IN THE FAIR COMPETITION COMMISSION
AT DAR-ES-SALAAM
IN THE MATTER OF FAIR COMPETITION ACT, CAP.285

FCC COMPLAINT No. 5 OF 2014

BETWEEN

FAIR COMPETITION COMMISSION……………………… COMPLAINANT

AND

SIMON GROUP LIMITED……………………........................ RESPONDENT

PROVISIONAL FINDINGS

(Made under Rule 19(3) & (4) of the Fair Competition Commission Procedure Rules, 2013 G.N.73 of 2013)

BEFORE THE FOLLOWING PRESIDING MEMBERS OF THE COMMISSION

Prof. Samuel M. Wangwe	Chairman
Prof. Marcellina Chijoriga	Member
Dr. Frederick S. Ringo	Member
Fadhili Manongi	Member
Felix Kibodya	Member

1.0 The Commission's Approach to this Complaint

According to Rule 17(1) of the Fair Competition Commission Procedure Rules, 2013 (referred to hereinafter as *the FCC Rules)*; the Commission is required to adopt *an inquisitorial procedure* in conducting its investigations and hearings. Rule 17 of the FCC Rules provides as follows:

> 17.-(1) The Commission shall adopt inquisitorial rather than adversarial procedure in conducting the hearings.
> (2) Subject to sub-rule (1), the inquisitorial procedure shall be considered as part of the investigation process.
> (3) For the purpose of sub-rule (2) the Commission shall provide a forum for presentation of any additional information or analysis with a view to facilitate investigation.
> (4) The Commission shall, in conducting a hearing, not be bound by the formal rules of evidence.

An inquisitorial process, as envisaged by Rule 17 above, differs from the adversarial approach applied in our courts of law. When adopting an inquisitorial approach, the Commission does not sit as an umpire or a neutral attendant to the process but as an active participant in the investigation and decision making process. Indeed, as once noted by the Fair Competition Tribunal in its ruling in the case of *TBL vs FCC and Another*, *Consolidated Appeal Nos. 4, of 2010,* (at page 36 and 37), even when the Commission convenes to make a finding, that is part of the investigation process since, the Commission is not a court of law and cannot even be equated to one.

2.0 THE PARTIES TO THE COMPLAINT

2.1 The Complainant

The Fair Competition Commission (referred to hereinafter as the **Complainant** or **Commission**) is an independent government body established under section 62 of the Fair Competition Act (FCA), No. 8 of 2003 for the purpose of promoting and protecting effective competition in markets and preventing unfair and misleading market conduct. Its address for services in relation to this complaint is:

Fair Competition Commission,
GEPF Building, Plot No. 37,
Regent Estate, Bagamoyo Road
P. O. Box 7883,
DAR ES SALAAM.

2.2 The Respondent

Simon Group Limited (referred to hereinafter as **SGL** or **the Respondent**) is a private company incorporated and registered in the United Republic of Tanzania under the Companies Act, 2002, Cap. 212. The Company holds a Certificate of Incorporation No. 62986 issued on the 14th of November 2007. Its registered office is at Plot No 2364/208 Ex- Kamata Complex, and its address of service for the purpose of this case (unless described otherwise by the Respondent) is:

Simon Group Limited,
Plot No 2364/208 Ex- Kamata Complex,
Nyerere Rd/ Msimbazi St,
P. O BOX 71800,
DAR ES SALAAM.

3.0 BACKGROUND TO THE COMPLAINT

In August 2014, the Commission observed, through the media, that the Respondent has acquired un-allotted shares of *Shirika la Usafiri Dar es Salaam Limited* (UDA), a leading public commuter services provider in Dar es Salaam, and became a major shareholder. It was reported that, the Respondent was further offered by the majority shareholder, Dar es Salaam City Council (DCC), to purchase majority shares of UDA in 2010 and the sale was positively concluded in 2013.

