tribunals. This is not alien to Zimbabwe for currently the High Court provides for separate rules for hearing bail proceedings despite the fact that there are already general High Court rules dealing with general procedure.²³⁵ It is thus submitted that the proposed structural provisions will only strengthen the merger regulatory framework without altering the current judicial system.

The second modification relates to the creation of the 'Merger Directorate' within the CTC. This does not mean that a new entity has to be formed but rather that the current internal structure has to be reflected in the statute. As already pointed out in relation to the retention of the Administrative Court, creating new institutions must not be an option for the following reasons. Firstly, although merger cases might constitute by far the highest number of competition cases,²³⁶ the low rate of litigation in these matters²³⁷ implies that any new institutions outside the current structure might serve no meaningful purpose. As such, it is advisable that the identified institutional deficiencies be dealt with through strengthening the

²³³ The Administrative Court is established by the Administrative Court Act 39 of 1979 as a specialized court whose jurisdiction is bestowed by other statutes such as the Competition Act. See generally, Feltoe G A *Guide to the Administrative and Local Government Law in Zimbabwe* (4th ed.,)(2006) 24; Madhuku (2010) (note 4 above) 75.

²³⁴ Section 40(2).

²³⁵ See High Court Rules of 1977 in Statutory Instrument 1047/1971 and High Court of Zimbabwe (Bail) Rules, 1991 in Statutory Instrument 109/1991.

²³⁶ See Kububa AJ 'Zimbabwe' (2005) in *UNCTAD Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries : Thailand, LAO, Zambia, Zimbabwe* UNCTAD/DITC/CLP/2005/2, 277-365, 277(between 1999 and 2005, of the 200 competition cases handled by the CTC, restrictive and unfair trade practices combined constituted 60% and mergers and acquisitions constituted 40% of the total); Kububa (2009) (note 12 above) 30(between 2006 and 2011, mergers cases totalled to 416 compared to 358 restrictive business practices cases.)

²³⁷ UNCTAD A *Tripartite Report* (2012) (note 20 above) 176.

current establishment. It is through an effective regulatory structural framework that effective merger regulation can be achieved.

8.5 Concluding remarks

An effective merger regulatory framework is a necessity for the overall effectiveness not only of the Zimbabwean competition system but also specifically the Zimbabwean merger regulatory system. An effective system must be capable of dealing with current as well as future merger regulatory concerns. It must thus be flexible to accommodate any changes in the business operating environment such as a harsh macroeconomic environment that precipitates corporate transactions aimed at ensuring corporate survival. However, flexibility must not result in the regulatory system sacrificing the principles of merger regulation that is, ensuring that only mergers posing no or little threat to the competitive market structure are allowed to proceed. In other words, anti-competitive mergers must be blocked or modified in order to avert the anti-competitive effects they might cause on the competitive structure of the market. This requires a balancing act between the pro-merger benefits and the likely anti-competitive effects of a given merger. Thus an effective system must be able to strike and maintain such a balance at any given time.

It has been shown that the current merger regulatory system in Zimbabwe fails to meet the status of an effective system. A number of deficiencies in the regulatory system make it inadequate to effectively provide for a regulatory mechanism that can promote vital corporate transactions implemented through mergers and acquisitions without unnecessarily sacrificing the principles of merger regulation. In other words, the current system is not ideally suited to promote beneficial corporate restructuring transactions on the one hand and protect the competitive market structure on the other. The system is defective mainly in its inability to provide for clear definitions of vital concepts such as the public interest concept, the statutory definition of a corporate merger and the standard for merger assessment. In an ideal situation, some of these statutory shortcomings might be cured by the structure of the regulatory institutions as well as its practical approach to these matters. However, the current merger regulating institutional structure and approach of the CTC to such doctrines as the failing firm and failing divisions in merger regulation does not aid in this critical aspect. The system remains severely in need of changes.

A survey of such jurisdictions as South Africa, the EU and the US provide a useful insight into how some of the issues raised above can be dealt with and in the process can promote an effective merger regulatory framework. These jurisdictions thus provide selected lessons for Zimbabwe. For instance, the South African merger regulatory system, which share a similar historical development to merger regulation in particular and competition law in general, provide for a broad based system that cater for *inter alia*, the consideration of traditionally non-competition factors in merger regulation in a bid to advance wider policy objectives. However, the system clearly demarcates these public interests considerations. This adds to the effectiveness of the South African system and hence provides a vital lesson for Zimbabwe that effective merger regulation can still be achieved within a broad-based system driven by wider policy considerations. The South African system also provides a three-pronged institutional structure as the competition authority.²³⁸ This structure provides for a three-pronged distinct and independent institutional framework that is capable of creating a buffer against any attempts to abuse the much talked about public interest concept. Finally, the regulatory authorities have managed to make use of a clearly spelt out substantive assessment standard for merger review incorporating the clearly defined public interest test to apply the failing firm doctrine in merger regulation. The result of such an approach is a commendably flexible approach to the doctrine and a vital lesson to Zimbabwe that one does not necessarily need a strict approach to the failing firm doctrine in order to achieve an effective merger regulatory framework.

