THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

# MERGERS AND TAKEOVERS: THE JURISDICTION OF THE COMPETITION AND CONSUMER PROTECTION COMMISSION AND ITS IMPACT ON CONSUMER PROTECTION

BY

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## DECLARATION

I, **LOUISE DE-ASSIS CHILEPA**, computer number – **26094711** do hereby declare that I am the author of this Directed Research entitled: Mergers and Takeovers: The Jurisdiction of the Competition and Consumer Protection Commission and its Impact on Consumer Protection, and confirm that it my own work. I further declare that due acknowledgement has been given where work of other scholars has been used. I verily believe that this research has not been previously presented for a degree at the University of Zambia or any other University.

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## ABSTRACT

The Competition and Consumer Protection Commission was created under Section 4 of the Competition and Fair Trading Act which Act has now been repealed and replaced by the Competition and Consumer Protection Act No. 24 of 2010, which Act has continued the existence of the Commission. The Commission is mandated to encourage and promote competition within the Zambian Economy and in an effort to do so, it is mandated with the approval of mergers and takeovers which mergers may be detrimental to competition in the economy.

This research endeavours to establish the impact that merger control has on the consumer. Merger control is not an end in itself but a means to an end. Competitive economies are a requirement for better products, innovation and better prices. Consumers on the other hand are the end beneficiaries of competition, thus the importance of the Competition and Consumer Protection Commission.

The Competition and Consumer Protection Act sets out the extent of the jurisdiction of the Commission exercisable in the review of mergers and takeovers. In a bid to establish the extent of jurisdiction of the Commission this paper addressed the establishment of the Commission and it functions therein. The paper then assessed mergers and takeovers in general and then moved on to assess mergers and takeovers in the Zambian context as provided in the Competition and Consumer Protection Act. The paper then endeavoured to explore the jurisdiction of the Competition and Consumer Protection Commission in relation to mergers and takeovers and its impact on consumer protection. And then a comparative study of the Competition and Consumer Protection Commission and the European Competition Regime was undertaken to evaluate the efficiency of the Commission.

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# CHAPTER 1

# GENERAL INTRODUCTION

## 1.1 INTRODUCTION

Healthy competition has been said to be an important element in the creation of common market free from restraints on trade. According to the World Intellectual Property Organisation, "experience has shown that there is little hope of fairness in competition being achieved solely by the free play of market sources."[1] Furthermore, Furse points out that "the importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy."[2] Therefore it is important to have in place an effective mechanism for the control of anti-competitive practices and the abuse of market power by the enterprises that have acquired a dominant position in a relevant or defined market.

The Competition and Consumer Protection Act No. 24 of 2010 (herein after referred to as the Act) is an Act continuing the existence of the Zambia Competition Commission now called the Competition and Consumer Protection Commission which Commission was created under the Competition and Fair Trading Act[3] which Act has been repealed by the Competition and Consumer Protection Act. Similar to the Competition and Fair Trading Act, this Act aims at safeguarding and promoting competition and it aims at protecting consumers against unfair trade practices. In order to achieve its objectives, the Act provides for the continuance of the Competition and Consumer Protection Commission which is mandated with ensuring the observance of the provisions of the Act.

In its mandate to safeguard and promote competition, the Act makes provisions for Mergers. Mergers and Takeovers are corporate actions which entail the combining of

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[1] WIPO intellectual Property Hand Book: Law, Policy and Use (2.753)
[2] M. Furse, Competition Law of the EC and UK (4th edition). (Oxford: Oxford University Press, 2004: p1)
[3] Act No. 18 of 1994

two firms into one legal entity. According to Whish[4], "a true merger involves two separate undertakings merging entirely into a new entity." This is done mainly to improve company performance and shareholder value in the long term. Mergers and takeovers result in the boosting of economies of scale, greater sales revenue and market share in the market, broadened diversification and increased tax efficiency[5].

The Act provides that the Minister of Commerce, Trade and Industry shall set thresholds for mergers that need mandatory notification[6]. The Commission is empowered with the approval of mergers that will fall within the threshold as set by the Minister. Mergers that do not meet the notification threshold need not be notified to the Commission but however in certain instances where the Commission has reasonable grounds to believe that a merger may adversely reduce competition, it may require that it be notified despite the proposed merger transaction falling below the prescribed threshold[7].

The Commission is vested with these powers so as to ensure that the dominant market forces do not abuse their dominance power, thus distorting competition. The control of mergers and takeovers is concerned with the maintenance of a competitive market structure[8]. The control of mergers and takeovers concentrates on preventing a merged entity from abusing its market power and also maintaining a market structure that is capable of delivering the benefits that follow from competition.

## 1.2 PROBLEM STATEMENT

Competition Laws like the Competition and Consumer Protection Act are laws that promote and maintain market competition by regulating anti-competitive practices. The Act establishes the Competition and Consumer Protection Commission which has the duty of ensuring the observance of the provisions of the Act. The Commission is mandated with the duty of protecting the consumers, preventing anti-competitive trade practises and ensuring that the market power is favourable so as to promote competition and economic growth in the economy.

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[4] R. Whish, Competition Law (5th Edition). (London: LexisNexis, 2003:p779)
[5] www.investopedia.com
[6] Section 26 of the Competition and Consumer Protection Act No.10 of 2010
[7] Competition and Consumer Protection Act No.24 of 2010
[8] R. Whish, Competition Law (5th Edition). (London: LexisNexis, 2003:p779)

The Commission has the mandate to control mergers and takeovers, it is empowered by the Act to give approval for any merger or takeover that meets the prescribed threshold and any merger or takeover that does not acquire such authority from the Commission has no legal effect and no rights or obligations are imposed on the parties by any agreement incidental thereto. According to section 26 (4) of the Act, where a merger transaction does in fact meet the prescribed threshold and the parties to the merger transaction have not applied for authorisation to the Commission, then such merger transaction is void.

Whereas it is important to have in place an effective mechanism for the control of anti-competitive trade practises, such mechanism must be endowed with sufficient power so as not to render it ineffective. It is therefore the purpose of this study to analyse the jurisdiction of the Commission and evaluate whether under such jurisdiction it effectively performs its functions under the Act.

clear statement of the problem

## 1.3 OBJECTIVES OF THE STUDY

The overall objectives of the study are to analyse the extent of the jurisdiction of the Competition and Consumer Protection Commission in its control of mergers and takeovers and the effect of the regulation of mergers and takeovers on consumer protection. This is to ensure a broader understanding of the competition and fair trading rules governing commerce and trade which rules are being enforced in Zambia at the time being.

In order to achieve this multistage project, the following activities shall be undertaken:

1. An analysis of the law governing mergers and takeovers with reference to the work of various scholars on this topical subject;
2. An appraisal as to the extent of the jurisdiction of the Competition and Consumer Protection Commission in relation to mergers and takeovers;
3. An evaluation of the Competition and Consumer Protection Commission in comparison to other similar bodies in foreign jurisdictions;
4. An identification of the effect of the decisions made by the Competition and Consumer Protection Commission; and

5. A conclusion establishing the extent of jurisdiction, the force of decisions and the implications of the decisions made by the Competition and Consumer Protection Commission.

## 1.4 RESEARCH QUESTIONS

1. What is the rationale behind merger control and how does it benefit the economy?
2. To what extent does the Competition and Consumer Protection Commission exercise jurisdiction over mergers and takeovers?
3. How does the jurisdiction exercisable by the Commission affect the consumer?

## 1.5 METHODOLOGY

Owing to the fact that this paper is more technical in nature, the objectives of the paper as stated above will be achieved by analysing the applicable laws and reports of the Competition and Consumer Protection Commission. It will draw information from authors who have analysed rules of competition and fair trading. It will analyse the rules of law governing the competition environment in Zambia in respect to mergers and takeovers and the jurisdiction of the Competition and Consumer Protection Commission. The paper will then carry out a case study of the decisions of the Competition and Consumer Protection Commission. The paper will then go further to make a comparison of the Competition and Consumer Protection Commission with other identical foreign bodies focusing mainly on the European Union Competition regime. It will then assess the impact the regulation of mergers and takeovers has on the consumer.

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## 1.6 SIGNIFICANCE OF STUDY

The Act aims at protecting and promoting competition by restricting uncompetitive trade practices. The Act covers mainly four areas of competition namely, restrictive business practices, mergers and acquisitions, cartels and the abuse of dominant position of market power. In Section 8, the Act prohibits against anti-competitive trade practices, agreements and decisions. It provides as follows;

> "Any category of agreements, decision or concerted practice, which has as its object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anti-competitive and prohibited."

The Commission is mandated with the duty of protecting the consumers, preventing anti-competitive trade practises and ensuring that the market power is favourable so as to promote competition and economic growth in the economy. This is so because

> "Free competition between enterprises is considered the best means of satisfying supply and demand in the economy and of serving the interests of consumers and the economy as a whole"[9].

