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The Element of Control in the Statutory Definition of Mergers in Zimbabwe: Towards A Clearer Merger Definition

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Abstract

A transaction that falls within the definition of a notifiable merger is subject to scrutiny by the competition authorities. The Zimbabwean Competition Act [Chapter 14:28] defines a merger as a situation arising as the result of an acquisition or establishment of a controlling interest by one or more entities over the entire or part of the business/es of another. Such a transaction thus can be referred to as constituting a merger if it is established that a controlling interest is either acquired or established. The Act then provides for the manner in which the controlling interest is acquired or established. However, no further clarity is provided as to what constitutes control. This could be viewed as a much-needed lack of clarity in the statutory definition, thereby impacting on the effectiveness of the statute, a situation that weakens the competition system. This article provides a detailed analysis of the control element for a merger definition in Zimbabwe. It argues that the Act provides only a qualifying element of control with interest, without providing a definition. The article proposes a clear definition of the element based on the established approach to control as supported by jurisprudence.

Keywords: Control; controlling interest; merger; Zimbabwe; Competition Act [Chapter 14:28]

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1 INTRODUCTION

Over the years, competition law has evolved as a significant component of Zimbabwe's broader policy framework. The enactment of a formal competition statute in 1996 in the form of the Competition Act (hereinafter the Act)[1] saw Zimbabwe joining a growing number of developing economies that have adopted formal competition systems.[2] Competition law is designed to regulate the conduct of firms on the market in order to promote, protect and maintain its competitive structure.[3] However, in the case of Zimbabwe, as is the case in many similar jurisdictions, competition law and policy aim to advance much broader objectives beyond pure economic goals.[4] This can be seen as placing a larger burden on competition law authorities when trying to ensure that both pure economic concerns (competition) and a broader policy consideration (non-competition) are catered for. This burden is either lessened or worsened by the statutes designed to regulate competition law.

The Act provides for the regulation of business conduct that impacts the market's competitive structure.[5] It aims to achieve this through providing for the prevention and control of horizontal and vertical anti-competitive agreements (restrictive practices),[6] the prevention and control of monopoly situations,[7] the regulation of corporate mergers and acquisitions[8] and the prohibition of unfair trade practices.[9] Crucially, the Act establishes and constitutes the Competition and Tariffs Commission (CTC) as the principal competition authority of Zimbabwe.[10]

Merger regulation is a critical component of Zimbabwe's competition law framework, not only because merger cases are by far the largest number of cases handled by the competition authority,[11] but also because the combination of two or more businesses can give rise to a myriad of competition concerns that are subject to statutory regulations. These relate to the creation of dominant market players that have the ability to engage in various anti-competitive practices such as restrictive business practices and anti-competitive agreements that have the potential

1 [Chapter 14:28] of 1996.

2 For a general development of competition systems in developing economies see Mehta and Evenett (eds) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) and in Zimbabwe in particular, see Mhamhare "Southern African Development Community (SADC) regional competition policy" in Drexl, Bakhoum, Fox, Gal and Gerber (eds) *Competition Policy and Regional Integration in Developing Countries* (2012) 56–65 58.

3 Singh and Dhumale "Competition Policy, Development and Developing Countries" (1999) South Centre Trade Related Agenda (T.R.A.D.E) Working Paper 7 12

4 Mhamhare 27. See further Brett "From Corporatism to Liberalisation in Zimbabwe: Economic Policy Regimes and Political Crisis, 1980-1997" 2005 *International Political Science Review* 91–106 93. See also Implementing Policy Change (IPC) *Study of Monopolies and Competition Policy in Zimbabwe* (March 13, 1992) 6. See generally Moisejevas and Novasad "Some Thoughts Concerning the Main Goals of Competition Law" 2013 *Jurisprudence* 627–642 and Whish and Bailey *Competition Law* (10 ed, 2021).

5 The Long Title to the Competition Act presents the statute's broad aims.

6 Restrictive Business Practices (RBPs) are defined in ss 2(1) and 5(1) and empower the Competition and Tariff Commission (CTC) to investigate and discourage and prevent RBPs.

7 Section 5(1) outlines the CTC's functions, as *inter alia*, to investigate monopoly situations and prevent them where they are fond to be contrary to public interest.

8 Section 2(1) defines a merger and s 5(1) mandates the CTC to study trends towards increased economic concentration. Section 28 empowers the CTC to investigate corporate mergers and acquisitions.

9 Sections 32(3) and 42 read with the First Schedule to the Act.

10 The CTC was established in 2001 by section 4 of the Amendment Act to replace the merged old Industry and Trade Commission and the Tariff Commission that were created in the original Act of 1996. See Batham "Zimbabwe" in Mehta (ed) *Competition Regimes in the World- A Civil Society Report* (2005) 306 307.

11 For instance, in 2017 the CTC reviewed 16 merger cases and only dealt with three cases of Restrictive Business Practices (RBPs). In 2022 the CTC dealt with 30 merger cases, 10 RBPs and 1 tariff case. See Competition and Tariff Commission *2017 Annual Report* (2017) and Competition and Tariff Commission *2022 Annual Report* (2022).

to negatively affect the competitive structure of the market. It is in this regard that an effective merger regulatory framework becomes a precondition for effective competition regulation.

