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

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OPSOMMING

Is daar 'n leemte in die omskrywing van statutêre samesmeltings in die Zimbabwiese Mededingingswet?

Die regulering van korporatiewe samesmeltings is uiters belangrik vir die bevordering en instandhouding van 'n mededingende markstruktuur. Regulering van samesmeltings is sentraal tot die Zimbabwiese mededingingstelsel. Gevolglik waarborg 'n effektiewe samesmeltingsreguleringsraamwerk grootliks 'n effektiewe mededingingstruktuur. Die statutêre omskrywing van korporatiewe samesmeltings bepaal die toepassing van die regulerende statuut ten aansien van korporatiewe transaksies wat potensieel 'n invloed kan hê op die mededingingstruktuur van die mark. Die Zimbabwiese Mededingingswet van 1996 is die hoofsamesmeltingsreguleringstatuut en verskaf die statutêre omskrywing vir korporatiewe samesmeltings. Hierdie omskrywing is egter vatbaar vir 'n verskeidenheid interpretasies, soos blyk uit die regsopinie in die *Caledonia Holdings (Africa) Limited/Blanket Mines (1983) (Private) Limited*-samesmelting. Die opinie maak aanspraak daarop dat die statutêre omskrywing sogenaamde konglomeraat-samesmeltings uitsluit uit die toepassingsgebied van die Mededingingswet. Hierdie artikel voer egter aan dat die huidige statutêre omskrywing wyd genoeg is om alle transaksies te dek, insluitende transaksies tussen partye met 'n ekonomies nie-verbandhoudende verhouding gebaseer op die uitleg en toepassing van die *eiusdem generis*-reël. Die artikel voer aan dat hierdie reël verkeerdelik uitgelê en toegepas is in die *Caledonia*-opinie. Nietemin, die blote feit dat die opinie aanvaar is deur die Mededingings- en Tariefkommissie, die hoof samesmeltingsreguleringsinstansie in Zimbabwe, is voldoende rede om te betoog vir 'n duideliker statutêre omskrywing van korporatiewe samesmeltings en verkrygings in die Zimbabwiese Mededingingswet. Die artikel stel dus 'n duidelike statutêre omskrywing van korporatiewe samesmeltings voor.

1 INTRODUCTION

The concept of competition as applied in the context of business refers to the act of "striving for the custom and business of people in the market place"[1] thus

1 Whish *Competition law* (2009) 3.

denoting "a process of rivalry between firms . . . seeking to win customers' business over time".[2] This rivalry is accepted as being desirable due to the many benefits that normally obtain from a competitive market structure, namely, lower prices, better product quality, consumer choices and enhanced efficiency.[3] These benefits are generally not accessible in situations where either a single firm (monopoly) or a small group of firms (oligopoly) controls the market.

Competition generally enhances both allocative and productive efficiencies[4] and, in the process, maximises consumer welfare.[5] Effective competition can also stimulate innovation through the desire to improve product quality in order to win customers and the market.[6]

Competition policy is formulated to ensure the benefits from a competitive market. Competition law or anti-trust law is thus a component of the policy aimed at protecting the competition process for the benefit of consumers.[7] This is done by targeting business conduct that is perceived as actually or potentially anti-competitive and capable of depriving consumers of the benefits associated with a competitive market.

The regulation of corporate mergers and acquisitions is one of the most pronounced means of protecting the competitive market structure from potential anti-competitive business behaviour. Business combinations implemented through mergers and acquisitions[8] create or strengthen dominant market positions. Dominant firms have both the ability and means to abuse their dominant positions through engaging in anti-competitive practices such as affecting market prices by either increasing prices or reducing sales, lowering outputs in a bid to maximise profits and lowering both distributive and productive efficiencies.[9]

2 UK Competition Commission *Merger references: Competition Commission guidelines* (June 2003, CC2) para 1.20 and *Market investigation references: Competition Commission guidelines* (June 2003, CC3) para 1.16 (available at http://bit.ly/1jzI6NJ).

3 Whish (fn 1 above) 4.

4 Allocative efficiency refers to situations whereby consumer goods and services are made available to consumers at prices that they (consumers) are able and prepared to pay and the said prices are always at or below the cost of producing such goods or services (marginal cost). Productive efficiency refers to the production of goods and services at the lowest possible cost.

5 See, generally, Bishop and Walker *The economics of EC competition law* (2003) 2.22–2.26.

6 Fox "Competition, development and regional integration: In search of a competition law fit for developing countries" in Drexl *et al* (eds) *Competition policy and regional integration in developing countries* (2012) 283.

7 *Brown Shoe Co v United States* 370 US 294, 8 L ed, 2d 510, 82 S Ct 1502 (1962). See also Hamner "The globalization of law: International merger control and competition law in the US, the EU, Latin America and China" 2001–2002 *J of Transnational L and Policy* 385 398; Whish (fn 1 above) 1.

8 The term corporate mergers and acquisitions will be used interchangeably herein to denote any situations whereby organised business combine their business.

9 A dominant firm, if it is able to exercise monopoly power may create allocative inefficiency in that it will deprive consumers of the monopolistic products despite the fact that they will be able and are prepared to pay for them. A monopoly can also, in the absence of competition, employ excessive methods of production thereby increasing the cost of production and ultimately passing on the cost burden to consumers. See also Liebenstein "Allocative efficiency vs X-efficiency" 1966 *American Economic R* 392–415 (labelling the retention and employment of outdated industrial processes in production and inappropriate use of resources as the "X-inefficient").