The research is therefore justified on the basis that it is important to have in place an effective mechanism for the control of anti-competitive practices and the abuse of market power by the enterprises that are dominant within the market. The control of mergers and takeovers is concerned with the maintenance of a competitive market structure[10]. The control of mergers and takeovers concentrates on preventing a merged entity from abusing its market power and also maintaining a market structure that is capable of delivering the benefits that follow from competition. It can therefore be noted that the control of mergers and takeovers play a very prominent role in shaping the economy as it ensures the existence of a competitive market. Therefore, there is need to have in place an effective mechanism for their control so as to ensure that stake holders are in check, and that major stake holders do not abuse their market power. The Competition and Consumer Protection Commission is one such mechanism and it is therefore vital to analyse it effectiveness and the role it plays in the market economy.

## 1.7 OUTLINE OF CHAPTERS

Chapter one of the research is a general introduction of the topic highlighting the problem statement and objectives of the study. The chapter also addresses the establishment of the Zambia Competition Commission and its functions.

In chapter two, the paper analyses the concepts of mergers and takeovers, the various types of merger, their advantages and disadvantages and the rationale behind merger control.

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[9] WIPO Intellectual Property Hand Book: Law, Policy and Use

[10] Richard Whish. Competition Law (5th Edition). (London: LexisNexis, 2003:p779)

Chapter three explores the jurisdiction of the Competition and Consumer Protection Commission in relation to mergers and takeovers and its impact on consumer protection.

Chapter four of the paper is a comparison of the Competition and Consumer Protection Commission and the European Commission under its Directorate General for Competition.

Chapter five is a conclusion drawn from the previous four chapters. The chapter goes further to make recommendations addressing the shortfalls of the Commission.

## 1.8 OPERATIONAL DEFINITION OF TERMS

### 1.8.1 CONSUMER

The Act under Section 2 defines a consumer as follows:

(a) For the purposes of Part III, any person who purchases or offers to purchase goods or services, supplied by an enterprise in the course of business, and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer or a final consumer; and

(b) For the purposes of other parts of this Act other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purposes of re-sale, but does include a person who purchases goods or services for the purposes of using the goods or services in the production or manufacture of other goods for sale or the provision of another service for remuneration.

The case of Gruber v Bay[11] is an important common law case dealing with the meaning of a consumer. In this case it was held that the Brussels Convention, which convention governed competition law, cannot in principle be relied upon by any person who concludes a contract for a purpose which is partly concerned with his trade or profession. The European Court of Justice further added that it would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, when

[11] Gruber v Bay WA AG (Case c-464/01) [2005] ECR 1 -439

considered in its entirety. According to the European Court of Justice this interpretation is supported by the restrictive definition of consumer.

Therefore considering the definition of consumer in Section 2, which too is very restrictive in its nature as it excludes persons purchasing goods for resale or for use in the production or manufacture of other goods or services or the provision of another service for remuneration, the interpretation of a consumer provided in the case of Gruber v Bay may be said to be applicable in the Zambian context.

### 1.8.2 MERGERS

Under the Act a merger has been defined at Section 24 (1), as occurring where an enterprise directly or indirectly, acquires or establishes, control over the whole or part of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.

According to Whish[12], "a true merger involves two separate undertakings merging entirely into a new entity." Furthermore, Mark Furse[13] defines a merger as being "any situation in which ownership of two or more undertakings is joined together." He goes further to note that this joining may be influenced by various factors and that it can be amicable and consensual, or unwelcomed and hostile. Therefore a merger basically involves a situation in which two or more previously independent entities come together to form one.

### 1.8.3 TAKEOVER

A takeover has been defined as the acquisition of control over an enterprise, called a target, by stock purchase or exchange, either hostile or friendly[14]. It is the assumption of control of another business enterprise, mainly done by way of purchase of shares so that the enterprise wanting to control the other has the controlling shares. It should be noted that from the definition provided for mergers under the Act, Section 24 also seems to encampus a takeover as it also provides for a situation in which one enterprise acquires control of another.

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[12] R. Whish, Competition Law (5th Edition). (London: LexisNexis, 2003:p779)
[13] M. Furse, Competition Law of the EC and UK (4th edition). (Oxford: Oxford University Press, 2004)
[14] www.investorwords.com

## 1.9 THE COMPETITION AND CONSUMER PROTECTION COMMISSION

### 1.9.1 ESTABLISHMENT

Section 4 of the Act provides for the continued existence of the Competition and Consumer Protection Commission. According to Section 4 (1);

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

At Sub-section 2, Section 4 goes further to provide that "the Commission shall be a body corporate with perpetual succession, and a common seal, capable of suing and being sued in its corporate name and with power, subject to the provisions of this Act, do to all such acts and things as a body corporate may by law do or perform."

By referring to the Commission as a body corporate, reference is made to the legal rules that allow it to enter into obligations, own property and to sue and be sued. The Commission is empowered to do these things in its own name by the principal of corporate personality. As a body corporate the Commission is given a legal personality by the law. Legal personality has been defined as "the capacity to be a bearer of rights and duties under the law"[15]. Section 4 (2) further provides that the Commission has perpetual succession, by this it entails that "...the entity apparently never dies, it is theoretically immortal."[16]

### 1.9.2 FUNCTIONS

Section 5 provides for the functions of the Commission, this section lays down the following functions:

*(a)* review the operation of markets in Zambia and the conditions of competition in those markets;

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

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

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

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[15] C, Anyangwe, An Outline of the Study of Jurisprudence.( Lusaka: UNZA Press, 2004: 34).

[16] C. Anyangwe. An Outline of the Study of Jurisprudence. (Lusaka: UNZA Press, 2004)

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

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

*(g)* advise Government on laws affecting competition and consumer protection;

*(h)* provide information for the guidance of consumers regarding their rights under this Act;

*(i)* liaise and exchange information, knowledge and expertise with competition and consumer protection authorities in other countries;

*(j)* advise the Minister on agreements relevant to competition and consumer protection and on any other matter relating to competition and consumer protection;

*(k)* co operate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act; and

*(l)* do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act.

## 1.10 CONCLUSION

It is thus evident that the Competition and Consumer Protection Commission is a body corporate with perpetual succession having the power to do all acts and things as a body corporate may by law be permitted to do. Under the Act the Commission is primarily concerned with establishing conditions that would enhance free and effective competition; it endeavours to prevent the creation of barriers as a result of anti-competitive practices. The main objectives of the Commission include the promotion of effective competition in both the private and public sector for the benefit of the consumer. In order to effectively accomplish this, the Commission has also been empowered to approve mergers and takeovers which are an important aspect of competition law. This is in order to prevent the abuse of market power which may be a direct result of mergers and takeovers through the creation and/or strengthening of a dominant position within a relevant or defined market.

## CHAPTER 2

## MERGERS AND TAKEOVERS

### 2.1 INTRODUCTION

As already defined a true merger involves two separate undertakings merging entirely into a new entity[17]. What is also important to note is that mergers under competition law include a far broader range of corporate transactions than full mergers of this kind. An example of this is in an instance where one company acquires the majority number of shares in another thus being able to control the affairs of that company[18]. For example in 2002, Zambian Breweries PLC acquired the entire issued share capital of Zambia Bottlers. Such an instance would normally be regarded as a takeover but the Competition and Consumer Protection Act governs this too under the definition of mergers. Therefore mergers under the Competition and Consumer Protection Act do not only involve the voluntary merging or combining of two or more entities into one but also includes where an enterprise acquires some form of control over the whole or part of another enterprise[19]. The effect of a merger is that it extinguishes the merged corporation, and the surviving corporation assumes all the rights, privileges, and liabilities of the merged corporation, the merging companies become one single entity in all respects.

The decisive factor when considering whether or not a merger has occurred as provided for by the European Commission Merger Regulations[20] (ECMR) is whether the company acquiring the shares may be able to acquire the possibility of exercising decisive influence. What is meant by this is a situation in which the enterprise acquiring the shares is enabled by such acquisition to exercise some form of control over the other enterprise. Therefore what ought to be achieved by a merger is that two formerly independent enterprises are now under common control. Examples of true mergers would be the merger of Ciba-Geiby and Sandoz to form the major

[17] R. Whish, Competition Law (5th ed.). (LexisNexis: London , 2003: p779)
[18] R. Whish, Competition Law (5th ed.). (LexisNexis: London, 2003:p779)
[19] Section 24(1), Competition and Consumer Protection Act No.24 of 2010
[20] Council Regulation 139/2004

pharmaceutical company Novartis[21] and the merger of Glaxo Wellcome and SmithKlein Beecham to form GlaxoSmithKlein[22].

### 2.1.1 HORIZONTAL MERGERS

A merger can be horizontal, vertical or conglomerate. A horizontal merger is one that takes place between competitors in the same product and geographical markets and at the same level of production or distribution cycle. According to Whish[23], Horizontal mergers pose a greater danger to competition as opposed to vertical mergers. These types of mergers may generate economies of scale and of scope, however these types of mergers may allow for market power to be wielded as it takes place between competitors at the same level. This envisions a situation in which two independently powerful forces merge, this may in a way significantly affect the competition in the industry as these power houses would acquire a dominant position in the market. Horizontal mergers thus have the capacity of creating monopolies and in this regard may lessen competition or just merely strengthen the dominant market share held by the entities pre-merger.