This article is one of a series that assesses the effectiveness of the Zimbabwean general competition system and the merger regulatory framework in particular.[12] The author aims to provide an analysis of the element of control in the statutory definition of mergers in Zimbabwe. The Act defines a merger as occurring where one or more entities acquire or establish a controlling interest in the entire or part of the business of a competition, supplier, customer or another person.[13]

A transaction that falls within the definition of a merger and falling within the prescribed threshold calculated on the basis of the merging parties' combined annual turnover or assets in Zimbabwe must be notified to the CTC.[14] Such a notification regarding a "notifiable merger", that is, "a merger or proposed merger with a value at or above the threshold prescribed" by the Act, needs to be notified to the CTC within the period of either the "conclusion of the merger agreement between the merging parties"[15] or the acquisition of a controlling interest by a party to the transaction over the whole or part of the business of the other party.[16] It is clear that a transaction is notifiable if it is a merger as defined and has a value falling within the prescribed thresholds. Parties whose transaction is notifiable have a duty to notify the CTC within the prescribed period, failing which they will be liable for penalties for non-compliance as prescribed for under section 34A(5) of the Act. It thus becomes important to determine which transactions constitute a merger.[17] This determination cannot be completed without ascertaining what constitutes "control", for it is only when control has been acquired or established that a merger occurs. The notification requirement is triggered by the acquisition or establishment of a controlling interest. Notification is mandatory, that is, once a transaction falls within the definition of a notifiable merger, it triggers a duty to notify on the part of the merging parties. Given the centrality of the control concept to the definition of a merger and the legal implications flowing from failure to notify a merger transaction,[18] the need to clarify the concept of control becomes apparent.

This article provides an analysis of the element of control as contained in the statutory definition of merger in Zimbabwe. The first part will present the statutory definition of a merger in Zimbabwe in order to place the control element within the definitional context. This will be followed by a discussion on the concept of control in general and the element of control within the statutory context in particular. Here it will be argued that the legislature merely provided for a concept without providing meaningful clarity on what constitutes control for

12 See generally Nzero *Corporate Restructurings in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* (LLD-thesis, UP, 2013). See also Nzero "Is There a Gap in the Definition of Corporate Mergers in Zimbabwe's Competition Act? Revisiting the Caledonia Holdings (Africa) Limited/Blanket Mine (1983) (Private) Limited Merger" 2015 78(4) *THRHR* 589–604; Nzero "Merger Regulation in Zimbabwe: A Critical Assessment of the Effectiveness of the Merger Regulatory Institutions" 2015 *Midlands State University Law Review* 30–52 and Nzero "The Standard for Merger Assessment in Zimbabwe: The Law and Practice" 2022 *THRHR* 21–32.

13 Section 2(1).

14 Section 34(1)(a) read with s 2 of the Competition (Notifiable Merger Thresholds) (Amendment) Regulation No.2 of 2001.

15 Section 34A (1)(a) and (b). A merger must be notified within 30 days of either the conclusion of the merger agreement or (b) acquisition of a controlling interest by either of the parties.

16 *Ibid*.

17 For a discussion on the statutory definition of a merger, see Nzero 2015 *THRHR* 589 and *Competition and Tariff Commission v Innscor Africa Ltd* 2018 2 ZLR 236 (S).

18 Failure to notify a notifiable transaction attracts sanctions for the merging parties. See s 34A(5) of the Competition Act. See further *Competition Commission v Edgars Consolidated Stores (Edcon) and Retail Apparel Group (RAG)* 95/FN/Dec02.

purposes of satisfying the merger definition. Drawing lessons from other jurisdictions, the third part will make an argument for the need to provide, through legislative intervention, a more comprehensive and clear definition of a merger that clarifies the element of control.

2 A MERGER DEFINED

The definition of a merger transaction determines whether a given transaction is subject to either merger review and/or notification requirements.[19] This definition is central to the merger regulatory system. It identifies those transactions that are "suitable" for notification (notifiable transactions).[20] A transaction is suitable for notification if, as a result thereof, previously independent entities merge in a rather permanent relationship and whose outcomes are likely to be contrary to the policy goals of the competition law system.[21]

A merger occurs when two or more independent business entities combine whole or parts of their businesses.[22] These merging entities must have existed as independent entities prior to merging.[23] Entities can merge through mutual consent (a friendly merger) or a hostile takeover. The Act defines a merger as:

> [T]he direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of—
>
> (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
>
> (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
>
> (c) any means other than as specified in paragraph (a) or (b).[24]

Section 2(1) covers two broad issues. These relate to who can merge and how a merger occurs. The first issue basically deals with the types of mergers covered by the provision. The first scenario refers to an acquisition or establishment of control by a competitor. This type of merger involving entities who are direct competitors (in the same line of business) is known as a horizontal merger.[25] The second scenario relates to a merger involving parties with a supplier or customer relationship (on different levels of production) and such a merger is known as a vertical merger.[26] Lastly, the proviso makes reference to a scenario where control is acquired or established over the business "of another person". This "or of another person" is neither a direct

19 Organisation for Economic Cooperation and Development (OECD) "Definition of Transaction for the purposes of Merger Control Review" 2013 *Policy Roundtable* OECD DAF/COMP 25 12 https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf (accessed 20/09-2020).