Subsequently, on 28th August, 2014, the Commission initiated an investigation in accordance with Section 69(1) of the FCA and Rule 10 (1) (c) of the FCC Rules, in respect of the Respondent's acquisition of shares in UDA. The purpose of this

investigation was to ascertain whether the transaction in question amounted to a notifiable merger as per Section 11 (2) of the FCA (read together with paragraph 2(2) of the Fair Competition (Threshold for Notification of a Merger) Order, 2007, as amended by GN No. 93 of 17th April 2009 (the Threshold Order).

The Commission was satisfied that the alleged violations constitute a *prima facie case* and, on 10th February, 2016 the Commission issued a ***Statement of the Case*** in accordance with Rule 12 (3) of the FCC Rules to the Respondent. The '*Statement of the Case*' set out facts which constituted the complaint and the provisions of the law alleged infringed, *to wit*, sections 11 (2), (5) and (6) of the FCA, read together with paragraph 2 (2) of the Threshold Order.

4.0 FACTS CONSTITUTING THE COMPLAINT

Facts constituting this complaint, as set out in the Statement of the Case served upon the Respondent, were as follows:

(i) THAT, on 22nd June 1949, Dar es Salaam Motor Transport Limited (DMT), a private limited liability company, was incorporated under the Companies Ordinance, Cap.212, and issued a certificate of incorporation, No.1006, to run passenger freight business in the city of Dar es salaam as well as overseeing the running of all medium haul routes to the other regions of Tanganyika.

(ii) THAT, the DMT maintained an authorised share capital of TZS. [redacted] divided into [redacted] shares of a nominal value of Tshs [redacted]/- per share.

(iii) THAT, in 1970, as a result of the Government's nationalisation strategy, DMT was placed under the National Transport Corporation

(NTC) and, effectively on 4th June, 1974; the DMT changed its name to Shirika la Usafiri Dar es Salaam Limited (UDA).

(iv) THAT, as a public corporation, on 19th January 1985 UDA was granted an exclusive licence to operate a business of passengers' service in the City of Dar-es-Salaam.

(v) THAT, on 22nd September 2002, following a special resolution entered on 27th November 2001, and which had the effect of amending UDA's Articles of Association, UDA was incorporated as a private company limited by shares in accordance with the Company Act, 2002 Cap 212.

(vi) THAT, pursuant to the amendment of its Articles of Association, UDA increased its shares capital from [redacted] inherited from Dar-es-Salaam Motor Transport Limited (DMT) to [redacted] shares of which [redacted] were allotted and [redacted] were un-allotted shares.

(vii) THAT, out of the allotted shares (issued share capital) of the Government of Tanzania, through the Treasury Registrar (TR) held [redacted] and the Dar es Salaam City Council held [redacted] The purchased shares constituted [redacted] of [redacted] authorised shares in UDA.

(viii) THAT, on 11th February 2011, vide Share Subscription Agreement between UDA and Simons Group Limited (SGL), a limited liability company registered and organised under the laws of Tanzania, a total of [redacted] un-allotted shares were acquired by SGL with the approval of UDA's Board of Directors at a value of Tshs [redacted]/- per share. The total price which was paid as consideration value was TZS. [redacted]

(ix) THAT, following the acquisition of the [redacted] un-allotted shares by SGL, the shareholding structure of UDA changed. SGL became a majority shareholder with a controlling stake equal to [redacted] while the Dar es Salaam City Council and the Government (through the Treasury Registrar) became minority shareholders, holding the following stakes: [redacted] (equal to [redacted] shares) and [redacted] (equal to [redacted] shares) respectively.

(x) THAT, on 25th September 2013, Simon Group Limited (SGL) acquired [redacted] shares held by the Dar es Salaam City Council (DCC) in UDA. Following this transaction SGL owns [redacted] of UDA.

We have noted on the basis of the facts as set out in the above paragraphs, that there were indications that the conclusion of two transactions as mentioned under paras **4(viii) and 4(x)** above by Respondent had contravened the provisions of the FCA and Respondent was informed the basis upon which the complaint was established, regarding breach of section 11(2); 11 (5) and 11 (6) of the FCA, read together with the Threshold Order.