According to Ginsburg and Levin, horizontal mergers raise three competition concerns; the first concern is the elimination of competition between the merging firms, which, depending on their size, could be significant. The second is that the unification of the merging firms' operations might create substantial market power and might enable the merged entity to raise prices by reducing output unilaterally. The third problem is that, by increasing concentration in the relevant market, the transaction might strengthen the ability of the market's remaining participants to coordinate their pricing and output decisions. The fear is not that the entities will engage in secret collaboration but that the reduction in the number of industry members will enhance tacit coordination of behaviour[24]. For these reasons it is important that horizontal mergers be critically scrutinised before granting them permission to forge ahead.

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[21] Case No. IV/M.737 OJ (1997) L 201/1

[22] Case No. COMP/M 1846

[23] R. Whish, Competition Law (5th ed.). (LexisNexis: London , 2003)

[24] Ginsburg, Martin D. and Jack S. Levin. *Mergers, Acquisitions and Leveraged Buyouts.* Chicago: Commerce Clearing House. (1989)

In the case of Gencor/Lonhro Merger[25], it was feared that the horizontal merger of the two firms would take the form of increasing prices, and as such the merger was blocked. Another case showing the adverse effects of horizontal mergers was that of Aitours/First Choice[26] in which the merger would have had the effect of reducing capacity and production as a result leading to price increment.

### 2.1.2 VERTICAL MERGERS

A vertical merger on the other hand is one that is between firms that operate at different levels of the market. This is where one firm acquires control or merges with another firm on a different level of the production or distribution cycle. This thus divides vertical mergers into two, which is backward integration and forward integration. Backward integration is where an enterprise acquires control of another enterprise further down the distribution chain, whereas forward integration is where control of another enterprise further up the distribution chain is acquired. According to Martin[27]

> "Vertical mergers can make entry more difficult by foreclosing rivals from previously independent firms at either the vertical level, or by increasing capital requirements associated with entry and by promoting product differentiation. A vertically integrated oligopoly is insulated from competitive pressures that come from vertically related, competitive levels. This makes oligopolistic output coordination easier."

Even though vertical mergers de-concentrate the market, there is the danger of limiting competition in that as pointed out by Martin, vertical mergers may foreclose a market to competition. Furthermore vertical mergers have the capacity to change the pattern in which the market operates.

### 2.1.3 CONGLOMERATE MERGERS

A conglomerate merger is one that brings together firms which do not compete with each other in any product market and which does not entail vertical integration[28]. There are three main types of conglomerate mergers:

1. Product line extensions; this type of conglomerate merger is where one firm by acquiring another adds related items to its existing items;

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[25] (97/26 (1996) OJ L11/30)
[26] (2000/276 (2000) OJ L93)
[27] S. Martin, Industrial Economies.( New York: Macmillan 2nd Edition 1994: p309)
[28] R. Whish, Competition Law (5th ed.). (LexisNexis: London , 2003)

2. Market extensions; this is where the firms involved formerly sold the same products in different geographical markets; and

3. Pure conglomerates; this is where there is no functional link whatsoever between the merged firms.

Conglomerate mergers may affect competition in that they are likely to create a monopoly, giving the merged firm an upper hand in the market. According to Marks[29] "conglomerate mergers, however, may lessen future competition by eliminating the possibility that the acquiring firm would have entered the acquired firm's market independently. A conglomerate merger also may convert a large firm into a dominant one with a decisive competitive advantage, or otherwise make it difficult for other companies to enter the market. This type of merger also may reduce the number of smaller firms and may increase the merged firm's political power, thereby impairing the social and political goals of retaining independent decision-making centres, guaranteeing small business opportunities, and preserving democratic processes".

## 2.2 ADVANTAGES OF MERGERS AND TAKEOVERS

The advantages of mergers are to improve company performance and shareholder value in the long term, they are often used as a tool to enhance profitability by expansion of operations. Mergers and takeovers result in the boosting of economies of scale, greater sales revenue and market share in the market, broadened diversification and increased tax efficiency[30].

Firstly, mergers are aimed at boosting economies of scale, this entails that, "a firm will produce goods at the lowest marginal cost where it is able to operate at the minimum efficient scale, if it operates on a smaller scale than this, marginal cost will increase and there will be a consequent loss of allocative efficiency".[31] Economies of scale may enable a product to be produced more cheaply or may result in lower overall costs.

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[29] M. L. Marks, Charging Back up the Hill: Workplace Recovery after Mergers, Acquisitions, and Down-sizings. (San Francisco: Jossey-Bass, 2003)

[30] www.investopedia.com

[31] R. Whish, Competition Law (5th ed.). (LexisNexis: London , 2003)

Secondly, mergers are primarily tools for increasing profits. According to Furse[32], this happens in two ways, "either because the effect of the merger is to reduce competition between the participants to the merger, or where the merger leads to cost saving through the gaining of efficiencies as a result of the joining of assets and fixed factors of production allowing prices to be reduced and market shares to be increased."

Thirdly, mergers may increase management efficiency and the market for corporate control. Upon merging, in addition to all the resources merged entities bring to each other human resources. The human resource brought together contribute to the output of the firm in various ways and their combined intelligence may enable the newly formed entity operate more efficiently and increase its profitability.

Lastly, mergers result in the increase of market power for the merged entities. Mergers may result in the increase of market power in that two or more already established entities come together to form one thus joining together strengths in the already established industry. It allows for easy penetration in to the market whilst overcoming barriers to entry and avoiding intense competition. And by increasing market power, mergers make it easier for an entity to meet its set goals, which goals would have taken longer had it undergone the exercise as an independent entity.

## 2.3 DISADVANTAGES OF MERGERS AND TAKEOVERS

The first disadvantage of mergers to be pointed out is the elimination of competition. Corporate mergers may promote monopolistic practices by reducing costs and taxes which activities may have an adverse impact on the welfare of the society as a whole. By bringing together two companies, mergers and takeovers inevitably eliminate competition among the merging firms. Mergers allow for the wielding of market power thus making it possible for the dominant firms to control pricing of goods in the relevant market. A merger creates a situation in which the merged firm becomes a single firm monopoly or adds to the power of a single firm monopoly[33]. In this regard, mergers substantially lessen competition.

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[32] M. Furse, Competition Law of the EC and UK (4th Edition). (Oxford University Press: Oxford, 2004: p.313)

[33] M, Furse, Competition Law of the EC and UK (4th Edition). (Oxford: Oxford University Press, 2004)

Another disadvantage attributed to mergers is set out in US DOJ Horizontal Merger Guidelines[34] in which it is stated that "a merger may diminish competition by enabling firms in the relevant market, more likely, more successful or more completely to engage in coordinated interaction that harms consumers." This proposition entails that firms may as a result of a merger coordinate activities such that it may result in high prices which are detrimental to the consumer or low prices that may result in the damage of the competitive structure. According to Myers[35] "predatory behaviour constitutes a class of anti-competitive behaviour where prices are too low, to the extent that the competitive process itself is damaged." Hay[36] goes further to provide as follows;

> "A dominant firm reacts to competition in one of its markets, either a geographical or a product market, by cutting prices so as to drive the competitor out of business. The competitor in question may be either a new entrant or a small firm that has been a passive follower of the leadership of the dominant firm but has now begun to gain market share. The purpose of the dominant firm's price cutting is to preserve its long run monopoly but frightening off potentially serious competition. The dominant firm is therefore quite willing to accept losses in that particular market for the time being-losses which it can absorb since it is earning high profits in other markets."

As a result of increased market power, mergers and takeovers give companies the ability to restrict outputs and raise prices. A typical example of the role played by dominant market power was pointed out in 2006 in relation to the sugar industry in Zambia. At the time the Zambia sugar industry had an oligopolistic market structure with three main players namely Zambia Sugar Plc, Kalungwishi Estates Limited and Consolidated Farming Limited. The market was highly concentrated, with Zambia Sugar Plc being the dominant firm with a monopoly market share of 93.54%, Kalungwishi and Consolidated with a market share of 0.35% and 6.11% respectively[37]. During this period, the Competition and Consumer Protection Commission (then called the Zambia Competition Commission) noted that, the industry was characterised by exorbitant prices of sugar, periodic shortages of sugar and frequent variation of prices[38].

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[34] 1992, s.2.1

[35] G, Myers, Predatory Behaviour in UK Competition Policy. (London: OFT, 1994; para. 1.1)

[36] D.A Hay, and D. J Morris, Industrial Economics and Organisation Theory and Evidence. (Oxford: Oxford University Press, 1991: p580)

[37] Zambia Competition Commission, Draft report on the Zambian Sugar Industry regarding the pricing of Industrial sugar on the market, Lusaka, 2006. p.5.

[38] Zambia Competition Commission Draft Report on the Zambian Sugar Industry regarding the Pricing of Industrial Sugar on the Market, Lusaka, 2006, p.5

## 2.4 RATIONALE FOR CONTROL OF MERGERS AND TAKEOVERS

Merger control is carried out in the public interest. In considering a merger it is important to look into whether as a result thereof the market may be less competitive and therefore be harmful to consumer welfare, if the merger is allowed to proceed. For example in 2001, the then National owned cement manufacturing company was privatised. Chilanga Cement Company was the only cement-manufacturing firm in Zambia and it had a near total monopoly share in the Zambian market. Lafarge Cement then made a bid to takeover Chilanga Cement Company through a regional acquisition. At the time of the bid to take-over Chilanga Cement, the cement market share in Zambia was 82 percent to Chilanga cement, 15 percent to PPC of South Africa and 3 percent to Unicem of Zimbabwe[39]. On the basis of the competitive and public interest assessment of the transaction, it was recommended by Zambia Competition Commission secretariat that the Board of the Zambia Competition Commission should not authorize the Lafarge takeover of the Chilanga Cement PLC. This advice was based on the premise that the authorisation of the transaction would lead to serious adverse effects on the then existing and future tempo of competition in Zambia and the Eastern and Southern Africa region. As a result the Zambia Competition Commission board rejected the takeover notification.