20 Notification thresholds are used to identify transactions that have a sufficiently material connection to the jurisdiction.

21 OECD 2013 *Policy Roundtable* 15.

22 Coates IV "Mergers, Acquisitions and Restructuring: Types, Regulations and Patterns" 2014 Discussion Paper No. 781 *Oxford Handbook on Corporate Law and Governance* 2.

23 Neuhoff, Govender, Versfeld and Dingley *A Practical Guide to the South African Competition Act* (2006) 77.

24 Section 2 (1) as amended by s 2 of the Competition Amendment Act 29 of 2001.

25 Examples include *The Coca-Coal Company /Cadbury-Schweppes* merger [2000] CTC/M&A/Dec000 and *Rothmans of Pall Mall (Zimbabwe) Limited/British American Tobacco (Zimbabwe) Limited* merger [1999] CTC/M&A/Sept99. See generally Von Kalinowski "Business Organisations" 1979 *Antitrust Laws and Trade Regulations* s 19.02(1). On the rationale for regulating horizontal mergers, see *United States v Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct.1715,10 L.ED.2d.915 (1963).

26 Examples include *Acquisition of Shashi Hospitals by Premier Services Medical Investments* CTC/M&A/Feb2005 (merger between a health care provider and a health insurer).

competitor nor a customer or supplier.

Whereas the first two instances are clear, the same cannot be said of the last. This proviso has been a subject of varying interpretations as to what type of a merger it covers and ultimately what transactions are covered by the Act. A legal opinion in *Caledonia/ Blanket Mine* merger[27] which for a long time has been relied upon by the CTC, opined that the phrase "or of another person" simply extends the meaning to the categories stated in the definition, that is, horizontal and vertical mergers to the exclusion of the third known merger type involving entities with no economic relations, known as conglomerate mergers.[28] The opinion applied the *eius dem generis/ejusdem generis* rule[29] to argue that the legislature intended the definition to cover only transactions that are in the same class or genre as the enumerated (competition, customer or supplier). Contrary to the *Caledonia/Blanket Mine* opinion, it has been argued that it was never the legislature's intention to have the law restrictively applied in a manner that covers only two of the three known types of mergers.[30] This argument advocates for a holistic approach to the interpretation of the phrase by giving it a literal meaning. The phrase "or of another person" literally means other persons beyond those enumerated or stated. This will include transactions involving non-economically related entities (conglomerate mergers). The holistic approach looks at the intention of the legislature as guided by provisions elsewhere.

Section 3 provides that the Act applies to all economic activities having an effect within the Zimbabwean economy.[31] It follows then that the definition of a merger must not be interpreted narrowly to exclude other transactions that might have an effect within the economy. The law must be interpreted broadly to cover all transactions that have the potential to affect the competitive structure of the market. This argument has been accepted by the courts in the judgement in *CTC v Innscor Africa Ltd*.[32] It is however submitted that statutory clarity is still required in the mould of the South African provision following the amendment in 2000[33] which simply provides that a merger occurs where one or more firm directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another.[34]

2 1 The Acquisition or Establishment of a Controlling Interest

The second issue relates to how a merger occurs, namely where a controlling interest is acquired or established over the business *of another*.[35] This controlling interest can be acquired or established by one or more persons. This means either an individual entity can acquire or

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

28 See *Flacon Gold Zimbabwe/Cellular Systems* [2002] CTC/M&A/Oct02 and *FTC v Procter and Gamble Co* 386 US 568,577 (1967) and generally Standridge and Santopieto "Regulating the Pure Conglomerate Merger: Important Legislative Task of Useless Exercise?" 1979 *Syracuse Law Review* 607 608; Korah "The Control of Conglomerate Mergers in the United Kingdom" 1970 *Antitrust Bulletin* 761.

29 See generally on the rule, Cockram *The Interpretation of Statutes* (3ed 1987) 154 and *Quazi v Quazi* 1980 AC 744, 807–808; *Sacks v City of Johannesburg* 1931 TPD 433; *S v Makandigona* 1981 4 SA 439 (ZAD) and *Competition and Tariff Commission v Innscor Africa Ltd*.

30 Nzero 2015 *THRHR* 589.

31 Section 3.

32 *Competition and Tariff Commission v Innscor Africa Ltd.*

33 The South African section merger definition is a result of the amendment effected by the Competition Second Amendment Act 39 of 2000.

34 Section 12 of the South African Competition Act 89 of 1998 as inserted by s 6 of the Competition Second Amendment Act 39 of 2000.