It is, however, not the creation or strengthening of such dominant positions that is the subject of merger regulation but rather the abuse thereof.[10] Accordingly, merger regulation is not aimed at prohibiting corporate transactions that might be ordinarily beneficial to the economy at large and consumers in particular,[11] but rather those that negatively impact upon the competitive structure of the market.

Effective merger regulation is necessary to achieve the goals of competition law; that is, ensuring that competition is promoted and maintained in the economy through the protection of the competition process to benefit consumers in particular. The Zimbabwean Competition Act[12] which was enacted in 1996 and became effective in 1998[13] as part of a comprehensive economic reform programme,[14] aims at promoting and maintaining competition within the Zimbabwean economy.[15] Merger regulation is central to the achievement of these goals.

The Competition Act thus provides for merger regulation in order to promote and maintain competition in the economy of Zimbabwe. A transaction that is a merger as defined[16] and falls within the prescribed thresholds[17] must be notified to the Competition and Tariff Commission (CTC), the principal merger regulator[18] and parties thereto must seek authorisation to implement the merger. This authorisation must be sought and granted within thirty days of either concluding the merger agreement or the acquisition of a controlling interest by any of the parties to the proposed merger in another.[19] Section 2 defines a merger as meaning "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person".[20]

Merger provisions in the statute are thus triggered by the acquisition or establishment of a controlling interest by one or more firms of the whole or part of a business of a "competitor, supplier, customer or any other person". This definition is important for a number of reasons. Firstly, it determines the extent to which the Act applies to corporate transactions. Secondly, it determines the general application of the statute; and, lastly, it has a bearing on the effectiveness of not only the merger regulatory system, but the entire competition enforcement regime.

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10 *Complaint by the British American Tobacco Company (BAT) Zimbabwe (Holdings) Limited against Cut Rag Processors (Pvt) Ltd* [2002] CTC/RPS and, generally, Case 6/7 *Continental Can Co Inc v Commission* [1973] ECR 215, [1973] CMLR 199 para 26.

11 *International Shoe Co v FTC* 280 US 291 298 302, 50 S Ct 89, 74 L Ed 431 (1930).

12 Competition Act 7 of 1996 (hereafter the Competition Act) Ch 14: 28.

13 The Act became effective on 9 February 1998 by Statutory Instrument 21A of 1998.

14 Implementing Policy Change (IPC) *Study of monopolies and competition policy in Zimbabwe* (13 March 1992) (hereafter *The study of monopolies and competition policy in Zimbabwe*); Mhamhare "Southern African Development Community (SADC) regional competition policy" in Drexl *et al* (fn 6 above) 56 58.

15 Long title of the Competition Act.

16 S 2(1) of the ZCA. See also s 12(1)(a) of the South African Competition Act 89 of 1998.

17 S 34 (1) and (2).

18 S 3(3) confirms that the CTC is the principal merger regulator by requiring any sectoral regulator to seek final authorisation from it.

19 S 34A.

20 S 2(1).

There is no judicial clarity on the statutory definition of mergers in Zimbabwe.[21] Section 2 clearly encompasses mergers between firms with product lines in direct competition (horizontal mergers)[22] and between those whose product lines are in a customer-purchaser relationship (vertical mergers).[23] In the *Caledonia* merger,[24] the CTC relied on a legal opinion and accepted the position that the statutory definition does not extend to pure conglomerate mergers unless they reveal some horizontal or vertical elements. This position, however, has had far reaching implications on merger regulation in Zimbabwe as it has since been generally accepted that the definition does not cover pure conglomerate mergers.[25]

The basis for concluding that the definition section in the Act does not include pure conglomerate mergers lies in the interpretation of the phrase "or other person" in section 2. The legal opinion in *Caledonia*[26] employed the *eiusdem generis* rule to interpret the phrase "or other person" and concluded that it limits the provision to those persons in the same class as "competitor, supplier and customer".[27] This construction primarily raises the question as to whether there is a gap in the definition of a merger in the Zimbabwean Competition Act. If this question is answered in the affirmative, it may be asked whether the legislature intended to limit the application of the statute only to horizontal and vertical mergers to the exclusion of pure conglomerate mergers.

This article seeks to challenge the approach and conclusion in *Caledonia*, particularly the application of the *eiusdem generis* rule as being restrictive and contrary to the spirit of the legislation and not in line with the intention of the legislature. It will be demonstrated and argued that the approach which limits the application of the statute to only two of the three types of mergers cannot be justified in light of the overall aims of the Act. Accordingly, it will be submitted that the *eiusdem generis* rule was misapplied and the definitional provision misinterpreted. Although it is accepted that there is a need to provide legislative clarity on the statutory definition of merger under the Competition Act, it is submitted that there is no gap in the current provision as a purposive interpretation of the provision is in line with the objective of the statute and the general competition policy supports a wider construction, capable of bringing under the

21 This can be attributed to the lack of litigation in competition matters in Zimbabwe. See Kububa "Overview of competition law and policy in Zimbabwe" (2009) 6, presentation at the *3rd Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa* (Pretoria 3–4 September 2009), available at http://bit.ly/1oBCYKc (accessed on 20 September 2010) and UNCTAD "Zimbabwe" in *Voluntary peer review of competition law and policy: A tripartite report on the United Republic of Tanzania-Zambia-Zimbabwe* (2012) UNCTAD/DITC/CLP/2012/1 (available at http://bit.ly/1xS2WyN, accessed on 21 September 2012, hereafter UNCTAD *A tripartite report* (2012)) 176, projecting that the introduction of a stable multi-currency system might change this as firms will engage legal representation in order to deal with possible higher competition infringement penalties.