However, the parties subsequently appealed to a specially constituted Zambia Competition Commission Board to review this decision on the basis that they further provided assurances that specifically addressed the concerns raised by the Commission when it refused to accept the notification. As a follow up the Zambia Competition Commission authorised the takeover with a few undertakings by Lafarge. According to the Consumer Unit and Trust society in relation to the above cited takeover, "the key competition and consumer concern pertaining to the sector is high prices of cement and constant shortages. Another concern is the unreasonable differences in retail prices in the southern and northern parts of the country, which does not correspond to distance or transportation costs"[40]. From this it can be seen that merger control is very important as it ensures the protection of the consumers as a whole.

[39] www.cuts-international.org

[40] www.cuts-international.org

Merger control is also concerned with the maintenance of a competitive market structure. According to Whish, "merger control is not only about preventing a merged entity from abusing its dominant position in the future, it is also about maintaining a market structure that is capable of delivering the benefits that follow from competition law"[41].

It should be noted that the Act does not prohibit the existence or the creation of *monopolies per se, the holding of monopoly power is not illegal so long as it was acquired legally. The concern of the Commission, however is on the likelihood of abuse that will come about as a result of an increase in market power, it is concerned* with how monopoly power is acquired and how it is being exercised. Abuse of monopoly power is very detrimental to competition in a relevant market. Such abuse may be evidenced through the refusal to deal, the imposition of discriminatory terms and conditions, restricting territories to deal and/or price fixing. It is therefore important that safeguards be put in place so as to promote and preserve a competitive market structure and curb out the abuse of monopoly power. According to Lipimile[42] it is important to preserve and promote competition as a means to ensure the efficient allocation of resources in an economy. Lipimile goes further to note that this should result in growth, equitable distribution and lower prices to the consumers, efficient allocation of resources is absolutely essential to enable optimum utilisation of limited resources.

## 2.5 CONCLUSION

Though mergers may be defined as the merging of two separate undertakings into one new entity, it should be noted that under Section 24 (1)[43] of the Act these include a far broader range of corporate transactions including takeovers. The difference between a merger and takeover is that a true merger involves the mutual decision of two companies, this can be seen as a decision made between equals, a takeover on the other hand is characterised by the purchase of a smaller enterprise by a much larger enterprise, the most influential factor here is that a takeover does not necessarily have to be by consent[44] it may also be a hostile takeover. For a merger, the two companies

[41] R. Whish, Competition Law (5th ed.). (London: LexisNexis, 2003;p.787)
[42] G. Lipimile. Competition and Sectoral Regulations in Telecommunications
[43] Competition and Consumer Protection Act No.24 of 2010
[44] www.invetsopedia.com

combine to become one whereas for a takeover, one company called the target company is purchased by another company. Mergers and takeovers are essential for the market economy, having both advantages and disadvantages. In order to establish a competitive market economy, free from restraints on trade and having fair trading terms, a balance ought to be achieved between the benefits of mergers and takeovers to the economy and the harmful effects that may be attributed to them. This balance is achievable by having in a place a regulatory body that may prohibit those mergers that would substantially impede or lessen competition and those mergers that are more beneficial than they are harmful. Owing to this an effective merger control mechanism is of high importance as it enables the regulatory body to maintain such a balance.

# CHAPTER 3

# JURISDICTION OF THE COMPETITION AND CONSUMER PROTECTION COMMISSION

## 3.1 INTRODUCTION

According to Section 25(1) of the Competition and Consumer Protection Act, a merger subject to the provisions of the Act is reviewable by the Commission. In order to establish which mergers are subject to the provisions of the Act recourse must be made to Section 24 of the Act, which section defines what a merger is and when it may be said to have occurred. Section 24(1) of the Act provides that a merger occurs where an enterprise, directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective business. Section 24(2) goes further to provide as follows;

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

(a) Where an enterprise purchases shares or leases assets in or acquires an interest in, any shares or assets belonging to another enterprise;

(b) Where an enterprise amalgamates or combines with another enterprise; or

(c) Where a joint venture occurs between two or more independent enterprises.

The Section goes further to provide for instances in which a person may be seen to control an enterprise under subsection (1). According to Section 24(3), if a person beneficially owns more than half of the issued share capital of the enterprise, or is entitled to vote a majority vote that may cast at a general meeting of the enterprise or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise; or is able to appoint or veto the appointment of a majority of the directors of the enterprise; or is a holding company and the enterprise is a subsidiary of that company; or where the enterprise is a trust and has the ability to control the majority votes of the trustee, to appoint the majority of trustees or to appoint or change the majority of the beneficiaries of the trust or has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice can exercise the element of control; or has the ability to veto strategic decisions of the enterprise such as the appointment of directors and other decisions which may affect the operations of the enterprise, then such a person may be said to be in control of the enterprise in light of Section 24 (1).

From this section it is evident that any situation involving the combination or amalgamation of independent enterprises in any way that is to say the purchasing of shares or assets belonging to another enterprise which may result in the enterprise purchasing such shares acquiring an interest or gaining some form of control into the affairs of the other enterprise or the entry into a joint venture agreement, may be subject to the provisions of the Act as provided by Section 25 (1) of the Act. Therefore the Commission in essence has jurisdiction to review any mergers contemplated under Section 24 of the Act. However the Act goes further in Section 25 (2) to provide that the Commission shall review any mergers if -

(a) The merger is subject to prior authorisation in accordance with section twenty-six; or

(b) The Commission elects to review the merger in accordance with section twenty-seven.

In this regard it is important to analyse both Section 26 and Section 27 in order to establish the extent of the Jurisdiction of the Commission excisable over mergers.

Section 26 of the Act provides that the Minister (the Minister of Trade, Commerce and Industry) may by statutory instrument upon the recommendation of the Commission prescribe the threshold to be applied for the authorisation of a proposed merger[45]. According to Section 26, parties to a merger that meets the prescribed threshold as set out by the Minister are required to apply to the Commission for authorisation of the proposed merger. Section 26 (1) provides that parties to a merger transaction that meets the prescribed threshold under subsection (5) shall apply to the

* It should be noted that at this time, the thresholds as provided for under Section 26 (5) have not yet been ıssed by the Minister.

Commission for authorisation of the proposed merger in the prescribed manner or form.

Upon receipt of an application by parties to a merger that meets the prescribed threshold set out by the Minister, the Commission may approve or reject the application[46]. However in an instance in which the Commission rejects an application, it is to inform the applicant accordingly and give reasons thereof[47]. Therefore the Act requires that upon the review of an application for authorisation of a proposed merger and the Commission rejects such application, the Commission is not only required to inform the applicant of the rejection but it must also give reasons for such rejection. This may be inferred from the Chilanga Cement Company takeover[48] in which the Commission then called the Zambia Competition Commission rejected the takeover of Chilanga Cement Company by Lafarge Cement stating that the takeover would lead to serious adverse effects on the then existing and future tempo of competition in Zambia and the Eastern and Southern Africa region as a whole. The stating of the reasons for rejection allowed Lafarge Cement to provide assurances addressing the concerns raised by the Commission. Upon providing such assurances the Commission authorised the takeover of Chilanga Cement Company with a few undertakings which were to be observed by Lafarge Cement.

What is important to note from the provisions of Section 26 is that, it only requires parties to a merger transaction that meets the prescribed threshold to apply to the Commission for authorisation. In this regard it can therefore be concluded that in instances where a merger transaction does not meet the prescribed threshold, then such transaction need not be communicated to the Commission and the parties thereto need not apply for authorisation. However, where a merger transaction does in fact meet the prescribed threshold and the parties to the transaction have not applied for authorisation to the Commission, then such a merger is void[49].

The Act however goes further at Section 27 to bestow discretion on the Commission to review mergers falling below the prescribed threshold. Section 27 provides as follows:

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[46] Section 26 (2) of the Competition and Consumer Protection Act No. 24 of 2010
[47] Section 26 (3) of the Competition and Consumer Protection Act No. 24 of 2010
[48] www.cuts-international.org
[49] Section 26 (4) of the Competition and Consumer Protection Act No.24 of 2010

(1) notwithstanding section twenty-six, the Commission may, where it has reasonable grounds to believe that a merger falls below the prescribed threshold, review the merger if-

(a) The merger is likely to create a position of dominance in a localised product or geographical market;

(b) The merger is likely to contribute to the creation of a dominant position through a series of acquisitions which are not individually subject to prior notification;

(c) The merger may substantially prevent or lessen competition;

(d) The merger is concluded outside Zambia and has consequences in Zambia that require further consideration; or

(e) As a result of the merger, there is, or is likely to be, competition and public interest factors which require to be considered.