35 Added to denote the ideal reading.

establish control over another or can do so jointly with others.[36] The control needs to be acquired or established either on the entire business of another or part thereof. Whereas there is not much that can be said about the entire business component, much can be said on a part of the business component. This means a merger can occur where an entity individually or jointly acquires or establishes control over certain aspects of the business of another such as acquisition of selected assets.[37]

For a transaction to constitute a merger, control must be acquired or established over the business *of another*. Prior to the acquisition or establishment of control, the merging entities need to have been independent of one another. This implies that an entity cannot acquire another that is already under its control.[38] A mere change in the quality of control does not have a significant bearing on the firm's market behaviour.[39] However, changes in the nature of control that can have an impact on the firm's market behaviour are subject to approval by competition authorities.[40] This implies that internal restructurings of even related businesses are deemed to constitute a merger and are subject to notification.[41] However, this theoretically places a burden upon parties to notify internal restructuring transactions.[42] This has been the major criticism levelled against the decision of the South African Competition Appeal Court in *Distillers Corporation(SA)/Stellenbosch Farmers' Winery*.[43] However, considering that the golden rule in any court decision making is to treat each case on its own merit,[44] any attempt to adopt a blanket approach might not only result in some absurd outcomes but can also inadvertently defeat the very purpose of the merger control system which is to protect and promote the competition process. It is thus submitted that it is necessary to cast the regulatory net as wide as possible to ensure that the system captures as many transactions as possible that can potentially harm the competition process. Adopting a narrow interpretation of the concept of control will result in the system being susceptible to transactions that are harmful to competition but still pass through the regulatory scrutiny undetected. Merger regulatory provisions have generally been interpreted widely including to cover situations where no typical control is acquired.[45]

The concept of control is central to the merger definition. What needs to be established is what constitutes control. This and related issues will be discussed below.

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36 See for example Case IV/M.053 *Aerospatiale-Alenia/de Havilland,* [1991] OJ L334/42 and Case IV.M.993 *Bertelsmann/Kirch/Première*, [1999] OJ. L53/1. See further UNCTAD "Zimbabwe" 2012 in *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* UNCTAD/DITC/CLP/2012/1–16.

37 *United States v Lever Brothers Co*. 216 F.Supp.887 (1963).

38 *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd* 30/LM/Jun 03, paras 36–37 (change in control was held to constitutes a once-off event).

39 *Blumer (SA) (Pty) Ltd/Distillers Corp. (SA) Ltd* 94/FN/Nov00 25.

40 See for example in *Bertelsmann/Kirch/Premier* para 13 where a series of transactions between the parties would have seen CLT-UFA and Kirch jointly controlling BetaDigitalReserach and change the nature of control of Première after the withdrawal of Canal+.

41 *Distillers Corporation South (Africa) Ltd and Stellenbosch Famers Winery Group Limited v Blumer (SA) (Proprietary) Ltd and Seagram Africa (Proprietary) Ltd* 08/CAC/May/01, 25 (hereinafter *Blumer*).

42 Legh and Dini "South Africa Merger Control" in Davies (ed) *Merger Control: The International Regulation of Mergers and Joint Ventures in 65 Jurisdictions Worldwide* (2011) 347 348.

43 *Ibid.*

44 See *Schuman Sasol/Price's Daelite (Pty) Ltd* 10 Cc/Aug01 para 59.

45 See *Competition Commission v Edgars Consolidated Stores Ltd* 95/FN/Dec02 (2003) ZACT 19 (24 March 2003) (where an acquisition of a book debt was held to constitute a merger) and *Blumer* case 25 (even though no change in ultimate control, still a merger).

3 THE CONCEPT AND ELEMENT OF CONTROL

Section 2(1) of the Act provides that a merger occurs where a controlling interest is acquired or established by one entity over that *of another*. It thus follows that for a merger to take place as defined, a party must either acquire or establish a controlling interest over the business of another. The definition is thus completed after establishing whether or not a controlling interest has been acquired or established. It is however, important to determine what then constitutes a controlling interest. It is only after satisfying the requirement that a controlling interest has been acquired or established that a transaction can be deemed to be a merger and hence be subject to notification. Strictly speaking, any transaction that falls outside the ambit of the definition provided in the statute is not subject to notification, and that non-notification thereof does not attract any sanctions from the regulatory authority.

Section 2(1) of the Act provides that a controlling interest is acquired or established by means of direct or indirect purchasing or leasing of shares or assets or amalgamation or combination or any other means besides those listed. In defining a merger, section 2(1) lists the controlling interest as either having being achieved as a result of:

> (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
>
> (b) the amalgamation or combination with a competitor, supplier, customer or other person;
>
> or (c) any means other than as specified in paragraph (a) or (b).