22 Van Kalinowski "Business organisations" in *Antitrust laws and trade regulation* (1979) s 19.02(1)(c).

23 *Idem* s 19.02(2)(a).

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

25 *Idem* 6.

26 Fn 24 above.

27 *Idem* 6.

purview of the statute all economic activities having an effect on the whole or significant part of Zimbabwe.

In order to advance the above thesis, Part 2 of the article will present an overview of the Competition Act and discuss the stated aims and purpose thereof within the general competition policy framework. Part 3 discusses the statutory merger definition as provided in section 2 of the Competition Act and the *Caledonia* opinion and how it has influenced not only the interpretation of the definitional provision, but also the general application of the statute and the implications thereof for the effectiveness of merger regulation in Zimbabwe. Part 4 will argue for a clearer definition despite maintaining that there is no gap in the current definition of mergers in Zimbabwe. Accordingly, a proposal will be made for a suggested amendment to the current definition to provide for a simpler, clearer but more effective statutory definition.

2 MERGER REGULATION AND THE ZIMBABWE COMPETITION ACT

The Competition Act is the primary statute regulating corporate mergers and acquisitions in Zimbabwe.[28] This is done through, *inter alia*, the establishment of the Competition and Tariff Commission (CTC) as the competition enforcement authority with a mandate to regulate corporate activities through effective scrutiny of any business activities that actually or potentially impact upon the competitive market structure. To understand the merger regulatory framework in Zimbabwe, it is important to put it in the broader context of underlying policy.

2 1 Merger control policy: Brief overview

2 1 1 Origins and development of merger regulation in Zimbabwe

The Competition Act was enacted as a part of a competition policy formulated to compliment a comprehensive economic reform programme in the early 1990s.[29] Competition policy was thus contemplated as a mechanism to advance both socio-economic and, to an extent, political goals. Economically, it was meant to give a regulatory impetus to the reform efforts in order to promote competitiveness within the domestic market that was historically characterised by anti-competitive monopolists and oligopolists that created a highly concentrated economy and erected market entry barriers.[30] The *Study of monopolies and competition policy in Zimbabwe* exposed the existing economic structure and crucially highlighted the need for a formal competition policy that would enhance domestic competition and in turn the competitiveness of domestic industries on the regional and global markets.[31] Thus, competition legislation was deemed necessary to advance this cause.

28 Banking Act of 1999 Ch 24:20 (mergers in the financial sector) and Insurance Act Ch 34:07 (mergers in the insurance industry); Kovacic "Competition policy, economic development, and the transition to free markets in the Third World: The case of Zimbabwe" 1992–1993 *Antitrust LJ* 250 253; Kovacic "Creating new competition policy in transition economies" 1997–1998 *Brooklyn J of Int L* 403.

29 See *Study of monopolies and competition policy in Zimbabwe* (fn 14 above); Mhamhare (fn 14 above) 58.

30 *Study of Monopolies and Competition Policy in Zimbabwe* (fn 14) 5 37 41.

31 *Idem* 65.

Competition policy was also viewed as a vehicle to drive the government's broader social goals that were envisaged by its socialist ideology whose goals included the promise of free education and healthcare services and employment creation.[32] However, sustained periods of poor economic performance presented challenges to the achievement of these goals. Economic reforms were, consequently, mooted in a bid to enhance economic performance that was needed to support the social goals.[33] Competition policy was to provide the needed regulatory dimension to the policies given that the economic reforms on their own were still considered inadequate to reform the economy and achieve the goals.[34]

Lastly, competition policy was regarded as a mechanism by which the government could not only control the anti-competitive business behaviour and promote competitiveness within the economy for the benefit of the public, but also eradicate entry barriers that had for long periods kept out the indigenous entrepreneurs from economic participation.[35] A tightly-controlled economy that continued and kept out indigenous entrepreneurs was a breeding ground for political dissent.[36] Competition policy was mooted with the hope that it would provide the panacea to cure both social and economic ills. The current merger regulatory framework in Zimbabwe must be understood against this background.

In considering whether or not to approve a merger, the CTC's policy reflects these broader policy considerations in the form of applying a public-interest test. In determining whether to approve a notified merger, the CTC considers whether or not such a merger "is or will be contrary to public interest".[37] However, although the public interest consideration is at the heart of merger regulation in Zimbabwe, the concept is not defined anywhere in the statute.[38] In its decisions, the CTC has focused on the need to promote employment creation,[39] improve the competitiveness of local industries and national products on the regional markets,[40] generation of foreign currency[41] and promotion of indigenous entrepreneurs[42] as factors that must be taken into account in assessing the merger's public interest implications. These factors contribute to the merger policy's bid to advance a broader policy mandate.

