# *THE CONTROL AND REGULATION OF MERGER AND TAKE-OVER ARRANGEMENTS IN TANZANIA*

## *A dimensional analysis of the Fair Trade Practices Act, 1994*

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***Abstract***

*One of the recently enacted legislation in Tanzania is the Fair Trade Practices Act, 1994 (hereinafter referred to as the Act)[1]. The main thrust of this legislation is (in the words of its long title) to encourage competition in the economy by prohibiting restrictive trade practices, regulating monopolies, concentration of economic power and prices, to protect consumer and to provide for other related matters.*

*This paper is an attempt to make a dimensional analysis to the fourth part of this legislation. This part proclaims some positive rules which inter alia, regulates and controls the merger and take-over transaction[2] . The paper starts by investigating the sum and substance of the merger and take-over arrangements as coined in the legislation. Here, the paper observes that, the definitions of take-over and merger given in the Act are factually sufficient. The paper however comments that, some of the definitions contained in the Act are unreasonably wide.*

*The paper proceeds to depict the control and regulation mechanism and regulation mechanism as laid down in the Act. The paper goes on to make an account for desired goal behind the control and regulation of merger and take-over arrangements. On that account, the paper strongly maintains that, in imposing the regulatory and control measures, no due regard was made to investors interest. The control and regulation measures enshrined in the Act portrays only national interests.*

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## 1. DEFINING TAKE-OVER AND MERGER

Legally speaking, there is no definite meaning which is attributed to the terms "take-over" and 'merger'. While there is no perfect legal meaning of the terms, there are statutory, case laws and scholars definitions which do conjectural bear some striking similarities. These striking similarities serve as guidelines in judging whether a certain arrangements do quality to be a merger or take over. These striking similarities symbolizes minimum requirements and criterion for determining whether a particular arrangement is a merger or take-over. For instance, if an arrangement which have been claimed by a piece of legislation to be a merger ortake over arrangement protrudes these striking similarities, it will dive onto the sphere of legal criticism. These striking similarities are often explained well by using the titbits of legal input[3]. The below given meaning of the terms represents the generally accepted meaning though not conclusive.

### 1.1 MERGER

The term merger is often used synonymously with the term amalgamation. A wide range of legal scholars have explained a merger or amalgamation as an affair which takes place when the undertakings of more than one company are brought under the ownership and control of a single company. This single company be one of the companies conjoined or the new one. The outcome of the transaction is that, the shareholders who were members of several amalgamating companies together owns and controls the same enterprise as a joint-venture. A merger is one of the schemes which can be adopted by a company to re-organize itself, i.e. to re-arrange the company's share capital, or to re-arrange its relationship with its shareholders or creditors.[4]

### 1.2. TAKE-OVER

Take-over is a term which is often used to depict the acquisition by one company the control of one another by buying all or majority of its shares. In the ordinary sense the company taken over is smaller. In uncommon occasions a small company may

gain control of a large company. This infrequent situation is known as 'reverse take-over'. An offer to buy the shares at a stated price may be addressed to all shareholders. This kind of offer is commonly known as 'take-over bid'. This type of take-over has been widely used in the divestiture of state owned enterprises[5] . As a merger, take-over is one of the arrangements which can be adopted by the company in order to reorganise itself [6].

## *2.3 EXEGESIS OF MERGER AND TAKE-OVER UNDER THE ACT.*

For the purpose of regulating and controlling take-over and merger affairs, the Act has branded a series of normal arrangements to be merger or take-over. These transactions are elucidated under the provision relating to the interpretation of matters coined under part IV of the Act[7]. The allegorization of the terms starts by exemplifying the phrase 'merger or take-over' The provision makes it plain that, take-over or merger stands for a transaction or other action which involve the implementation of a merger or take-over proposal. The provision proceeds to illuminate in detail the sum and substance of a merger of take-over proposal. Let us decipher each of the situation studiously:-

(a) Firstly, a transaction will qualify to be a merger or take-over if there is acquisition or disposition of any shares in a company which together with shares, if any to which, the transferee has a beneficial interest, carry the right to exercise or control the exercise:-

(i) in the case of a private company of more than fifty percent of the voting power at any general meeting of the transferor company[8]

Illustration:-

Assume Alpha Co. Ltd ( a private company) has a voting power of more than fifty percent in Dog Co. Ltd. If Alpha Co. Ltd acquires other shares in Dog Co. Ltd, the acquisition qualify to be a merger or take-over.