5.0 COMPETITION ASSESSMENT

5.1 Overview

It should be noted that, the matter at hand is about failure, on the part of the Respondent, to notify a notifiable merger to the Complainant prior to its consummation as required by the FCA. Consequently, our competition assessment does not alter these allegations rather intends to establish as well, whether the Respondent consummated a prohibited merger contrary to section 11 (1) of the FCA.

Section 11 (1) of the FCA provides that:

"A merger is prohibited if it creates or strengthens a position of dominance in a market."

Position of dominance in a market is clearly defined under section 5 (6) of the FCA as, we quote for easy reference:

A person has a dominant position in a market if both (a) and (b) apply:

(a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and

(b) the person's share of the relevant market exceeds 35 per cent."

Based on the above provisions, in order to establish whether a particular entity occupies a position of dominance, we are required to define the relevant market since dominance (market power) does not exist in the abstract but rather only in relation to a market (relevant market).

7.1 Relevant Market Definition

The relevant market is divided into two parts: product market and the geographical market.[1] The product market describes the good or service. The geographic market describes the locations of the producers or sellers of the product or service.

7.1.1 Product Market

According to the submissions made by the Respondent, UDA, a targeted firm, is engaging in providing public passengers transport services in the city of Dar es Salaam. Normally, city bus transport involves shorter-route public transport bus services.

Public transport is the name given to travel services provided locally that allow masses of people to travel together along set routes.[2] The most common public transport modes in Dar es Salaam are buses (daladala), trains, and Dar rapid bus transport. However, the City Train, commonly known as '*Treni ya Mwakyembe*', and the Dar bus rapid transit, begun their operations in 2013 and 2016 respectively. In that chronology, it is obvious that bus transport commonly known as 'Daladala' was the only available means of public transport in Dar es Salaam during the time of the merger transaction.

[1] **Barry J Rodger & Angus MacCulloch, 2009,** *Competition Law and Policy in the EC and UK*, 4th Edition, at pg. 104.

[2] http://www.tfgm.com/Corporate/Documents/Miscellaneous/work.pdf (accessed on 10.3.2017 at 13.09)

Therefore, the product market in this case is the **Provision of public transport bus services (Commuter buses).**

7.1.2 Geographical Market

The relevant geographical market comprises the area within which the firms concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas, as the conditions of competition are appreciably different in those areas. Consequently, the Complainant defines the geographical market as **Dar es Salaam Region**.

7.1.3 Relevant Market

The relevant market is a consideration of both product and geographical market under which the firms operate. For this particular case, the Commission defines the relevant market to be the **provision of public transport bus services (Commuter buses) in Dar es Salaam City.**