(2) The Commission may, where it determines that a merger is reviewable by the Commission under subsection (1), request any party to the merger to submit to it any information on the transaction for its verification.

(3) The Commission may, within seven days of receiving and verifying the information under subsection (2), request the parties to the merger to apply to the Commission for authorisation of the merger in accordance with section twenty-six.

Section 27 allows for the Commission to review mergers that fall below the prescribed threshold, if it has reasonable grounds to believe that such mergers if authorised would adversely affect competition. This section therefore extends the jurisdiction of the Commission to review even those mergers that do not meet the prescribed threshold as set out by the Minister as provided for by Section 26 (5). Thus the jurisdiction of the Commission is not limited to or by the statutory instrument prescribing the threshold to be applied for the review of mergers. Where the Commission has reasonable grounds to believe that a proposed merger may adversely affect competition, Section 27 empowers the Commission to review such a merger despite the fact that the proposed merger transaction falls below the prescribed threshold.

In subjection (1) (d), section 27 further extends the jurisdiction of the Commission to mergers that are concluded outside Zambia and have consequences in Zambia that require further consideration. Accordingly the Commission maybe said to have limited extra territorial jurisdiction, limited in that, it may only exercise its jurisdiction on international mergers only when the proposed merger being concluded outside Zambia would have consequences on the Zambian market and/or consumers. Such jurisdiction was exercised to some extent in the **South African Breweries PLC takeover of National Breweries PLC**[50] in which the Commission had to consider the takeover of National Breweries as it was a Company registered in Zambia and any takeover would have consequences on the Zambian market regardless of it being taken over by a foreign firm. This merger occurred within the Republic between a local company and a foreign firm. The main concern that was raised by the Commission was that the takeover of National Breweries PLC by South African Breweries PLC would adversely affect competition as South African Breweries PLC was a shareholder in Zambian Breweries and as such Zambian Breweries would be seen as acquiring a dominant position in the market. However South African Breweries reassured the Commission that it was merely a shareholder in Zambian Breweries PLC and it would be the one in charge of operating National Breweries PLC and not Zambian Breweries PLC. The Commission thus proceeded to authorise this merger on condition that South African Breweries allows small brewers in the industry to develop and out of the plants National Breweries had, South African Breweries should allow Zambians to purchase four so as to foster competition in the industry.

Another Section dealing with the jurisdiction of the Commission in relation to mergers is Section 34 of the Act, which section deals with the determination of a proposed merger transaction. Section 34 allows the Commission to authorise a merger

[50] A. Seyuba, (Corporate Affairs Director, Zambian Breweries). "Enforcement of Competition Law after Privatisation" Private Sector Perspective. Paper Presented at the Regional Conference on Competition, Competitiveness and Investm ent in Glob al Economy (May 2004).

without any conditions, or with conditions and undertakings. Section 34[51] provides as follows:

(1) The Commission may, after the completion of an assessment and consideration of any representation on a proposed merger-

(a) Approve a merger without conditions;

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

(c) Reject the proposed merger.

Accordingly, the authority of the Commission is not only limited to the review of mergers thus authorising or rejecting a merger notification, but it may exercise its jurisdiction further by setting out undertakings or conditions that a party to a merger transaction must observe upon authorisation. As seen above in the **South African Breweries PLC takeover of National Breweries PLC**[52] the Commission authorised the takeover on the condition that South African Breweries PLC allow small brewers in the industry to develop and sell four plants to Zambians so as to foster competition. But however, strictly adhering to Section 34(1) (b), such conditions or undertakings are those given by the parties to address competition and other concerns that may have been raised during the Assessment of the proposed merger. This therefore entails that the Commission may not establish its own conditions or undertakings but only impose those that the parties to the merger transaction endorsed during the assessment of the merger. This may be viewed as a limitation on the authority of the Commission.

The Commission is also empowered to revoke an approved merger where it can be shown that a party to a merger submitted materially incorrect or misleading information in support of the merger or the party to the merger fails to comply with any of conditions that had been given when approving the merger[53]. In an event in which the Commission proposes to revoke an approved merger, it must give notice in

[51] The Competition and Consumer Protection Act No. 24 of 2010

[52] A. Seyuba (Corporate Affairs Director, Zambian Breweries). "Enforcement of Competition Law after Privatisation" Private Sector Perspective Paper Presented at the Regional Conference on Competition, Competitiveness and Investment in Global Economy (May 2004).

[53] Section 35(1) of the Competition and Consumer Protection Act No. 24 of 2010

writing to the parties to the merger transaction and to any person who is likely to have an interest in the matter, and call upon such party or person to submit to it, within thirty days of the receipt of the notice, any representations which they may wish to make on the proposed revocation[54].

## 3.2 MARKET ASSESMENT

Section 29 provides that the Commission shall, upon receipt of a proposed merger notification, carry out a market assessment of the proposed merger to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general. The relevant market is flexibly defined as any geographical area or coverage in which enterprises compete in respect of any goods and services and is determined on a case by case basis[55].

The Act sets out guidelines for the Commission to assess when reviewing proposed mergers. These assessments range from competition issues to public interest consideration. Section 30 deals with the competition assessment. It provides as follows:

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

In its quest to review a merger, the Commission is to take into account the likely and actual factors that affect competition in a defined market[56]. The factors include but are not limited to the following:

i) The levels of concentration of players in the relevant market;

ii) The creation or strengthening of barriers to market entry;

iii) The level of imports in the relevant market;

iv) The extent to which there is countervailing buyer or supplier power in the relevant market;

v) The availability of substitute products in the relevant market;

[54] Section 35 (2) of the Competition and Consumer Protection Act No. 24 of 2010
[55] www.hg.org/articles/article_1705.html
[56] Section 30 of the Competition and Consumer Protection Act No. 24 of 2010

vi) The likelihood of the merger removing from the market an existing effective and vigorous competitor;

vii) The dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics; and

viii) The risk that a position of dominance may be abused.

A case in which the Commission took into account the competition issues was **BOC Gases PLC's bid to acquire Industrial Gases Limited**. The Commission rejected this notification because it felt that the market needed to be protected as there were very few players in the market[57]. BOC gases Limited is the major supplier of both domestic and industrial gases, it held at the time 80% of the shares in the market while Industrial Gases held 19% of the shares in the market, the other 1% was held by Zambia Consolidated Copper Mines Limited and Nitrogen Chemicals of Zambia Limited. Had the Commission authorised this takeover, it would have meant that BOC Gases PLC would have 99% of the market shares thus creating a position of dominance and in a position to thwart any competition from Zambia Consolidated Copper Mines Limited and Nitrogen Chemicals of Zambia Limited.

Section 31 of the Act deals with the public interest assessments. Section 31 provides that the Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger. Public interest assessment includes but is not limited to the following:

i) The extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition;

ii) The extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia;

iii) The saving of a failing firm;

[57] ZCC Annual Reports 1999

iv) The extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia;

v) The extent to which the proposed merger may enhance the competitiveness, or advance or protect the interests of micro or small business enterprises in Zambia;

vi) The extent to which the proposed merger may affect the ability of national industries to compete in international markets;

vii) Socioeconomic factors as may be appropriate; and

viii) Any other factors that bears upon the public interest.

A case in which the Commission took into account the public interest was the takeover of **Northern Breweries PLC by Zambian Breweries PLC**. In this case the Commission allowed the takeover as Northern Breweries reached a stage called the Financial Failure Defence and was about to be declared bankrupt[58]. Northern Breweries was the only other competitor in the clear beer industry other than Zambian Breweries PLC, thus by allowing this merger the Commission prompted Zambian Breweries PLC to acquire a dominant position. The Commission however took into account the fact that once declared bankrupt thousands of employees would lose their jobs and as such was of the opinion that the proposed merger was more likely to result into a benefit to the public which benefit would outweigh any detriment attributable to a substantial lessening of competition. This was pointed out be the Commission in a report stating as follows:

> "Authorisation by the Commission of some types of anti-competitive behaviour is possible if the public benefit exceeds the detriment to competition. The Commission may grant immunity on the public benefit grounds from legal proceeds for some arrangements or conducts that would otherwise breach the restrictive trade provisions of the Act. To grant authorisation the Commission must be satisfied that the public benefit stemming from the arrangement outweigh the anti-competitive effects."[59]

Upon considering both public interest and competition factors, the Commission is to complete its assessment of the proposed merger within ninety days from the date of application for authorisation of the proposed merger and there upon issue its

[58] A. Seyuba (Corporate Affairs Director, Zambian Breweries). "Enforcement of Competition Law after Privatisation" Private Sector Perspective Paper Presented at the Regional Conference on Competition, Competitiveness and Investment in Global Economy (May 2004).
[59] Competition Rules in Zambia, ZCC Publication Item 11.

determination.[60] Section 32(2) further provides that where the Commission does not issue its determination within the ninety days as provided for by Section 32(1), the proposed merger will be deemed as having been approved, however the Commission may by giving notice to the parties to the proposed merger transaction at least fourteen days before the expiry of the ninety days, extend the assessment period by no more than thirty days.