(ii) In the case of a company other than a private

company of the fifty percent or more of the voting power at any general meeting of transfer company[9].

Illustration

Assume Alpha Co., Ltd (a public company) has a voting power of fifty per cent or more in Dog Co. Ltd. If Alpha Co. Ltd acquires other shares in Dog. Co. Ltd, the acquisition is a merger or take-over.

In all of the above transactions, the arrangement will not qualify to be merger or take-over if the transferee is already beneficial entitled to or already has a beneficial interest in any shares in the Company to which the proposal relates, being shares which carry the right to exercise or control the exercise of more than fifty percent of the voting power at any general meeting or the transferor company[10].

(b) Secondly, an arrangement is a merger or take-over:-

(i) If any person or body of person (other than a company) acquires or disposes the whole of the equity capital of the business [11].

Illustration:-

Assume Juma owns 50% of the equity share in Geto Co. Ltd. If Juma disposes all the equity shares he owns in Geto Co.Ltd, the disposition is a merger or take-over.

(ii) If any person or body of person (other than a company) acquires or disposes a portion in the equity capital of the business which made the transferee to have the whole or more than fifty per cent of the equity capital of the business.[12]

Illustration:-

Assume Juma owns 50% of the equity share in Geto Co. Ltd. If Juma disposes 20% of the equity shares to Ali and that disposition give Ali the whole or more than fifty percent of the

shares in Geto Co. Ltd, the transaction is a merger or take-over.

The Act however states explicitly that, the proposal will not be a merger or take-over if the transferee is already beneficially entitled to more than fifty percent of the equity capital of the business. [13.]

(c) Thirdly, an arrangement is a merger or take-over if:-

(i) the whole assets of a section of business are acquired or disposed by a company.[14]

Illustration:-

If Kenya Breweries acquires the whole assets relating to the distribution of Beers in Tanzania Breweries Limited, that acquisition is a merger or take-over,

(ii) the portion of the assets of a section of a business are acquired or disposed and the disposition places the transferee in a position to hold the whole or more than fifty per cent of the assets used in carrying on that section business.[15]

Illustration:-

If Kenya Breweries acquires the portion of the assets relating to distribution of beers in Tanzania Breweries Ltd and as the result of that acquisition, Kenya Breweries Ltd is to hold the whole or more than fifty per cent of the assets used in the distribution of commodities, the transaction is a merger or take-over.

The Act declares that, the acquisition of disposition will not be considered as a merger or take-over if the transferee already holds in the assets used in the carrying on of the section of the business to which the proposal relates, or the equity capital that represents more than fifty per cent of the value of

those assets.[16]

(d) Fourthly, a transaction is a merger or take-over if the acquisition or disposition of tangible and intangible assets together with any equity capital, entitles the transferee to control more than fifty percent of the combined value of the tangible or intangible assets, employed in connection with the business or section of a business.[17]

Illustration:-

If Tanzania Bottlers acquires trademarks, patents and the manufacturing plant of Bonite Bottlers, As the result of that acquisition Tanzania Bottlers controls more than fifty percent owner of the combined values of these trademarks, patent and manufacturing plant which in employed in connection with the production of soft drinks, the transaction is a merger or take-over.

Notwithstanding the above legal standpoint, the arrangement will not be a merger or take-over if the transferee already owns tangible or intangible assets, employed in connection with the business or section of the business, to which the proposal related being assets which have a value that is more than fifty per cent of the combined value of the tangible and intangible assets employed in connection with the business or section of the business.[18]

(e) Fifthly, an arrangement is a merger or take-over if the new business entity acquires by any of the means set above, a controlling interest in two or more independently owned business or in one or more sections of at least two such businesses being sections capable in themselves of being operated as business.[19]

Illustration:-

Assume Mtakuja Co. Ltd acquires the controlling interest in Mtakwenda Co. Ltd. and Mtasogea Co. Ltd This acquisition is a merger or take-over.