However, with all the above qualities, the South African authorities have made use of the criteria for adjudicating mergers involving failing firms established and being currently utilised in the EU and US.²³⁹ They have expressed preference to EU criteria in particular.²⁴⁰ The EU approach to merger regulation in general is that once it is established that the post-merger deterioration in the competitive structure of the market would have resulted with or without the merger, then the merger in question is deemed not to be the cause of such deterioration.²⁴¹ In the case of a failing firm claim, the merger involving a failing firm argument is justified regardless of it being anti-competitive if it can be established that the deterioration in the competitive market conditions post-failure and exit would nonetheless

²³⁸ Chapter 4 of the South African Competition Act of 1998.

²³⁹ See note 85 above.

²⁴⁰ See note 86 above.

²⁴¹ Par. 89 of the EC *Horizontal Merger Guidelines*.

occur even if the merger is prohibited due to the fact that the proposed acquiring firm would acquire the market share and assets of the exiting firm.²⁴² This is established in proving set criteria.²⁴³ However, these said criteria are difficult to meet. This is probably due to the fact that once a failing firm is accredited, so too is an anti-competitive merger approved. It is thus not this approach that is a crucial lesson for Zimbabwe. It is rather the fact that the Commission had consistently made use of the lack of causality principle in determining mergers in which the failing firm doctrine has been invoked. The principle is core to the application of the doctrine. It has been argued that this approach can be used to develop a single and effective criterion for the failing firm doctrine hence the proposed statutory provision which adapts the EU principle of lack of causality.

Lastly, in search of a suitable and effective merger regulatory provision for the related but distinct failing division doctrine, the US approach provided valuable lessons regarding the doctrine. The US *Horizontal Merger Guidelines* acknowledge that a successful failing division defence can provide a justification for the approval of an otherwise anti-competitive merger in the same vein as the more popular failing division defence.²⁴⁴ However, this acknowledgement is not reciprocated by the courts that have shown a reluctance to accept the doctrine in the same light as the failing firm defence.²⁴⁵ This reluctance has been demonstrated by the application of the criteria for the failing firm defence in cases where the facts clearly revealed a failing division scenario.²⁴⁶ It is not however this approach that provides lessons for Zimbabwe but the lesson lies in the merger regulatory agencies' acceptance of the failing firm doctrine. The criteria provided in the guidelines become the basis for developing and proposing a statutory provision for the failing division doctrine in Zimbabwe.

The research, after considering the approaches to selective aspects of merger regulation by comparative jurisdictions, then developed and suggested an effective regulatory model for Zimbabwe. This model seeks to strengthen the current regulatory mechanism and encompass both statutory and administrative reforms. Although the proposed model is a product of comparative research, caution was exercised in ensuring that it reflected the practical aspects

²⁴² See 8.3 above.

²⁴³ Par. 90 of the EC *Horizontal Merger Guidelines*.

²⁴⁴ Section 11 of the US *Horizontal merger guidelines*.

²⁴⁵ See note 159 above.

²⁴⁶ *Ibid.*

of the merger regulatory environment in Zimbabwe. It became more of an adapted version of merger regulation in the comparative jurisdictions rather than a wholesale adaptation of their approaches. This is reflected in the research recommending the retention of the basic policy underlying merger regulation in Zimbabwe as far as possible as well as the regulatory structure of the institutions tasked with merger regulation in line with the country's judicial system.

The key features of the proposed provisions are the need to provide clarity and legal certainty to essential concepts of merger regulation on one hand and advancement of a flexible and dynamic regulatory system on the other. This turned on the need to strengthen the current regulatory system by providing a framework capable of ensuring clearly defined legal principles and concepts underlying the regulation of corporate mergers and acquisitions without fermenting a rigid system. It is only through such a system that corporate transactions vital for general economic recovery and development and corporate survival are promoted. Such a system can also protect the competitive structure of the market and ensures that the traditional benefits attached to a competitive market economy are realised both in the short and long term. The proposed model will ensure both the protection of the competitive market structure and the promotion of vital corporate transactions implemented through corporate mergers and acquisitions. There is thus a need to amend the current provisions relating to merger regulation so that it becomes clearer, more certain and flexible in order to balance and reflect the country's socio-economic goals and competition objectives.

Finally, this research and the recommendations made therein is by no means a panacea for corporate restructurings amidst a challenging business operating environment for it does not necessarily address all aspects needed for corporate survival. However, it is submitted that the research still adds value by highlighting the inadequacies of the current regulatory system and the impact thereof upon the promotion of corporate restructuring transactions implemented through mergers and acquisitions. The developed and suggested model particularly reflects the practical aspects informing and influencing the merger regulatory policy hence is suitably equipped to cater for the current and future elements of merger regulation in Zimbabwe.

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