2 2 Purpose of and application of the Competition Act

The purpose of the Competition Act is spelt out in its long title as, *inter alia*, "to promote and maintain competition in the economy of Zimbabwe; . . . to provide

32 Knight "Growing opposition in Zimbabwe" 1991 *A J of Opinion* 23. See also Sigmund *The ideologies of developing nations* (1967) 11–21; Kovacic (fn 28 above) 233.
33 *Ibid*.
34 *Study of Monopolies and Competition Policy in Zimbabwe* (fn 14) 40.
35 Brett "From corporatism to liberalisation in Zimbabwe: Economic policy regimes and political crisis, 1980–1997" 2005 *Int Political Science R* 91 98; Kovacic (fn 28 above) 258.
36 *Ibid*.
37 S 32 (1). S 32(4) further provides that a merger is deemed to be contrary to public interests if it is likely to substantially lessen or prevent the degree of competition in Zimbabwe or a substantial part thereof.
38 UNCTAD *A tripartite report* (fn 21 above) 184.
39 *Merger between Dairibord Limited and Lyons Zimbabwe* merger [2001] CTC/M&A/Apr0.
40 *The Coca-Cola Company/ Cadbury-Schweppes* merger [2000] CTC/M&A/Dec00.
41 *Merger between Portland Holdings Ltd/Pretoria Portland Cement* [2001] CTC/M&A/Aug 01.
42 *Rothmans of Pall Mall (Zimbabwe) Limited/British American Tobacco (Zimbabwe) Limited* (1999) CTC/M&As/Sept 99.

for the regulation of mergers, . . . and to provide for matters connected with or incidental to the foregoing".[43]

Section 3 provides that the statute "applies to all economic activities within or having an effect within the Republic of Zimbabwe".[44] The phrase "economic activity" is not defined in the statute. It is proper to give it its ordinary meaning as denoting any "actions that involve the production, distribution and consumption of goods and services at all levels within a society".[45] Assigning the phrase its ordinary meaning implies that the legislature intends the Act to apply to as broad a number of activities as possible. This submission finds further support in the fact that the Act provides for a pre-merger notification requirement aimed at ensuring that the CTC is apprised of as many transactions as possible.[46] Corporate mergers and acquisitions thus fit the definition of "economic activity" as provided by the Act and, therefore, the statute applies thereto. However, the question may be asked as to what constitutes a merger for the purposes of the Act. Is the term limited to the category specified in section 2 or did the legislature intend it to include all known forms of mergers that constitute "economic activities"? These issues raise the further question as to whether there is a gap in the current statutory definition of a merger and are explored below.

3 DEFINING A MERGER

Generally, there are three types of mergers. Their common feature is the likelihood that they can negatively impact upon the competitive structure of the market regardless of the variation in the extent to which this can happen.

A merger can occur between firms having one or more product lines in direct competition.[47] This type is known as a horizontal merger. The US Supreme Court in *United States v Philadelphia National Bank*[48] stated the rationale behind regulating a horizontal merger is that it "produces a firm controlling an undue percentage of the relevant market, and results in a significant increase in the concentration of firms in that market".[49]

Mergers can also occur between firms with one or more product lines in a customer-purchaser relationship.[50] This type, commonly known as a vertical merger, is condemned on the basis that besides the potential to eliminate an effective market participant, the merger can foreclose other market participants and result in preferential and often discriminatory distribution between the firms engaging in a customer-purchaser relationship.[51]

43 Long title of the Competition Act.
44 S 3(1).
45 http://www.businessdictionary.com/definition/economic-activity.html 2012/10/15.
46 *BromorFoods (Pty) Ltd/ National Brands Ltd* 19/LM/Feb00 paras 35–36; *Duan et Cien AG/Kolosus Holdings Ltd* 10/LM/Mar03 para 136. See also Kovacic "Merger enforcement in transition: Antitrust controls on acquisition in emerging economies" 1998 *Univ Cincinnati LR* 1075–1112; Warner "International aspects of competition policy – Possible directions for the FTAA" 1999 *World Competition: L and Economics R* 1–36 (it is difficult to unscramble the egg once the merger has been consummated).
47 See, generally, Von Kalinowski (fn 22 above) 19.02(1).
48 *United States v Philadelphia National Bank* 374 US 321, 83 S Ct 1715, 10 L Ed 2d 915 (1963).
49 *Ibid*.
50 See, generally, Von Malinowski (fn 22 above) 19.02(2)(a).
51 *Philadelphia National Bank* (fn 48 above).

Finally, a conglomerate merger involves firms that do not share any form of economic relationship, either as direct competitors or customer-purchasers.[52] Generally, merger control condemns conglomerate mergers on the basis that they might have some horizontal or vertical elements. However, there is an age-old debate as to whether pure conglomerate mergers must be subjected to merger regulation and be condemned.[53] Pure conglomerate mergers are those involving parties that are not related in any economic sense and probably without any possibilities of any horizontal or vertical elements.[54] This debate will be revisited in the context of the definition of mergers in Zimbabwe with the major question being whether the definition excludes pure conglomerate mergers and, if so, whether the legislature intended it.

Section 2 of the Competition 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)."[55]

The definition refers to three situations as constituting a merger for purposes of the Act. The first contemplates the acquisition or establishment of a controlling interest over the whole or part of a business of a competitor. This denotes a horizontal merger and thus the Act applies thereto. The second part refers to a "supplier, customer" and denotes a vertical merger. Lastly, reference is made to the acquisition or establishment of a controlling interest of the whole or part of a business of "[an]other person". It may be asked what type of mergers are contemplated by the words "or other person". Is it a mere confirmation that it applies to horizontal and vertical mergers or does it go beyond those two to include pure conglomerate mergers as well?

Central to the definition of a merger is the element of control. This is also in line with the South African statute despite not qualifying control but setting out forms of control in section 12(2). This concept was comprehensively dealt with by the South African merger regulatory authorities and the guidelines therein are useful to the improvement of the Zimbabwean statutory definition of a merger.

3 1 *Caledonia*: Creating an artificial gap?