(f) Lastly, any arrangements is a merger or take-over if it is entered into for the purpose of having the effect of preventing or restricting competition between that company or section of a business and the other party to the arrangement or transaction or any body corporate that is interconnected with that party.[20]

Illustration:-

If Ndoto Co. Ltd concludes an agreement with Usingizi Co. for the purpose or having the effect of preventing or restricting competition between these two companies, the agreement is a merger or take-over.

While it can be argued on one hand that, the above definitions are fairly illustrative it can be also argued that, these definitions are confusing and too wide. For instance, the definitions explains concurrently the terms merger and takeover. This integral approach does not sense at all because in company law each term have its own independent meaning. It is impossible at any rate to offer a concise definition without splitting the terms. The legal scholars may concede with me that, any fused definition of a legal term is not rational. It can also be observed that, the above definitions are too wide unreasonably. From the legal standpoint, the definitions has covered many transaction which apparently have nothing to do with take-over or merger as are known in a traditional sense. As I have argued previously that, despite the absence of the conclusive legal meaning of the terms, the often given definitions do bear some striking similarities. This being so, we expect everyone who attempts to define a merger or take-over to be not so far from the other definitions. The absence of a conclusive meaning is not an excuse even for the parliament to declare a transaction which does not correlate with a merger or take-over to be so.

## *2. THE REGULATORY AND CONTROL FRAMEWORK.*

From the legal standpoint, the regulatory and control mechanism laid down in the Act are by and large procedural. Substantively,

the Act does not outlaw the acts of merger and take-over. Instead, it prescribes some procedural requirements to be invoked:- (i) if there is a merger of two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities or engaged in supplying of similar services[21] (ii) if there is a take-over of one or more such enterprises by another such enterprise, or by a person who controls another such enterprise.[22]

## *2.1 PROCEDURAL REQUIREMENTS*

The Act declares an offence for every person acting as a principal or agent to consummate any merger or take-over without the authorization of the Ministry of Industries and Trade. This offence is punishable for a fine not exceeding two million shillings or imprisonment for a term not exceeding twelve months or both. [23] The provision emphasize that, any merger or take-over which is not sanctioned by the Minister cannot create any legal obligation to the participating parties and is unenforceable in the legal proceedings.[24] Under the provision, a merger or take-over is valid only if it is authorised by the Minister. [25] The enterprise is required to lodge an application for a merger or take-over to the Commissioner for Trade Practices.[26] Before acting on that application, the Commissioner is empowered to make an investigation. In the process of investigation the Commissioner has a right to have an access to records relating to patterns of ownership and percentages of sales accounted for by participants in the proposed merger or take-over or by other leading enterprise in the relevant sector.[27] Basing on his investigation, the commissioner is required to make a recommendation on the application to the Minister. The Minister after reviewing the recommendation may approve or reject the application or may issue a conditional approval. The conditional approval will require the participating parties to mitigate the anticipated negative effects of the proposed merger or take-over on competition.[28] The decision of the Minister, must be published in the government gazette. The decision of the Minister is appellable to the Trade Practices Tribunal.[30] The judgement or order of the Tribunal is final and is enforced in the same manner as a

judgement or order of the High Court.[31]

## *3. THE WINNING - POST OF THE CONTROL AND REGULATORY MEASURES*

### *3.1 RATIONALE BEHIND CONTROL AND REGULATION*

Generally speaking, the control and regulation arrangement has been imposed for the sole object of discouraging the merger and take-over which "reduces competition in the domestic market and increases the ability of the producers of the goods or services in question to manipulate domestic prices in accordance with the principles of oligopolistic interdependence."[32]

The objective of the control and regulatory measures was stated categorically by the Minister for Industries and Trade when the National Assembly was debating the Bill. The Honourable Minister stated that the measures have been taken purposely to control the monopolies and concentration of economic power which are of adverse effect to the overall economic development. The Minister went on to stress that, the target of the law is to check these concentration of economic power leading to the detrimental effects on the economy like unreasonable high costs in production and distribution prices, worsening of product quality and limiting competition. Furthermore, the Minister clarified that, the law will apply only to those mergers and take-overs which deal in the same or substantially similar commodities. In actual fact the above mentioned objective is a key criteria for the Commissioner to have due regard in making his recommendation to authorize or reject the application for merger or take-over [33]