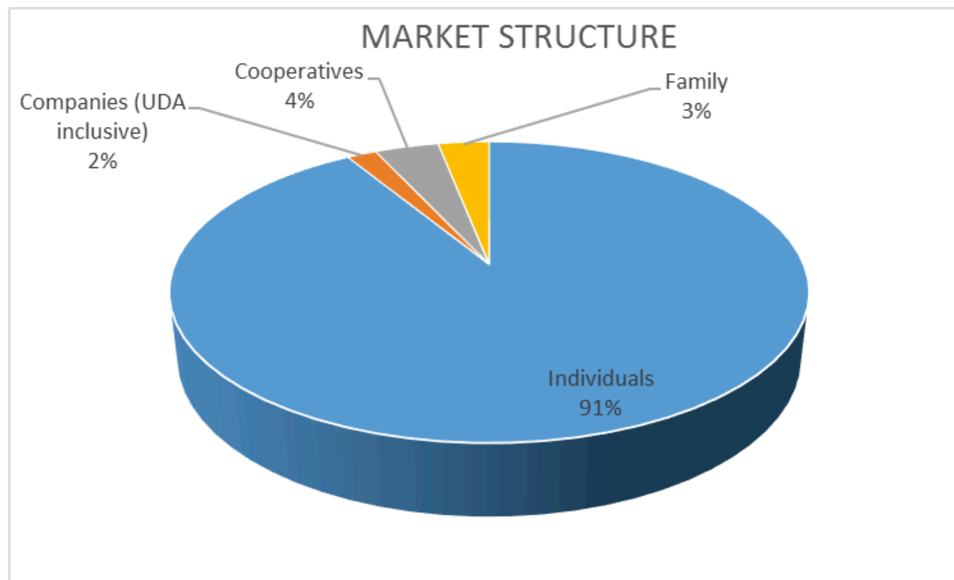
7.1.4 Market Structure and Shares

Prior to 1993, due to exclusive right granted to UDA, UDA was the only company which was providing city transport in the city of Dar e s Salaam. In 1993, due to increase in demand for public transport, the government allowed competition in the public transport business alongside UDA.[3]

Literary, ownership of commuter busses (Daladala) is widely dispersed with about 3,000 owners and an average of two '*daladalas*' per owner.[4] In 2011, SUMATRA conducted a study on '*User Needs and Management of Public Transport Services in Dar es Salaam*' so as to understand the relationships between owners, crew and passengers with a view to

[3] Dar Rapid Transit Agency, November 2014, Implementation Of Phase I of the Dar Rapid Transit System: Report on Consultations with Existing Daladala Operators and the Mitigation Measures.
[4] Ibid.

bringing harmony in the industry.[5] In that study it was found that most buses were owned by individuals as shown in **Figure 1** below.



From the above figure it is apparent, that the market share of UDA during the transaction dated 25th September 2013 was below 35%. Also, the investigation conducted by the Commission revealed that, before the transaction, the Respondent was not engaging in the 'Daladala' business. Thus, the post-merger market shares of UDA remain below the required thresholds for dominance (i.e., 35% as provided under section 5 (6) (b) of the FCA).

In view of the above, it is clear that the Respondent did not execute a prohibited merger contrary to section 11 (1) of the FCA. This conclusion, however, does not exonerate the Respondent from its obligation under Section 11(2) and (5) of the FCA. (*See the case Tanga Fresh v FCC, Tribunal Appeal No.5 of 2014, (unreported)*).

6.0 COMPLAINANT'S LEGAL AND ECONOMIC ARGUMENTS

6.1 Overview

The alleged infringement of the FCA by the Respondents is on the following counts:

[5] Study on User Needs and Management of Public Transport Services in Dar Es Salaam.

(i) *Acquisition of the* ██████ *un-allotted shares in UDA by the Respondent prior to the notification to the Commission on 11th February, 2011; and*

(ii) *Acquisition of the* ██████ *allotted shares held by DCC in UDA by the Respondent on 25th September, 2013.*

Based on the above scenario, it is clear that the acquisition of shares in UDA was in two folds. The first fold involves acquisition of the ██████ un-allotted shares and the second fold involves the acquisition of the ██████ allotted shares held by the DCC in UDA. The Commission considers these two transactions were separate and ought to have been notified to the Commission differently.

However, the acquisition of the ██████ un-allotted shares was not properly concluded, hence was void *ab initio*. Also, we have considered the Prime Minister's directives which led to the relinquishing of the said shares by the Respondent. Consequently, we shall first, as a matter of prudence, discuss in this Provisional Findings, the effects of the Respondent's relinquishment of the un-allotted shares.

6.2 Legal Repercussion of the PM's Directives and the Relinquishment of the ██████ Un-allotted shares

Article 5 of the Article of Association of Dar es Salaam Motor Transport Company Limited (UDA), attached hereto as **Annexure FCC-19**, provides that:

> *"the shares of the Company shall be under control of the Board of Directors and shall be subject to the provisions in that behalf of the ordinance and the Memorandum of Association and these Articles and without prejudice to any special rights previously conferred on the holders of existing shares or class of shares, may be issued with such preferred, deferred on other special rights, or such restrictions, whether in regard to dividend, voting, return on capital or otherwise, as the Company may from time to time by special resolution determine, and any preference share may with the sanction of a special resolution, be issued on the terms that it is or at the option of the Company is liable to be redeemed."*

Furthermore, Article 6 of the Article of Association of UDA provides that:

*"If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the **consent in writing of the holders** of three-fourths of the issued shares of that class or with the sanction of an extra-ordinary resolution passes at a separate general meeting of the holders of the shares of the class. To every such separate general meeting shall mutatis mutandis apply."*

In view of the above Articles, it is clear that the acquisition of the shares in UDA needed an authorization of UDA shareholders prior to the conclusion of the merger transaction.