In making its determination, the Commission may consider any undertakings offered by a party to a proposed merger, in order to address any concern relating to the proposed merger[61]. This may be highlighted in the Chilanga Cement Takeover in which the Commission rescinded its decision and allowed the takeover after Lafarge Cement made assurances addressing the concerns that had been raised by the Commission.

## 3.3 CONSUMER PROTECTION

Fair competition is a vital element for the development of any economy. In assessing competition issues before approving a merger, the Commission protects the consumers in that consumers are ultimately the beneficiaries of competition in the national economy. Mergers and takeovers may be means of achieving efficiencies, particularly where increased exposure to global markets is putting pressure on domestic firms to reduce costs, improve quality and service and innovate in order to become more competitive in those markets. According to Mehta et al[62] "it has been observed that competition policy helps create an enabling environment for entrepreneurial development, ensures efficient allocation of resources in an economy, technical progress, consumer welfare and regulation of concentration of economic power." Thus by suppressing anti-competitive conduct and encouraging fair competition among industries, the Commission promotes consumer welfare.

The Act requires that the Commission look into the dynamic characteristics of a market which characteristics include growth, innovation and pricing when assessing proposed merger transactions. Where a merger is between two strong competitors in a

[60] Section 32 of the Competition and Consumer Protection Act No.24 of 2010
[61] Section 33 of the Competition and Consumer Protection Act No. 24 of 2010
[62] Mehta, P.S and Nanda N, "Competition Policy, Growth and Poverty Reduction in Developing Countries, CUTS Centre for Competition Investment and Economic Regulation" Regional Conference on Competition, Competitiveness and Investm ent in Global Economy (May 2004 at p. 3).

relevant market, such a merger may create barriers to market entry, small up coming enterprises would be unable to penetrate the market as a result of the merger, as the newly merged firm would have covered the majority of the consumers. As a result, the newly merged firm would be able to control the market which in turn would adversely affect the consumer as such control may result in high prices and shortages of commodities. According to the Commission[63], "the Zambia Competition Commission is suppose to prevent anti-competitive conduct to encourage efficiency in business, which would result in wider choice for the consumer in terms of pricing, quality and service offered." As such it may be seen that in its goal to curb anti-competitive conduct, the Commission inevitably protects the consumer as it promotes the interest of the consumer who ultimately are the beneficiaries of competition in the economy.

Furthermore the Commission is to look into the risk of abuse of a dominant position which abuse may be as a result of a merger. As such in the BOC Gases PLC's bid to acquire Industrial Gases Limited[64], the Commission rejected the takeover bid as it would have resulted in BOC Gases PLC holding a market share of 99% therefore creating a dominant position in the gas industry. The creation of a dominant position inevitably allows an enterprise to control the market in which it operates. An enterprise may abuse such dominant position through vices such as price fixing, limiting the supply of commodities, vertical agreements and horizontal agreements. It ought to be noted that the holding of a dominant position is in itself not prohibited by the law but what the law guards against is the abuse of such dominant position once acquired.

One abuse of a dominant position may be seen in the case of the Zambia Sugar Company in the year 2006. During this period, the Zambia Sugar Company held a monopoly market share of 93.54%, it was noted by the Commission (then called the Zambia Competition Commission) that the sugar industry was characterised by exorbitant prices, periodic shortages and frequent variation of prices of the commodity[65]. Thus in guarding against the creation of a dominant position, the

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[63] "ZCC Roasts Cartels" Times of Zambia Archives Series-23rd September to 6th October 2004: www.times.co.zm

[64] ZCC Annual Report, 1999

[65] Zambia Competition Commission, Draft Report on the Sugar Industry Regarding the Pricing of Industrial Sugar on the Market, Lusaka, 2006.

Commission protects the consumer from events like those that occurred in 2006 in the sugar industry. In this regard, it can be seem that the Commission does protect the consumer from the likely effects of mergers and takeovers.

However it should be noted that there have been times that the Commission has authorised mergers which have resulted in the creation of a dominant position and elimination of competition. A case highlighting this fact is the Zambian Breweries PLC takeover of Northern Breweries PLC[66]. In this case the Commission did not protect the consumer as the resultant effect of authorising the merger is that Zambian Breweries is the only competitor and consumers are subjected to its whims and have no choice about the price, quality and service being offered. This case effectively highlights the inconsistency of the Commission in that it rejected the BOC Gases PLC's bid to acquire Industrial Gases Limited due to the fact that there were very few players in the market and such a merger would result in the creation of a dominant position but authorised the merger of Zambian Breweries and Northern Breweries *which merger thwarted competition in the clear beer industry resulting in the creation of a dominant position.*

## 3.4 *CONCLUSION*

The Competition and Consumer Protection Commission is authorised to approve mergers and takeovers subject to the provisions of section twenty six and section twenty seven of the Competition and Consumer Protection Act. Its jurisdiction ranges from the review of mergers that meet the prescribed threshold as set out by the Minister to mergers which the Commission has reasonable grounds to believe may in one way or another adversely affect competition but which merger transaction falls below the prescribed threshold. The Commission may based on the outcome of the assessment and the conditions and undertakings given by parties to merger transaction, approve mergers without conditions, approve mergers with conditions or undertakings or reject mergers. However when approving mergers with conditions and undertakings, the Commission may only do so with the conditions that were given by the parties during the assessment. The Commission further has limited extraterritorial jurisdiction in that the Act allows it to review mergers that have been

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[66] A. Seyuba, Corporate Affairs Director, Zambian Breweries. "Enforcement of Competition Law after Privatisation" Private Sector Perspective. Paper Presented at the Regional Conference on Competition, Competitiveness and Investment in Global Economy (May 2004).

concluded outside Zambia but which mergers have consequences in Zambia that require further consideration. In exercising its jurisdiction to review mergers and takeovers, the Commission positively impacts consumer welfare as it protects the consumer from exorbitant prices, shortages of goods and services and other vices that may result from uncontrolled mergers and takeovers.

# CHAPTER 4

# THE EUROPEAN UNION COMPETITION REGIME

## 4.1 INTRODUCTION

The Directorate General for Competition is an organ of the European Commission responsible for establishing and implementing competition policy for the European Union. The Directorate General is mandated to enforce the competition rules of the Union so as "to ensure that competition in the EU is not distorted and markets operate as efficiently as possible thereby contributing to the welfare of consumers and to the competitiveness of the European Community."[67]

The mission of the Directorate General for Competition is to enable the European Commission make markets deliver more benefits to the consumers, businesses and the society as a whole. According to the Directorate General for Competition, "competition is not an end in itself. It is an indispensable element of a functioning single market guaranteeing a level playing field. It contributes to an efficient use of society's scarce resources, technological development and innovation, a better choice of products and services, lower prices, higher quality and better productivity in the economy as a whole."[68]

The Directorate General for Competition prevents mergers when they would significantly reduce competition. According to the European Commission[69], "the objective of examining proposed mergers is to prevent harmful effects on competition. Mergers going beyond the national borders of any Member State are examined at the European Level; this allows companies trading in different European Union Member States to obtain clearance for their mergers in one go."

Council Regulation 139/2004 known as the European Commission Merger Regulation (ECMR) governs the control of mergers and other concentrations within the European Community. The ECMR gives the Commission jurisdiction over any concentration that has a community dimension. The ECMR provides that a concentration arises where a change in control on a lasting basis results from a merger between previously

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[67] ec.europa.eu
[68] ec.europa.eu
[69] ec.europa.eu

independent undertakings or parts of undertakings, acquisition of control of the whole or parts of one or more undertakings whether by purchase of securities or assets and the creation of a full-function joint venture[70].

The ECMR provides that a concentration with a community dimension should be deemed to exist where the aggregate turnover of the undertakings concerned exceeds given thresholds; that is the case irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there. Where a proposed merger meets the prescribed threshold, it ought to be notified to the European Commission. A merger below these thresholds may be reviewed by the national competition authorities in the European Union Member States. These rules are applicable to all mergers regardless of where the merging companies have their registered offices so long as these companies operate within the EU. The Directorate General for Competition may also examine mergers referred to it from the national competition authorities of the European Union Member States[71].

The Directorate General for Competition examines all mergers to see if they would impede competition. If a proposed merger does in any way impede competition and no undertakings are made by the parties thereto, it must be prohibited so as to protect other businesses and consumers. Proposed mergers may be prohibited if the merging firms are major competitors or if the merger would otherwise significantly weaken effective competition in the market, in particular by creating or strengthening a dominant player. Article 2 (3) of the ECMR provides that any concentration falling within its scope will be incompatible with the common market (and must therefore be prohibited unless sufficient remedies are offered) if it 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."

The Commission may conditionally approve a merger which may significantly impede competition if the parties thereto commit to taking action to try to correct this likely effect. If satisfied that the commitment would maintain or restore competition in the market thereby protecting the consumer, the Commission may give conditional

[70] Article 3 of the European Commission Merger Regulation

[71] Article 22 of the European Commission Merger Regulation

clearance for the merger to go ahead, thereafter monitors whether the merging companies fulfil their commitments and may intervene if they do not do so.