Section 2(1) (a) and (b) of the Act specifies the purchase or lease of shares or assets or amalgamation or combination as ways of assuming control. Subsection (c) is a catch-all provision that recognises that control can take place using other means and ways besides those listed in (a) and (b). Here the legislature merely specified ways of assuming control or means in which control takes place without defining what amounts to control. The concept of control is merely qualified to include a controlling interest which denotes the quality of control. A controlling interest is any interest that can be acquired in the business of another that entitles the acquirer to exercise influence over the market behaviour of the acquired entity, which behaviour may actually or potentially impact the competitive structure of the relevant market.[46] It is submitted that this qualification of the concept of control does not cure the deficiency in the definitional element. This lack of legislative clarity becomes critical when one considers that the means of acquiring or establishing control provided in the Act can either be direct or indirect.

Direct control can be acquired or established where there is immediate ownership of assets or rights[47] through either purchase or lease or amalgamation or combination or any other means. In order to determine whether a firm has acquired or established direct control, the South African competition authorities in *Bulmer*[48] adopted a rather formalistic approach, namely whether the acquiring firm had actually acquired control or is in a position to exercise control.[49] If this is answered in the affirmative, then control is deemed to have been directly acquired or established. This is a clear-cut case. However, it becomes murkier when dealing with instances where control is acquired or established indirectly. The fact that the interpretational section of the Zimbabwean Act does not provide a statutory definition of control militates against this situation. In comparable jurisdictions such as South Africa and Canada, the legislature at least

46 Case IV.M/890 *Blokker/Toys 'R' Us* [1998] OJ L316/1.

47 *Distillers Corporation (SA) Ltd and Another v Bulmer (SA) (Pty) Ltd and Another* (08/CAC/May01) [2001] ZACAC 4.

48 *Ibid*.

49 *Ibid* 25.

provides ways in which control can be demonstrated despite not defining control and what means could be relied upon to clarify what constitutes control.

Section 12(2) of the South African Competition Act provides that an entity is in control if it:

(a) beneficially owns more than half of the other firm's issued share capital;

(b) has the right to cast the majority of the votes at the firm's general meeting or is able to directly or indirectly control the voting;

(c) Is able to influence the appointment of directors of the firm.

(d) Is a holding company and is a subsidiary of that firm as provided for by the law.

(e) As a trust, is able to control the majority of the trustees' votes, to appoint the majority of the trustees or appoint or change the trust's majority beneficiaries.

(f) As a close corporation, owns majority of members' interest or directly control or entitled to control the majority of members' votes in the entity; or

(g) Possess the ability to materially influence the firm's policy just like the exercise of control in ordinary commercial practices as contemplated in the other cases listed above.[50]

This list illustrates situations where an entity is deemed to be in control of another. The situations are merely an illustration of either formal or functional control[51] without necessarily defining the concept. Formal control ordinarily encompasses all forms of control in which an entity acquires or establishes a beneficial interest over another.[52] Functional control relates to the firm's ability to influence the decision-making process of another.[53] However, it is submitted that because it is so explicit, formal control provides a clearer illustration of the element of control than functional control. The definition is more comprehensive when couched with an illustration of a formal control.

The South African provision is almost similar to the Canadian position which also deems an entity to be in control if it, *inter alia*, beneficially holds more than half of the voting securities even if held through subsidiaries,[54] has the ability to vote for the directors of the entity,[55] hold sufficient votes to elect the majority of directors[56] and is able to influence the appointment of majority directors[57] as well as holding "an interest in the partnership that entitles the person to receive more than fifty per cent of the profits of the partnership or more than fifty per cent of its assets on dissolution".[58]

It is generally accepted that an entity is deemed to have control over another if it is able to

50 Section 12(2) of the South African Competition Act 89 of 1998. See also s2(4) of Canadian Competition Act which provides for thresholds indicating control by holding interest that entitles a profit share of asset share upon dissolution.

51 OECD "Competition Law and Policy in South Africa" 2003 in OECD *Global Forum on Competition Peer Review* 28.

52 See s 12(a), (d) and (e) of the South African Competition Act.

53 This includes the ability to influence the voting pattern of the firm, that is, to appoint of cause the appointment of majority of directors in a company or trustees in a trust, or members in other entities as well as to veto such appointments.

54 Section 2(4)(a) of Canadian Competition Act.

55 *Ibid*.

56 *Ibid* s 2(4)(b).

57 *Ibid* s 2(4)(b(ii).

58 *Ibid* s 2(4)(c).

exercise influence over the controlled entity.[59] Control is deemed to have been acquired or established if the acquiring entity merely possesses the ability to exercise influence rather than actually exercising that influence.[60] This implies that an entity is in control over another if it has the mere ability to materially or decisively influence how that other entity behaves in the market, even if such ability is never exercised. An entity possessing the ability to influence another can invoke its ability, thereby causing an alteration of the competitive market structure. It is due to this realisation that the mere possession of the ability to exercise some sort of influence over another becomes a regulatory concern.

In determining whether or not control has been acquired or established indirectly, an attempt must be made to establish circumstances where control is deemed to have been indirectly acquired or established. These circumstances cannot be exhaustive[61] and constitute only the most common instances that result in the acquisition or establishment of control. Since the Zimbabwean Competition Act does not provide these instances, this article will draw from comparable jurisdictions.