### *3.2 ACCOMPLISHMENT MECHANISM*

According to section 38, the Commissioner is required (when evaluating the application) to have due regard to the anticipated effects of the merger or take-over proposal. In most cases, the Commissioner will recommend for authorization of the proposal if it will be advantageous to the country to the extent that the participants produce goods and services entering into

international trade and the merger or take-over will yield a substantial more efficient unit with lower production costs and great marketing thrust, thus enabling it to compete more effectively with imports, expand the country exports and thereby increase employment. In short, the Commissioner will recommend for the approve of the application if it is likely to have positive effect.

Conversely, the Commissioner will recommend for rejection of or the merger or take-over proposal if it will be disadvantageous to the extent that it reduces competition in the domestic market and increase the ability of producers of the goods or services in question to manipulate domestic prices in accordance with the principle of oligopolistic interdependence[34]. This means that application will be turned down if it is likely to have negative effect to the economy.

It is in the above context, the Commissioner has been given powers to have an access to all records relating to the patterns of ownership and percentage of sales accounted for participating parties in the merger or take-over arrangements in question or other leading enterprises in the relevant sector. The rationale behind these powers is to enable the Commissioner to make an opinion if the proposed arrangement will have either a negative or positive effect to the economy.

Admittedly, the measures to control and regulate monopolies are desirable in the current era of privatization of state owned enterprises. In order to have a real and genuine competition, the opportunities and benefits favouring few companies must be minimized. It can be argued that, this legislation is timely in the sense that, the country is privatizing the state owned enterprises which most of them were used to enjoy monopoly. It will be unfair therefore to transfer this monopoly to private entities which will step into the shoes of the former public enterprises. It is therefore very important for the government to regulate the in-coming private entities notably when they are likely to do an act which is detrimental to the economy. Thus the winning post of the legislation, i.e. to encourage competition in the economy

by inter alia regulating monopolies and concentrations of economic powers can be viewed as an important step in creating a proper balance to the private enterprises.[35]

## *4. THE SHORTFALL OF THE WINNING POST*

Any determined legal analysis must highlight the merits and demerits of a certain claimed legal standpoint. This paper therefore will be faint- heartedly if it will not make an attempt to view the winning post of the regulatory and control measures from the negative angle. Arguably, there are some negative impact which may emanate from the proclaimed control and regulation of take-over and merger arrangement. One of these is the marginalisation of the investors interests at the expense of national interests.

### *4.1 BALANCE OF INTERESTS*

It is undisputable fact that, any sound legal framework for business must consider the interests of the investors on one hand and those of the national on the other. Again. it is traditionally recognised in company law that, merger or take-over are one of the measures that may be opted by a company in order to reorganise or reconstruct itself.

A merger for example can be adopted by a company for the purpose of widening its sphere of operation or changing its domicile or carrying into effect a compromise with creditors/members of the company. In economic theory,a merger of two or more companies is beneficial as it creates one stronger competitor or realizes significant economies of scale and thus produce a lower cost competitor. A take-over arrangement may be opted by a company in order to eliminate the minority interests. In a take-over, the minority shareholder has no rights beyond the rights to dissent and be paid off the proportionate share. Again, take-over transaction is beneficial as it releases the debt liability of the transferor company and may be beneficial to the creditor if the transferee company is comparatively more

credit worth.[36]

It is ridiculous therefore to note that, despite the fact that the legislators had in mind the above benefits of merger and take-over, they proceeded to enact the law which suppresses them. While it is a recognised fact that, there merger and take-over arrangements which have detrimental effect to the economy, it is also recognised by company lawyers that, there are genuine arrangements of this kind which are opted for the sole purpose of recognising the company. The Act has picked only the economic theory underlying most attacks on merger or take-over arrangements (i.e most mergers and take-overs create monopolies and encourage collusion by reducing negotiation) as a basis for control and regulation. The Act has tendered this economic theory as a key factor to the Commissioner in recommending to the Minister whether to reject or approve the arrangement. This leads us to the conclusion that, in making an evaluation for approval of the merger or takeover arrangement, only national interests will be considered. This being so, the regulatory and control measures can be said as a departure from the current policies of promoting private investments and changing the economy from the command structure to free market. It is interesting to note that, the same Parliament which enacted a law to promote private investment has re-enacted a law which has the impact of limiting the freedom of those investors.[37] The Act ought to have made a reservation to the genuine take-over and merger arrangements adopted for the sole purpose of re-organising the company. I therefore polemicize that, the control and regulation measures to take-over and merger affairs imposed by the Fair Trade Practices Act, 1994 are not fair as they are not recognising any company interest in an arrangement in question.