### 4.1.1 SIMILARITIES WITH THE COMPETITION AND CONSUMER PROTECTION COMMISSION

From the above outline, it can be noted that both the European Commission and the Competition and Consumer Protection Commission are ultimately based on the same principles when it comes to merger regulation. Both systems' ultimate goal is to curb anti-competitive practices which may adversely affect the market economy.

In their aim to curb anti-competitive practices and the creation or strengthening of a dominant position, both the European Commission and the Competition and Consumer Protection Commission have put into place a pre-notification requirement for all mergers that meet the prescribed threshold. Section 26 of the Competition and Consumer Protection Act requires that all parties to a proposed merger transaction meeting the prescribed threshold are to apply to the Commission for authorisation of the proposed merger in the prescribed manner or form. Article 4(1) of the ECMR prohibits the closing of a merger transaction prior to notification and clearance by the European Commission.

Another notable similarity between the two Commissions is that the both provide for the protection against mergers that are concluded outside their jurisdiction but are likely to significantly impede competition within their markets. In the case of Gencor v Commission[72], the Court of First Instance upheld the European Commission's decision prohibiting a proposed merger between Impala Platinum Holdings Limited controlled by the South African Group Gencor and the Platinum Division of the British Group Lohnro PLC case T-102/96 holding that the ECMR applies to transactions carried out outside the community but liable to significantly impede competition within the community. Similarly section 27(1) (d) of the Competition and Consumer Protection Act allows for the Commission to review mergers concluded outside Zambia but which mergers have consequences in Zambia that would require further consideration.

[72] (1999) ECR 11-753

Furthermore both the ECMR and the Competition and Consumer Protection Act prohibit the completion of mergers that meet the prescribed threshold without authorisation from the relevant authorities. According to Section 26 (4) of the Competition and Consumer Protection Act, a merger that meets the prescribed threshold under subsection (5) and is implemented without the Commission's authorisation is void. Similarly the ECMR bars parties to a concentration from putting the concentration into effect until it has been declared compatible with the common market, a concentration put into effect in contravention of the automatic suspension period is provisionally invalid and may subject the parties to fines[73].

Article 11 of the ECMR gives the Commission investigative powers. Gutermuth et al[74] states that "the merger regulation lays down not only rules for notification of proposed merger transactions but also provides for the Commission's investigative powers, setting out the rights of the parties." Article 11 allows the European Commission to issue formal or informal requests for information to the notifying parties and third parties such as competitors and consumers. The European Commission may interview company officials during inspections, it may examine books and records and demand on spot oral explanations and enter any premises. In line with this the European Commission may impose fines of up to 1% of the aggregate turnover if a company provides incorrect or misleading information. Similarly the Competition and Consumer Protection Commission under Part II of the Act is endowed with investigative powers. Section 7 (4) provides inter alia that any inspector with a warrant may at any reasonable time enter, search, examine any document or article found on the premises, require information to be given, take extracts from or make copies of any book or document found on the premises that has a bearing on the investigation.

Another similarity is that both Commissions may authorise mergers that are likely to impede competition provided that the parties thereto make commitments to address this likely effect. In the Zambian context this is evidenced by section 34 of the Act in which it is provided that the Commission may after completion of an assessment and consideration of any representation on a proposed merger, approve a merger transaction with conditions or undertakings given by the parties to address

[73] Article 14(2) (b) European Commission Merger Regulation
[74] Article 14(2) (b) European Commission Merger Regulation

competition and other concerns that may have arisen during the assessment of the proposed merger. This point was driven out in the case of Lafarge Cement takeover of Chilanga Cement[75] in which the Commission authorised the takeover after Lafarge Cement made a few undertakings addressing the concerns that were raised by the Commission. This may also be seen in the South African Breweries takeover of National Breweries PLC[76] in which case the Commission authorised the takeover on the condition that South African Breweries PLC allow small brewers in the industry to develop and sell four plants to Zambians so as to foster competition within the jurisdiction. Article 2 (3) of the ECMR provides that any concentration falling within its scope will be incompatible with the common market and must therefore be prohibited unless sufficient remedies are offered, thus further allowing parties to a proposed merger transaction to offer remedies addressing the concerns raised by it.

Lastly, both systems provide for an appeal mechanism for aggrieved parties. The EC Treaty provides for a judicial review procedure in that it allows for an application for annulment of the Commissions decisions in merger cases to be filed with the Court of First Instance by (i) the parties to the transaction to whom the decision is addressed and (ii) other parties that are directly and individually affected by the decision. A further appeal against the judgment of the Court of First Instance limited to points of law can be made to the European Court of Justice. The position of annulment of decision was reflected in the cases of Airtours/First Choice[77], Schneider Electric/Legrand[78] and Tetra Laval/Sidel[79] in which the Court of First Instance annulled the Commission's prohibition decisions on application by the parties. Article 230 of the EC Treaty sets out four principle grounds for review of the Commissions merger decision these being:

a. Lack of competence;
b. Infringement of an essential procedural requirement;
c. Infringement of the EC Treaty or of any rule of law relating to the application; or

[75] www.cuts-international.org
[76] A. Seyuba, (Corporate Affairs Director, Zambian Breweries). "Enforcement of Competition Law after Privatisation" Private Sector Perspective. Paper Presented at the Regional Conference on Competition, Competitiveness and Investment in Global Economy (May 2004).
[77] Airtours V Commission (2002) ECR II-2585
[78] Schneider Electric v Commission (2002) I CR II 4071
[79] Tetra Laval v Commission (2002) ECR II 4591

d. Misuse of powers.

Similarly the Competition and Consumer Protection Act provides at section 68 under the functions of the Competition and Consumer Protection Tribunal that the Tribunal is to hear any appeal made to it under the Act. The Act goes further to provide at section 75 that a person aggrieved with a decision of the Tribunal may appeal to the High Court within thirty days of the determination.

### 4.1.2 DIFFERENCES WITH THE COMPETITION AND CONSUMER PROTECTION COMMISSION

One notable difference between the ECMR and the Competition and Consumer Protection Act is that the Act does not define the term relevant market. The European Commission's Market Definition Notice[80] provides guidance on its method for defining relevant markets. These are defined both in terms of products or services that belong to the market and the markets geographical scope. According to Gutermuth et al[81]

> "In determining whether a merger is compatible with the common market the commission defines the relevant product and the geographical market and assesses whether the merger substantially impedes competition in those markets."

The Competition and Consumer Protection Act makes mention of the terms relevant market and/or defined market in several sections but this term has not been defined neither by the Act nor by the Commission itself. The market definition is of decisive importance as such it is important that the Commission defines the term as it enables to draw a conclusion as to whether a proposed merger significantly impedes competition in those markets.

The main concern of the European Commission when it comes to dealing with mergers is that a proposed merger notification does not significantly impede competition. Article 2 (3) of the ECMR provides to this effect that " a concentration which 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, shall be declared to be incompatible with the common market."

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[80] Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (O.J 1997 No. C372/5)

[81] Gutermuth et al. Guide to EC Merger Regulations (Berlin:Wilmer Cutler Pickering Hale and Dorr LLP 2004)

The European Commission guards against the creation or strengthening of a dominant position. According to Gutermuth[82], mergers between competitors are likely to harm competition due to the creation or strengthening of a dominant position as this would result in the combined firms increase in market power that is to say its power to increase prices, reduce outputs or reduce innovation which activities are a threat to consumer welfare.

The European Court of Justice has defined a dominant position as

> "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.[83]"

Under the Horizontal Merger Guidelines an otherwise problematic merger can be declared compatible with the common market if one of the merging parties is a failing firm. In the case of Kali + Salz[84] three conditions were set out as prerequisites for the failing firm defence. These three conditions are as follows:

a. The acquired undertaking would in the near future be forced out of the market for financial difficulties if not taken over by another firm;
b. There is no less anti-competitive alternative purchaser than the notified merger; and
c. In the absence of the merger, the assets of the failing firm would inevitable exit the market.

Section 31 of the Competition and Consumer Protection Act dealing with the public interest assessment provides inter alia that the Commission in considering a proposed merger, may take into account factors bearing upon the public interest including but not limited to the saving of a failing firm. What is important to note in this regard is that the Commission is not only to look into competition assessment when dealing with a proposed merger but it may go further to look into factors bearing upon the public interest. The European Commission only takes into account the failing firm defence and makes no further considerations of other public interest factors, this is so

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[82] Gutermuth et al. Guide to EC Merger Regulations (Berlin:Wilmer Cutler Pickering Hale and Dorr LLP 2004)

[83] Case 27/76 United Brands v Commission (1978) ECR 207 para 65

[84] Joined cases C-65/94 and C-30/95 French Republic and Societe Commerciale des Potasses et de L'azote and Enterprise Minieres et Chinuque (1998) ECR I-1375

because its principle aim is to guard against anti-competitive practices. In considering other public interest factors, the Commission fails in its mandate to curb out anti-competitive tendencies.