This legal opinion, *inter alia*, attempted to clarify the statutory definition of corporate mergers and acquisitions as provided in the Competition Act. This followed a CTC's communication to two companies registered in Zimbabwe – Caledonia Holdings (Africa) and Blanket Mine – that an agreement concluded

52 See, generally, *FTC v Procter and Gamble Co* 386 US 568 577 (1967). See also Standridge and Santopietro "Regulating the pure conglomerate merger: Important legislative task or useless exercise?" 1979 *Syracuse LR* 607 608; Korah "The control of conglomerate mergers in the United Kingdom" 1970 *Antitrust Bulletin* 761.

53 Korah (fn 52 above) 759.

54 See, generally, Standridge and Santopietro (fn 52 above) 608.

55 S 2 as amended by s 2 of the Competition Amendment Act 29 of 2001.

between their respective controlling companies for the sale of shares constituted a notifiable merger in terms of the Act. Blanket Mine operated a gold mine near Gwanda in Zimbabwe and all its issued shares were owned by the then Kinross Holdings Zimbabwe (Private) Limited, now Caledonia Holdings Zimbabwe (Private) Limited, an entity registered in Zimbabwe.[56] Caledonia was in turn wholly owned by Blanket (Barbados) Holdings Limited, a Barbados-registered company which was itself owned by Kinross Gold Corporation of Canada.[57]

In 2006, Kinross sold all its issued shares in Blanket Barbados to Caledonia Holdings Africa of Canada. The effect of this transaction was that the shares of Blanket Barbados were transferred from Kinross Gold of Canada to Caledonia Holdings Africa. The ownership of the gold mine situated in Zimbabwe also changed hands. Although these transactions were conducted outside Zimbabwe, the effect thereof was a change in the ultimate shareholding and control of a company in Zimbabwe that has economic interests in a gold mine near Gwanda.[58] The transaction was not notified to the CTC, hence the communication to the Zimbabwean firms stating the CTC's intention to impose a penalty for non-compliance with the statutory requirement.[59] The Act requires parties to a merger to notify the proposed transaction to the CTC before implementation, failing which constitutes a punishable violation of the statute.[60] The parties then sought a legal opinion that was presented to the CTC and was accepted with the consequence that it had laid the foundation for the notion that non-horizontal and non-vertical mergers are not covered by the statutory definition.[61]

In determining whether the transactions were covered by the statute as notifiable mergers the opinion focused on (a) the application of the Competition Act and (b) the definition of merger. These aspects are discussed below.

3 2 Application of Act

The long title of the Act spells out the objectives of the statute as primarily to promote and maintain competition in Zimbabwe through, *inter alia*, merger regulation. Section 3(1) provides that the statute applies to "all economic activities within or having an effect within the Republic of Zimbabwe". The question then is whether the statute can be applied to a transaction concluded outside Zimbabwe and, if so, to what extent. Here a fine line must be drawn between issues of extra-territorial application of domestic statutes and of those regulating the domestic effects of external activities. This is because parties to a merger in a transaction having effects on the Zimbabwean market can be domiciled outside the country.

In concluding that the statute does not apply to the merger agreement between two non-Zimbabwean firms, the opinion's focus was on matters of general jurisdiction relating to enforcement of judicial orders.[62] Generally, a judicial tribunal's jurisdiction is determined by (a) where the conduct in question occurs,

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56 *Caledonia* (fn 24 above) 1.
57 *Ibid*.
58 *Ibid*.
59 S 34A(3) of the Act empowers the CTC to impose a penalty upon parties for implementing a merger without authorisation.
60 *Ibid*.
61 UNCTAD *A tripartite report* (fn 21 above) 182; Kububa (fn 21 above) 4.
62 *Caledonia* (fn 24 above) 4.

(b) where the parties reside, conduct business or own property and, (c) where the parties agree to the jurisdiction.[63] However, it is submitted that these rules are formulated mainly for convenience and must not constitute an exclusive basis upon which regulation is based.

Generally, domestic statutes do not have extra-territorial effect. However, it is clear that the basis for jurisdiction of the merger regulatory authorities does not lie in whether the parties to an agreement are resident in Zimbabwe or whether the agreement in question was concluded outside Zimbabwe, but rather whether the said transaction has any effect on competition within Zimbabwe. The Act clearly provides for an effect-based approach and this constitutes a departure from the general basis of jurisdiction and has been applied in many jurisdictions, notably by the South African Competition Tribunal in the *Ansac* cases.[64] Accordingly, the global transactions in the *Caledonia* matter were subject to the jurisdiction of the statute to the extent that they had an effect on competition in Zimbabwe. The controlling interests in the gold mine near Gwanda changed hands, implying that there was an acquisition of a controlling interest therein. The change in ownership is generally a competition authority's concern for it potentially signals a change in the operational, decision-making and, ultimately, the firm's market behaviour and the market structure.

The opinion correctly pointed out that the presence of an economic activity is not the litmus test for conferring jurisdiction on the statute.[65] The question that ultimately needs to be answered is, therefore, not whether there was an economic activity having an effect on competition within Zimbabwe, but rather whether such an activity resulted from a transaction that constituted a merger as defined. It is this aspect that raises issues and forms the writer's basis for challenging the consequences of the opinion in *Caledonia.*

3 3 Defining a merger

The question is what types of mergers, if any, the legislature intended to regulate as covered by the definition in section 2. Is it only between economically-related entities or between any entities for as long as they have an effect on competition within Zimbabwe?

Section 2 of the Competition Act defines a merger as "the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person".