3 1 Instances Where Control is Deemed to Have Been Acquired or Established

Generally, an entity is deemed to have control over another, jointly or otherwise in any one of the following circumstances. It is submitted that if as a result of an acquisition, a firm:

a) owns shares above a certain threshold.[62] However, thresholds are only a guideline for control and can still be acquired even though the acquired shares are below the prescribed threshold;[63]

b) acquires the right to use the acquired firm's assets. This can be a result of either direct share purchases or asset lease;

c) is entitled to cast a majority of votes during the acquired firm's General Meeting. Generally, control is acquired when an entity acquires sufficient shares of another entity that will give the acquirer the right to a majority vote in an election of the company's board of directors;

d) is able to control the management of the acquired firm;

e) is able to appoint or veto the appointment of the acquired firm's senior management team

f) is a holding firm and the acquiring firm is its subsidiary; and

e) is able to materially or decisively influence the policy of the acquired firm.

The concept of control is a central element of the merger definition in Zimbabwe. The Act defines a merger as involving the acquisition of or establishment of a controlling interests and further illustrates how control can be achieved. However, the concept of control itself remains undefined. The effect of such an omission is that a critical component of the statutory definition of a merger which forms the face of the merger regulatory framework is left undefined. This in turn negatively impacts on the effectiveness of the Zimbabwe merger regulatory framework, as

59 Although the aspect of excising influence is common to several jurisdictions, the degree of control varies. In s12(2)(g) of South African Competition Act refers to material influence; article 3(1) of Council Regulation 4068/89 OJ [1990] L257/14 refers to decisive influence. See also Case IV.M/890 *Blokker/Toys 'R' Us*, [1998] OJ L316/1.

60 See Case IV.M/890 *Blokker/Toys 'R' Us*, [1998] OJ L316/1.

61 See *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (PTY) Ltd* 30/LM/Jun03 and *Caxton and CTP Publishing & Printers Ltd v Naspers Ltd* 16/FN/Mar04.

62 Cf s 12(2)(a) of the South African Competition Act 89 of 1998 which provides that a firm is deemed to be in control if it owns more than half of the acquired firm's issued shares and also s2(4) of the Canadian Competition Act.

63 In case 1IV/M.258 *CCI/GTE* OJ [1992] C225/14 it was held that an acquisition of 19 per cent shares of voting rights was sufficient to confer control.

the starting point in appraising the framework is to look at the clarity of the critical elements, essential for an effective merger regulatory framework. This entails that parties who seek to rely on such provisions must be able to know what is expected of them when they file merger notifications. In this context, they must be able to ascertain from the reading of the statute what is constituted by control for their transaction to satisfy the statutory definition of acquiring or establishing a controlling interest. All the essential elements of the statutory definition of a merger must thus be clearly defined for the framework to be effective. The control element is one such critical definitional element and the fact that it is not clearly defined calls for clarity. The ensuing sections thus propose statutory clarity on the element.

4 TOWARDS AN EFFECTIVE MERGER DEFINITION FOR ZIMBABWE: SOME PROPOSALS

It is conceded that finding the ideal provision for Zimbabwe is not an easy task. It would require several approaches to the transactional definition of a merger to arrive at an ideal definition. These approaches are the "objective numerical criteria", the "economic criteria" and the "mixed approach".

4 1 The Objective Numerical Criterion

This approach relies on percentage thresholds or share acquisitions of an interest in a target firm. The objective criterion makes the regulatory system more predictable and transparent. However, in a bid to meet the set thresholds, merging firms can structure their transactions in a manner designed to avoid the thresholds required for notification.[64]

The thresholds are not randomly picked. They should be representative of the potential effects a given transaction is likely to have on the relationship between the acquiring and target firms.[65] A higher threshold entails outright control whereas a lower threshold signifies a minority interest in the target which is an indicative of the likelihood that the holder of such an interest may have additional sufficient means of influencing the target's market behaviour.[66] Setting the thresholds too high will result in few transactions falling within the definition and setting the thresholds too low will capture a wide range of transaction *albeit* at a cost to both the merging parties and the regulatory authorities.[67]

The objective numerical criterion has also been employed in cases where the percentage thresholds are stablished at the lower end of the scale, thereby necessitating the need for an additional criterion, which indicates a closer link between the merging parties.[68] However, in such cases, a review is only triggered if additional indicators point towards some form of influence over the target firm.[69]

It is submitted that the application of the objective numerical criterion's flexibility augers well with the need for a pragmatical merger enforcement system that is not rigid. However, there is a risk of being fixated on the numerical, hence the need to explore other possible options when determining when control can be deemed to have been acquired or established for the purpose of a merger review.

64 OECD 2013 *Policy Roundtable* 6.

65 *Ibid* 15.

66 *Ibid.*

67 *Ibid* 6.

68 See for instance Japan Fair Trade Commission, *Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations* (revised version, 2010), Parts I(1)(A) and I(1)(B).