Another notable difference between the European Commission and the Competition and Consumer Protection Commission is in the appeal process. The ECMR allows for third parties including competitors and consumers affected by a decision of the Commission to appeal against such decision. According to Article 230 (4) of the EC Treaty, natural or legal persons may institute proceedings against decisions that are addressed to them or that are of direct and individual concern to them. Gutermuth[85] goes further to state that competitors have been held to have standing when they have intervened in the procedure or when the Commission decision took into account their individual situations. The cases of Babyliss v Commission[86] and Phillips v Commission[87] suggest that competitors will have standing in all but exceptional cases. This differs from the Zambian system in that the Competition and Consumer Protection Act makes no provision for appeals by other persons other than the parties to the proposed merger transaction. In this way, third parties are excluded from appealing against decisions made by the Commission.

## 4.2 CONCLUSION

From the above, while it can be concluded that the Competition and Consumer Protection Act has many similarities with the Directorate General for Competition who is responsible for handling competition matters in the European Commission, it may also be pointed out that the Commission lacks many important features divested in the European Commission. Among these important issues is the failure to provide for an appeal mechanism for third parties who may be directly and individually affected by an authorised and/or prohibited merger transaction. Also the empowerment of the Commission to consider several public interest issues has in certain instances enabled the Commission to foster the creation and the strengthening of a dominant position which is the very aspect the Commission is suppose to protect the economy from, this is evident in the takeover of Northern Breweries PLC by

[85] Gutermuth et al. Guide to EC Merger Regulations (Berlin:Wilmer Cutler Pickering Hale and Dorr LLP 2004)
[86] (2003) ECR II-1279
[87] (2003) ECR II-1433

Zambian Breweries PLC. As a result of these shortfalls, the Competition and Consumer Protection Commission faces certain limitations when safeguarding consumer welfare.

# CHAPTER 5

## CONCLUSION AND RECOMMENDATIONS

### 5.1 GENERAL CONCLUSION

While mergers may be beneficial to the economy, they may at the same time also be harmful to the consumers as they may result in a significant reduction in competition. As seen in the previous chapters, mergers may enable companies to develop new products more efficiently and reduce production and distribution costs thus increasing competitiveness between the companies and benefiting the consumer in terms of increased quality, a broader choice of products and reasonable prices.

Mergers may reduce competition by creating or strengthening a dominant position. This acts as a detriment to consumers in that consumers may be subjected to high prices, reduced choice, less innovation and period shortages of commodities. The effect a dominant position has on the market was seen in the Zambia Sugar Industry when the Zambia Sugar Company was the dominant firm with a monopoly market share of 93.54%, the Commission noted at the time, that the sugar industry was characterised by exorbitant prices of sugar, periodic shortages of sugar and frequent variation of prices[88]. Due to this, it is important that mergers be regulated so as to maintain a balance between a more competitive economy and consumer welfare.

As earlier noted, healthy competition helps create a common market free from restraints on trade[89]. Vigorous competition may be said to be the life blood of strong and effective markets, it is a central driver for productivity growth in the economy[90], thus sufficient measures ought to be taken in order to ensure that it is not distorted. In ensuring the competitiveness of the market, the Competition and Consumer Protection Commission promotes the interests of consumers, as they are the ultimate beneficiaries of competition in the national economy. As pointed out by the Commission[91],

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[88] Zambia Competition Commission: Draft Report on the Zambia Sugar Industry regarding the pricing of Industrial Sugar on the Market. Lusaka (2006).

[89] WIPO intellectual Property Hand Book: Law, Policy and Use

[90] M. Furse, Competition Law of the EC and UK ($4^{th}$ edition). (Oxford: Oxford University Press, 2004: p1)

[91] "ZCC Roasts Cartels" Times of Zambia Archives Series-23rd September to 6th October 2004: www.times.co.zm

> "The Zambia Competition Commission is suppose to prevent anti-competitive conduct so as to encourage efficiency in business, which would result in wider choice for the consumer in terms of pricing, quality and services offered."

The control of mergers and takeovers is concerned with the maintenance of a competitive market structure[92]. The Competition and Consumer Protection Commission plays a very important role in exercising its jurisdiction over mergers and takeovers, as it safeguards the interests of the consumers by maintaining a competitive market structure capable of delivering the benefits that follow from competition. Mergers and takeovers may lessen competition in a relevant market, thus the Commission has the duty to assess those mergers that are likely to prevent or substantially lessen competition in a market in Zambia. The Commission must endeavour to prevent the creation of barriers as a result of anti-competitive practices. When a single firm monopoly is created, it makes it difficult for emerging firms to penetrate the market.

Consumer welfare depends substantially on the curbing of anti-competitive trade practices, the abuse of a dominant position being one such practise. It is important however to note that the law does not prohibit the holding of a dominant position but proscribes against the abuse of such a position. Section 30 of the Competition and Consumer Protection Act provides that one of the factors to be considered when reviewing a proposed merger is whether there is a risk that a position of dominance may be acquired. Mergers may in this regard diminish competition by enabling firms in the relevant market, more likely, more successful or more completely to engage in coordinated interaction that maybe harmful to consumers[93]. Therefore by taking into consideration the risk of abuse of a dominant position when assessing mergers, the Competition and Consumer Protection Commission protects the consumer.

The Act clearly stipulates the jurisdiction of the Commission. The Commission has jurisdiction to review all such mergers that meet the prescribed threshold passed by the Minister through Statutory Instrument on the recommendation of the Commission[94]. The Act further extends the Commission's jurisdiction by providing that the Commission may where it has reasonable grounds to believe that a merger

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92 R. Whish, Competition Law (5th Edition). (London: LexisNexis, 2003:p779)

93 US DOJ Horizontal Mergers Guidelines 1991 S.2.1

94 Section 26 of the Competition and Consumer Protection Commission Act No.12 of 2010

falls below the prescribed threshold, review the merger if the merger is likely to create a position of dominance in a localised product or geographical market or the merger is likely to contribute to the creation of a dominant position through a series of acquisitions which are not individually subject to prior notification or that the merger may substantially prevent or lessen competition of the merger is concluded outside Zambia and has consequences in Zambia that require further consideration or as a result of the merger, there is, or is likely to be competition and public interest factors which require to be considered[95].

As seen above many benefits flow from a competitive market structure and the beneficiaries of such competition are the consumers. Excessive consolidation of companies may have a negative effect on competition, thus the need for the Commission to control mergers and takeovers transaction between enterprises, the requirement for prior notification for transactions meeting the prescribed threshold is an effort by the Act to regulate such transactions. The Commission may approve or reject merger notifications if such mergers give the Commission sufficient reasons to suspect that they may substantially impede or lessen competition. The Commission may also approve mergers with such conditions as it sees fit.

From the jurisdiction placed upon the Commission, it is evident that this is done in an effort to create a regulatory body that would be able to maintain a competitive market structure. Merger control is not only concerned with preventing the creation or strengthening of a dominant position but also maintaining a competitive market structure. According to Whish, "merger control is not only about preventing a merged entity from abusing its dominant position in the future, it is also about maintaining a market structure that is capable of delivering the benefits that follow from competition law"[96].

[95] Section 27 of the Competition and Consumer Protection Act No.24 of 2010
[96] R. Whish, Competition Law (5th ed.). (London: LexisNexis, 2003;p.787)

## 5.2 RECOMMENDATIONS

The Commission lacks consistency in its decision making process, this may be seen in the **BOC Gases PLC's bid to acquire Industrial Gases Limited**[97] and the takeover of **Northern Breweries PLC by Zambian Breweries PLC**[98]. In both these cases the takeover would inevitably lead to the creation of a dominant position, due to this reason, the BOC Gases takeover was rejected whilst the Northern Breweries takeover was authorised. Having authorised the takeover of Northern Breweries, the Commission did not protect the consumer as the resultant effect was that Zambian Breweries PLC was the only competitor in the clear beer industry and consumers are subjected to the companies whims and have a limited choice as regards the product, quality and service, and the company may also detect prices without considering a working price formula. Thus it is recommended that the Commission should exercise consistency when rendering its decisions, so that the same law may be seen to apply equally to all parties involved.

The public interest assessment consideration has to a larger extent enabled the Commission to foster the creation of a dominant position which is the very factor the Commission is suppose to protect consumers against. As already pointed out above in the takeover of Northern Breweries PLC by Zambian Breweries, the Commission fostered the creation of a dominant position due to the fact that when considering the merger, it took into account the failing firm defence which is a public interest consideration. The Commission expressly held out that it may authorise types of anti-competitive behaviour if the public interest exceeds the detriment to competition[99]. This is an abrogation on its mandate to promote competition, it is therefore recommended that public interest assessments should be left to other specialised bodies of the Government and not the Commission as its main concern should be to ensure a competitive economy.

The Commission must allow for the participation of third parties in its proceedings provided that they may be directly or indirectly affected by the authorisation or rejection of a proposed merger transaction. The Competition and Consumer

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[97] ZCC Annual Reports 1999

[98] A. Seyuba, Corporate Affairs Director, Zambian Breweries. "Enforcement of Competition Law after Privatisation" Private Sector Perspective. Paper Presented at the Regional Conference on Competition, Competitiveness and Investm ent in Global Economy (May 2004).

[99] ZCC Publication, Item 11

Protection Act makes no provision for the intervention by affected third parties when assessing a proposed merger transaction, further more it makes no provision for appeals by other persons other than the parties to the proposed merger transaction. In this way, third parties are excluded from intervening and appealing against decisions made by the Commission, the proceedings are limited only to the parties to the proposed merger transaction.

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