The opinion interpreted the phrase "or other person" as used in the definition as referring only to any such person who falls in the same category as competitor, supplier or customer.[66] Thus, *Caledonia* opined that the legislature intended

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63 See, generally, *Siemens Ltd v Offshore Marine Engineering Ltd* 1993 3 SA 913 (A) 928; Brilmayer *et al* "A general look at general jurisdiction" 1988 *Texas LR* 722.

64 *Competition Commission and Botswana Ash (Pty) Ltd v American National Soda Ash Corporation* 49/CR/Apr00 and 87/CR/Sep00 where the tribunal held that even if the actual agreements (export cartel) were concluded in the US, the effects thereof in South Africa had to be considered. See, for a discussion of the *Ansac* cases, Moodaliyar "Competition policy in the SADC: A South African perspective" in Drexl *et al* (eds) (fn 14 above) 66 78.

65 *Caledonia* (fn 24 above) 3.

66 *Idem* 6.

the definition and by extension, the statute, to apply only to horizontal and vertical mergers and not pure conglomerate mergers.

This interpretation is premised on the *eiusdem generis* rule. This rule was stated by Cockram[67] as follows:

> "Where a list of items which form a genus or class is followed by a general expression, the general expression is, in the absence of a contrary intention in the statute, construed *eiusdem generis* to include only other things of the same class as the particular words."

Applying this rule, the opinion concluded that the definition refers to "competitor, supplier, customer or other person" implying that the general expression "or other person" only refers to those in the same class as competitor, supplier and customer.[68] In other words, the definition is only limited to horizontal and vertical mergers as they involve competitors, suppliers, customers and "other persons" and not to conglomerate mergers for they do not involve competitors, suppliers, customers or persons within the same class as them. According to this interpretation, the intention of the legislature was to limit the application of the statute to only those "economic transactions" between "customers, suppliers, customers *and similar persons*"[69] to the exclusion of pure conglomerate mergers. It may be asked whether this is what the legislature intended.

It is submitted that a construction that excludes any type of merger from the ambit of the statute is unfounded. Firstly, it has been shown that the Act's aim is to promote and maintain competition within the economy of Zimbabwe through effective merger regulation. Effective merger regulation entails that there must be a system in place capable of ensuring that any "economic activity" having an effect in Zimbabwe or any substantial part thereof is scrutinised by the CTC. The term "economic activity" is broad enough in its ordinary sense to encompass all three types of corporate merger transactions, namely, horizontal, vertical and conglomerate mergers. Thus, on this point there is nothing to suggest that the legislature intended to limit economic activities in the form of mergers to only two of the three types of known mergers.

There might not be a clear provision to determine which types of mergers are covered by the statute, but it is submitted that one thing is clear: the legislature intended to provide a statute with a mechanism to promote and maintain competition within the economy of Zimbabwe through, *inter alia*, the regulation of mergers. It is then a mystery why the same legislature in the same statute purportedly "intended" to limit the merger regulation to only two of the three known merger types, given that they all pose harmful threats to achieving the goal of promoting and maintaining competition in Zimbabwe. This observation supports the view that the legislature never intended to restrict the application of the statute to only the regulation of horizontal and vertical mergers to the exclusion of conglomerate mergers. In other words, it is submitted there is ample evidence to suggest that conglomerate mergers are covered by the definition.

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67 *The interpretation of statutes* (1987) 154. See further *Quazi v Quazi* 1980 AC 744 807–808; *Sacks v City Council of Johannesburg* 1931 TPD 443*; S v Makandigona* 1981 4 SA 439 (ZAD).

68 *Caledonia* (fn 24 above) 6.

69 UNCTAD *A tripartite report* (fn 21 above) 82 (italics added).

The phrase "or other person" can be construed as a catch-all phrase that is meant to capture all other forms of mergers outside those specified as between competitor, suppliers and customers. If the legislature really intended to maintain a same line of persons, it is submitted that it would have used the word "and", not "or". "And" means in addition to the list provided, suggesting in addition to competitor, supplier and customers, whereas "or" suggests a diversion from the list. Thus, the use of "or" entails that the legislature intended to expand the list to include even those persons outside the specified list. There is nothing in the statute or anywhere else to suggest that such a construction is wrong. In fact, there is ample evidence to support it. The objectives of the statute clearly indicate that the statute is meant to bring under the CTC's scrutiny, as many transactions as possible as long as they are "economic activities" having an effect on the Zimbabwean economy and aimed at promoting and maintaining competition within the economy.

In 2001, the principal Competition Act was amended to, *inter alia*, strengthen merger regulation.[70] In addition to inserting the current definition of mergers, the Amendment Act introduced a compulsory pre-merger notification regime in which all mergers meeting a set threshold need to be notified to the CTC before implementation.[71] The rationale behind this requirement is loud and clear: to bring to the attention of the CTC as many corporate transactions as possible. This signalled the legislature's intention to expand the application of the statute in merger regulation, an intention that would be in vain if the definition of a merger is applied restrictively.

Statutory interpretation techniques – or rules as they are referred to – are meant to find the meaning of words and phrases used in statutes so as to help arrive at the intention of the legislature when enacting the statute.[72] Anyone purporting to be interpreting the meaning of words and phrases used in a statute must therefore strive to get as close to the intention of the legislature as can be ascertained and to avoid overstepping this function or pushing it too far for this can upset the intention of the legislature. Thus, the legal opinion in *Caledonia* in interpreting the statutory definition of a merger applied the *eiusdem generis* rule to define the phrase "or other person". However, it is submitted that the rule was misapplied and that the definition of merger was misinterpreted.