69 OECD 2013 *Policy Roundtable* 15.

4 2 The Economic Criterion

This approach provides for a definition that is directly linked with the means through which a transaction might negatively alter the competitive structure of the market.[70] This approach focuses on whether a transaction in question will enable the acquirer to have the ability to exercise some form of influence over a previously independent entity.

The intensity degree of the influence is defined differently in different merger statutes. These degrees largely describe the levels of influence that must be exerted by the acquirer over the acquired entity in order for the transaction to fall within the merger definition. These variations include "material influence", [71] "decisive influence", [72] "significant influence"[73] or "competitive significant influence".[74]

The decisive influence test, which is a higher standard, has been applied by the European Court of Justice (ECJ) in its interpretation and application of the parental liability doctrine.[75] This criteria seeks to determine the alleged controlling firm's ability to exercise decisive influence over the management or affairs of the other entity, be it through majority shareholding, veto rights, or contractual covenants.[76] An entity is presumed to exercise decisive influence where the parent company holds all the voting rights rather than simply all or almost all of the share capital in a subsidiary company.[77] This rebuttable presumption of decisive influence relates to the liability of the parent entity for anti-competitive conduct of its subsidiary when the parent exercises a decisive influence over its subsidiary.[78] The basis for imputing the liability of the subsidiary on the parent company lies in Article 23 of Regulation 1/2003[79] and applies to the entire undertaking, as opposed to merely the infringement on the legal entity (in this case the subsidiary). In terms of the decisive influence standard, the parent company need not hold the entire shareholding in the subsidiary but rather "directly or indirectly, all or almost all of the capital in a subsidiary",[80] which enables it to exert influence over it.

The material influence standard is lower than the decisive influence test. In terms of the material influence test, an entity is deemed to have a material influence over the other if it is able to significantly influence materially "the strategic day-to-day commercial behaviour of the"[81] the other entity. The objective of the material influence test is making an assessment of an entity's ability to influence affairs and management of the other through tools such as shareholding, special rights, status as well as expertise of an entity/person, board representation, and structural/

70 *Ibid* 15

71 SA material influence, s12(2)(g) of the South African Competition Act. See also s 26(3) of the UK Enterprises Act 2002.

72 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. L 2004/1 (2004) (EUMR), Article 3 (1) and (2). See further *Blokker/Toys 'R' Us* para 13 (possibility of exercising decisive influence on a firm').

73 Section 91 of the Canadian Competition Act.

74 German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB).

75 See Case C-97/08 P *Akzo Nobel NV v Commission of the European Communities*, OCL 046 (EU 2009).

76 Jones "The Boundaries of an Undertaking in EU Competition Law" 2012 *European Competition Journal* 301−331.

77 *Akzo Nobel* case.

78 See generally Seet "Attribution of Liability Between Parent and Subsidiary Within A Single Economic Entity: The Singapore Experience" 2017 *Singapore Journal of Legal Studies* 124.

79 European Union " Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty" https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003R0001 (accessed 13-01-2024).

80 Case C-595/18 P *The Golman Sachs Group Inc.v European Commission*, EU:C:2021:73.

81 Section 12(2)(g) of the South African Competition Act.

financial arrangements.[82] However, the variations in terminology used in defining the intensity degrees are not of any particular significance.[83] In their variations, they still directly capture the possible harm to competition.[84]

The economic approach is effective in that it targets more transactions that are potentially harmful to competition. This effectiveness is further bolstered by the fact that it is difficult for merging parties to manipulate the system as is the case with the objective criterion. The objective approach however, requires a more case-specific interpretation. This situation creates uncertainty and makes the merger review process less transparent. This is because the approach gives the regulator an insight into factors to consider, which insight is not available to merging parties. However, the benefits of adopting an economic approach are far greater than its shortcomings. Regulatory guidelines and consistent decisions by authorities can be developed to cure any perceived deficiencies in the approach.

4 3 A Mixed Approach

This approach is a hybrid between the objective and economic approaches. It utilises the lower threshold levels of the objective criterion and an indicator of the closeness of the relationship between the merging parties.[85] The mixed approach uses the two criteria side by side for instance an acquisition of ten per cent interest and acquisition of control over another or acquisition of significant, material or decisive influence over another. It is preferable to set thresholds at a lower level and combine this with an additional criterion that shows a closer relationship between the merging parties.[86]

4 4 The Proposed Definition of the Control Element

In coming up with a suitable definition of a merger, one must take into account the fact that the control element is only but one aspect thereof. Furthermore, even though guidance can be sought from comparative jurisdictions, the most important consideration is that the Zimbabwean policy goals that underpin merger regulation should be central to any such suggestion. It follows then that the comparative jurisdictions can only provide a platform that is grounded on sound legal and economic reasoning upon which the Zimbabwean system can be improved.

The current statutory definition of a merger needs improvement. Following the recent High Court judgment in the *CTC* v *Innscor* case,[87] the legislature needs to provide a clearer definition that is broad enough to advance the statutory objectives as well as the general competition policy goals. It has been highlighted above that the element of control, despite its centrality to the definition of a merger, remains undefined. Section 2(1) of the Act defines a merger as involving the acquisition or establishment of "controlling interest" over the whole or part of the business of another. The provision went further to indicate how such establishment or control is achieved. A controlling interest is then broadly defined as:

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82 See Competition Bureau of Canana *Merger Enfrocement Guidelines* 2011.