## *5. CONCLUDING REMARKS*

It must be acknowledged that, the control and regulation of monopolies can be considered as a blue-print for restricting the detrimental monopolies. It is to be expected that, the government will suppress only take-over and merger which have a real detrimental effects to the economy. We do hope that the

government will allow in practice the take-over and mergers opted for the sole purpose of reorganising the company. Nevertheless, the control and regulation measures conceals a host of serious practical problems. How the government is going to know that a particular arrangement has been adopted for the sole purpose of company reconstruction should the potentially detrimental results of the arrangement be taken into account? What rights and constraints should be introduced for foreign participants? The practical importance of such question is undoubted. But, given a clear perception of the issues, they are essentially operational problems to which some kind of solution can be found. The guiding criterion must be clear in order to make sure that the company interests are not jeorpadized. The invention of control and regulation measures which are not damaging the interests of the investors must be identified.

## *NOTES*

1. *This Act is in the Printing House now. The Act has been passed by the Parliament. See the bill of this Act in the Government Gazette No. 53 of 31st December, 1993.*
2. *The fourth part spreads into eleven section i.e. SS 30 - 40*
3. *For the detail analysis of the merger and take-over arrangements, see Weinberg and Blank, Take-over and Mergers, 4th edn. London 1980.*
4. *For case law and statutory exposition of mergers see Sealy, L.S. Cases and Materials in Company Law, 3rd edn. London, 1986 pg.484*
5. *For the further discussion on the take over as a means of privatization see Nankani, H. Techniques of Privatization of state- owned Enterprises, World Bank Technical paper Number 89, Washington, 1988*
6. *Sealy L.S. op. cit, see also Sir Johnson. The city Take-over Code, Oxford, 1980.*
7. *S, 30 (1)*
8. *S 30 (1) (a) (i)*
9. *S. 30 (1) (a) (ii)*
10. *S. 30 (4) (a)*
11. *S. 30 (1) (b) (i)*
12. *S. 30 (1) (b) (ii)*
13. *S. 30 (4) (b)*
14. *S. 30 (1) (c) (i)*
15. *S. 30 (1) (c) (ii)*
16. *S. 30 (4) (c)*
17. *S. 30 (1) (d)*
18. *S. 30 (4) (d)*
19. *S. 30 (1) (e)*
20. *S. 30 (1) (f)*
21. *S. 35 (1) (a)*
22. *S. 35 (1) (b)*
23. *S. 35 (1)*
24. *S. 32 (2)*
25. *S. 36*

26. *The Commissioner for Trade Practices is to be appointed section 3 of the act*
27. *S. 37*
28. *S. 39 (1) and (2)*
29. *S. 39 (3)*
30. *S. 40*
31. *S. 5*
32. *S. 38 (b)*
33. *The Bill was moved into the Parliament on Thursday, February 3, 1994. See the Daily News February, 3, 1994 under the title "Government Moves Trade Bill"*
34. *For the detail meaning of the oligolipolistic interdependence see Paul A. Samuelson and William D. Nordhans, ECONOMICS 4th edn. New York, 1992.*
35. *For further discussion of the benefits of privatization see Wiseman J. "Privatization in the command Economy" in Ott A and Hartley K (Ed) Privatization and Economic Efficiency. Vermont, 1991 at pgs 257 - 270.*
36. *For further discussion on the benefits of take-over and mergers see Scharf, C. Acquisition, Mergers, sales and take- overs, Englewood Cliffs Printice - Hall, 1971 see also Saharary H.K. Principles and Practice of Company Law in India 2nd edn. Calcutta 1983 at pgs 333 - 348*
37. *The referred law here is the National Investment (Promotion and Protection) Act, 1990. (Act No. 10)*

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