The golden rule in judicial decision-making is that each case must be decided on its own merits. As such, the question of whether the transaction between Blanket Mine and Caledonia Holdings should have been notified might be decided by other factors, as was correctly pointed out in the opinion such as who was to notify.[73] However, barring any technicalities in formalities, the conclusion that the statutory definition covers only mergers between parties sharing an economic or similar relationship to the exclusion of non-related entities is misleading and must not be used as a precedent for it is simply a bad one. Any slight indication that the legislature intended the same must be eliminated from the statute.

70 Competition Amendment Act 29 of 2001.
71 S 34A in Part IVA.
72 See *R v Takaendesa* 1972 4 SA 72 (RAD).
73 *Caledonia* (fn 24 above) 6.

It is submitted that the application of the rule in determining the meaning of the phrase "or other person" as used in the statutory definition of a merger results in absurdity, as it would mean that only economic activities having an effect on the economy of Zimbabwe in the same class as competitor, supplier and customer would constitute a merger whereas other economic activities with similar effect on the economy of Zimbabwe, but which are not in the same *genus* or class as "competitor, supplier, customer", would not constitute a merger.[74] It is submitted that there is enough ammunition provided in the statute to determine the extent to which the legislature intended the statute to apply in general and the types of mergers covered in particular. As such, the application of the *eiusdem generis* rule was not necessary as it had the effect of creating an artificial gap in the statutory merger definition. The rule should not be applied as a general rule of application, but rather cautiously[75] to avoid misinterpretation of statutory provisions. In particular, in constructing the meaning of "or other person" as used in section 2 "it must be remembered that the *eiusdem generis* rule is only one of many rules of construction; it is not to be invoked automatically whenever general words follow particular words".[76]

Probably *Caledonia* and its seemingly growing influence and acceptance[77] that the legislator intended to exclude pure conglomerate mergers from the ambit of the statutory definition, can find some solace in what Standridge and Santopietro described as "the lack of uniformity on opinions regarding the economic effects of conglomerate mergers within the economics literature".[78] There are other writers who maintained that even during increased periods of merger activities (merger waves) there is little evidence that conglomerate mergers pose a danger to either economic concentration or result in anti-competitive practices.[79] However, there are still some authors who maintain that conglomerate mergers pose an equal threat to competition.[80]

A merger involving firms operating in unrelated markets and sharing no economic activity normally raises eyebrows as to the rationale behind it. As opposed to horizontal and vertical mergers, conglomerate mergers may not be motivated by the need to rationalise operations and, as such, they have the potential to affect both efficiency and production capacities of merging parties.[81] Thus, it is

74 See also *Claudius Murawo v Grain Marketing Board* SC27/09 (2008) 7–8 where the Supreme Court in a labour case rejected the application of the *eiusdem generis* rule as resulting in absurdity.

75 See *Rex v Nolte* 1928 AD 377 328 ("the rule itself is one that has to be applied with caution, and is not of general application").

76 *S v Makandigona* 1981 4 SA 439 (ZAD) 443H–444A.

77 This acceptance that the Act does not apply to pure conglomerate mergers is disputed by this writer.

78 Standridge and Santopietro (fn 52 above) 608.

79 See eg Markhom *Conglomerate enterprise and public policy* (1973); Seiner *Mergers: Motives, effects, policies* (1975); Lorie and Halpern "Conglomerates: The rhetoric and the evidence" 1970 *J of L & Economics* 140.

80 See generally US Federal Trade Commission (FTC) *Economic report on conglomerate merger performance* (1973); Mueller "Conglomerates: A 'non-industry'" in Adams (ed) *The structure of American industry* (1961) 442; Korah (fn 52 above) 762 (since it involves firms in unrelated activities, it might provide less scope for rationalisation and hence operate against the public interest).

81 See generally OECD "Portfolio effects in conglomerate mergers" 2001 *Policy Roundtables* DAFFE/COMP (2002) 5.

important to regulate them to ensure that they are not contrary to public interest. Given the role of public interest considerations in Zimbabwean merger regulation, it is thus increasingly difficult to even imagine any reason why the legislature can be said to have intended to exclude conglomerate mergers from the purview of the statute.

It has been shown that the legal opinion in *Ex parte Caledonia* which laid the foundation for accepting that the definition of mergers in section 2 does not cover pure conglomerate mergers is not only in contrast with the greater objectives of the statute, but creates an artificial gap in the statutory definition. There is no evidence to support a construction that limits the application of the statute to conglomerate mergers that are "economic activities" having an effect on the economy of Zimbabwe. On the contrary, the promotion and maintenance of competition in the economy of Zimbabwe require that every corporate transaction meeting the prescribed thresholds must be notified and scrutinised accordingly. However, regardless of the point of view that one might adopt, it is submitted that there is a need to clarify the statutory merger definition in Zimbabwe to avoid theorising such a crucial matter, given the absence of judicial jurisprudence in the area of merger regulation. The following part of the article accordingly develops and suggests a model statutory definition.

4 PROPOSING AN EFFECTIVE STATUTORY MERGER DEFINITION

In providing a statutory merger definition, the legislature must be applauded for appreciating the reality that a business is divisible and, as such, a merger can be achieved through the acquisition or establishment of a controlling interest over the whole or part of a business of another.[82] The phrase "whole or part of the business of" entails that it is not necessary that what is to be acquired is the entire business for acquiring even a part thereof that is capable of conferring upon the acquiring party a controlling interest suffices. This is important because even the acquisition of a mere part of a business can materially affect the competitive structure of the market to amount to a substantial lessening or prevention or competition, hence requiring regulation.