83 OECD 2013 *Policy Roundtable* 15.

84 *Ibid* 14.

85 OECD *2013 Policy Roundtable* 15.

86 See parts 1(1)(A) and 1(1)(B) of the Japan Fair Trade Commission *Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations* (revised version, 2010).

87 *CTC v Innscor Africa Ltd.*

(a) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking;

(b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.

This provision only provides ways in which control can be acquired or established without defining what control is. Unfortunately, this does not shed any light on what constitutes control. This situation undoubtedly hampers the effectiveness of the merger regulatory provisions as the definition acts as a face to the entire provisions and provides an essential tool for interpreting them. A rather incomplete or scanty definition becomes a handicap to the effectiveness of the entire system.

Section 2(1) of the Act should be amended to provide circumstances in which control is deemed to have been acquired or established. These circumstances, which capture the most common instances must be interpreted widely in order to give the definition of control in particular and that of a merger in general, a broader coverage.[88] This wide definition will enable the CTC to assess a wide range of transactions that have the potential to materially alter the competitive structure of the market. It is only through subjecting as many as possible transactions that the regulatory framework will be able to protect the competitive structure of the market from possible harmful transactions consummated through anti-competitive mergers.

However, in as much as a wide definition is desirable given the need to cover as many transactions as possible that are practically possible, it has been argued to the contrary that there is also a need to maintain a manageable and predictable merger review process.[89] The merger review process is manageable and predictable if it is able to reasonably maintain costs associated with requiring notification of merger transactions. Thus, there is a need to balance the desire to know as many transactions that can potentially harm the competitive structure of the market (wider approach) and the need to ensure a reasonable cost associated with the notification of any merger transactions (narrow approach). It is this cost/benefit analysis that determines whether or not to narrow the merger definition.

What the legislature has done in comparable jurisdictions is to provide guidelines on when control can be deemed to have been acquired or established.[90] These guidelines inevitably shed light on what constitutes control for purposes of merger regulation. It has been made clear that the said legislative guidelines must never be interpreted as constituting an exhaustive list.[91] It is thus submitted that an improved section 2(1) of the Act must, *inter alia*, provide a catch-all proviso that ensures that all other circumstances that might not have been expressly provided as circumstances in which control is deemed to be excised over another entity are captured. It is thus suggested that an ideal definition of a merger in Zimbabwe should, in addition to incorporating changes relating to who can merge by substituting the ‘competitor, supplier, customer or of another person’ with simply ‘of another,’ provide a non-exhaustive list of instances where the controlling interest is deemed to have been acquired or established.

It is suggested that these instances reflect the mixed approach highlighted above. The specific instances would be:

(a) beneficially owning more than half of the issued share capital;[92]

(b) entitlement to casting a majority of votes at the general meeting or have the ability to

88 See *Bulmer* case.

89 OECD 2013 *Policy Roundtable* 13.

90 See s 12 2(c) of the South African Competition Act and s 2(4)(b) of the Canadian Competition Act.

91 See *Bulmer* case.

92 See s 12(2(c) of the South African Competition Act and s 2(4)(b) of the Canadian Competition Act.

influence the majority votes of the entity it controls;

(c) ability to appoint or veto the appointment of the majority of directors;

(d) it is a subsidiary of a holding company;

(e) in case of a partnership, holds an interest that entitles it to more than half of the profits or assets upon dissolution;[93] or

(f) is able to materially or decisively influence the entity's policy.

Even though it is conceded that these instances do not necessarily amounts to a definition of control, they provide clarity on the element that is central to the definition of a merger in Zimbabwe.

5 CONCLUSION

The effectiveness of a merger regulation significantly impacts upon the effectiveness of the entire competition system. A merger is defined in the Act as occurring where one or more entities acquire or establishes a controlling interest in the whole or part of the business of another. The acquisition of control is a critical element of the statutory definition. However, section 2(1) of the Act, in addition to qualifying the quality of control, only provides ways in which control can be acquired or established. However, these do not shed any light on what constitutes control. This situation undoubtedly hampers the effectiveness of the merger regulatory provisions as the definition is the face of the entire merger regulatory framework and provides an essential tool for interpreting them. Parties who intend to rely on such a provision will be left to wonder what aspects of their transactions would be considered as having constituted acquisition or establishment of a controlling interest. A rather incomplete or scanty definition becomes a handicap to the effectiveness of the entire system. A review of comparative jurisdictions that have statutory guidelines on what constitutes control for a merger definition shows that ultimately it is a question of whether the acquiring entity is in a position to exercise influence over the market behaviour of the acquired or target firm. There is thus a need for legislative clarity in Zimbabwe on what constitutes control for the purpose of determining whether a merger has occurred.

93 See s 2(4)(c) of the Canadian Competition Act.