However, one can point to the lack of an illustration of the quality of control as potentially rendering the provision vague. A distinction is made compared to the South African provision that contains an illustration of the quality of controlling interests.[83] However, accurate the observation might be, it can be argued that the "vagueness" of the provision is intended to create a broader definition that is not restricted by any categories of controlling interests, but rather capable of capturing all forms of acquisitions that confer upon another a controlling interest over the business of another firm. The statute provides threshold values that, if met, trigger notification on behalf of the merging parties.[84] Thus, the quality of the controlling interest becomes academic.

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82 S 2(1) of the Competition Act. See also s 12 (1) of the South African Competition Act 89 of 1998.

83 See s 12 (2) of the South African Competition Act for the forms of control.

84 S 34 read with s 2 of the Competition (Notifiable Merger Thresholds) (Amendment) Regulations No 2 of 2011 published in Statutory Instrument 110 of 2011 which sets the thresholds at above US$1 200 00.

The legislature also correctly provided that one or more entities can acquire or establish a controlling interest over the whole or part of a business of another.[85] This entails that control can either be established or acquired individually or jointly. The regulation of transactions in which joint control has been established or is being acquired is needed in order to regulate activities that might have co-ordinated effects on the market.

Despite some bright spots on the statutory definition of merger, it has been shown that there is still a need for further legislative clarity. It is acknowledged that the definition as it stands covers horizontal, vertical and any other transactions having effects on the competitive structure of the market. It is also accepted that horizontal and vertical mergers pose more serious competitive threats than pure conglomerate mergers. However, the latter category has the potential to negatively affect competition through, largely, the elimination of potential competition.[86] It is suggested that in order to effectively promote and maintain competition within the economy of Zimbabwe, any doubts as to the extent the statutory definition covers horizontal, vertical and pure-conglomerate mergers must be eliminated. No room must be left for second-guessing the intention of the legislature as was the case in *Caledonia.* This calls for a clear and effective statutory definition.

An effective statutory definition can be achieved through legislative clarity. Such clarity envisages amending the current definition to effectively put paid to any doubts that the definition captures all forms of mergers to the extent they have an effect on the competitive structure of the market. It is proposed that such a provision must be simple, clear but extensive enough to capture all forms of corporate transactions impacting on the competitive market structure. As such, it is suggested that the ideal definition does the following:

(a) Avoid any express reference to particular types of mergers by deleting the words "competitor", "supplier" and "customer".

(b) Retain the general phrase "other person" but in a more refined manner to read as "of another".

Accordingly, the suggested definition would define a merger as:

> "The direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of *another 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)."[87]

The phrase "of another person" is broad enough to cover horizontal, vertical and conglomerate mergers for another person can either be a competitor (horizontal merger), a supplier or customer (vertical merger) or a party with no economic relations with the acquiring firm (a pure conglomerate merger). Despite being

85 S 2(1).

86 See, generally, Turner "Conglomerate mergers and s 7 of the Clayton Act" 1965 *Harvard LR* 1362; Berger and Peterson "Conglomerate mergers and criteria for defining potential entrants" 1970 *Antitrust Bulletin* 489 494.

87 S 2 of the Competition Act with italics added to show the suggested changes.

broad, the suggested definition maintains a simple definition that is effective to promote and maintain competition within the economy of Zimbabwe and enables the CTC to exercise much needed flexibility and apply the statute to cover as many corporate transactions as possible.

5 CONCLUSION

The current statutory definition of a merger as contained in section 2 of the Competition Act, though expressly making reference to horizontal and vertical mergers and impliedly applying to conglomerate mergers to the extent that they have either horizontal or vertical elements, still creates uncertainties as to whether it applies to pure conglomerate mergers. *Caledonia* concluded that the legislature did not intend to extend the definition beyond horizontal and vertical mergers. This construction effectively eliminates pure conglomerate mergers from the statutory definition of a merger and raises the question as whether there is a regulatory gap in the statute.

The statutory definition provides that the acquisition or establishment of control needs to be over a controlling interest of either a "competitor, supplier, customer" and went on to generally provide for "or other person". *Caledonia* interpreted this phrase as referring to any person in the same class as "competitor, supplier or customer", thereby restricting the definition to either horizontal or vertical mergers to the exclusion of pure conglomerate mergers. This construction is deficient as it fails to adequately consider the intention of the legislature.

It is submitted that there is ample evidence in the statute that the legislature intended the statute to cover any "economic activities" having an effect on the Zimbabwean economy. As such, limiting the definition of a merger to only two of the three types of mergers is not in the spirit of the legislation. Furthermore, the Competition Act's objective is primarily to promote and maintain competition within the economy of Zimbabwe through, *inter alia*, merger regulation. This objective can only be achieved through an effective regulatory framework that ensures that the regulator authority scrutinises as many transactions as possible. To this end, limiting the transactions that can be scrutinised is contrary to the spirit of the legislation. As such the approach in *Caledonia* is flawed and the employment of the *eiusdem generis* rule amounts to a misapplication of the principle with the consequence that the statutory definition was misinterpreted. As a result the approach created an artificial gap in the statutory definition. It is, however, suggested that there is still a need to provide a clear definition that covers all types of mergers given their potential harm to the competitive structure of the market.