It is in line with the above that findings that on 16th January, 2016, in the meeting between the Prime Minister of the United Republic of Tanzania, the Management of the Respondent and various stakeholders of UDA, the Prime Minister directed the Respondent to renounce the ownership of the un-allotted shares. We have been made privy that on 18th February, 2016 the Respondent relinquished the shares vide the *Shares Subscription Agreement* executed by the Board of Directors of UDA to remain un-allotted in the share capital of UDA.

Subject to Article 6.0 of the Article of Association of UDA and the decision of the Respondent to relinquish the un-allotted shares, the Commission is of the view that the transaction involving the acquisition of such un-allotted shares no longer stands. Consequently, section 11 (2) of the FCA read together with section 11 (5) and (6) of the FCA and the Threshold Order cannot be invoked. As such only one transaction regarding acquisition of the allotted shares in UDA needs to be examined in this Provisional Findings.

6.3 The acquisition of the allotted shares in UDA

As noted earlier in these Preliminary Findings, on 25th September, 2013 the Respondent entered into a *Share Purchase Agreement* with the Dar es Salaam City Council. As a result,

shares held by DCC in UDA were transferred to the Respondent in consideration of a sum of

The Respondent has not been able to provide evidence showing that the acquisition of the allotted shares was nullified by any Government machinery. The fact that there is no evidence to substantiate illegalities which may lead to reversing the transaction, the Commission considers the conclusion of shares was legally concluded and since it was concluded in breach of the FCA, this Commission is justified to have it scrutinised.

In order to establish whether the Respondent gave effect to a notifiable merger contrary to Section 11(2) and (5) of the FCA, read together with the Threshold Order as amended, the Commission is obliged to establish the following elements of offence:

i. Whether the acquisition of the shares held by the DCC in UDA constituted a merger as defined under the FCA;
ii. Whether the transaction was notifiable;
iii. Whether the investigation is within the prescribed period;
iv. Whether the alleged infringements of the FCA were committed negligently or intentionally.

The Commission, therefore, proceeds to examine the above issues as follows:

6.3.1 Whether the acquisition of the shares of UDA constituted a merger as defined under the FCA.

Section 2 of the FCA, defines a merger to mean:

"…. an 'acquisition of ***shares,*** *a business or other assets, whether inside or outside Tanzania, resulting in* ***the change of control*** *of a business, part of a business or an asset of a business in Tanzania'.* (Bold added for emphasis).

The definition above indicates that *a merger* includes also *an acquisition*. Section 2 of the FCA has also defined the word 'acquisition' to mean:

> *"**Acquisition**", in relation to shares or assets, means acquisition, either alone or jointly with another person, of any legal or equitable interest in such shares or assets but does not include acquisition by way of charge only.*

Based on the above provisions it is clear that, for a transaction to qualify to be a merger, there must be an acquisition of *shares, a business or other assets* and that acquisition should result in the *change of control* of business or part of the business.

However, in establishing whether the acquisition of the ██████ shares in UDA constituted a merger, we will assess the following:

i. Whether there was an agreement to acquire shares in UDA;
ii. Whether the acquisition of such shares resulted in the change of control of a business or part of business in Tanzania.

6.3.1.1 Whether there was an agreement to acquire shares in UDA

According to the FCC's investigation, it has been revealed that, on 25th September, 2013, vide an Agreement of Sale of Shares between UDA and the Respondent, a total of ██████ issued shares were acquired by the Respondent, with the approval of UDA's Board of Directors, at a value of Tshs ██/- per share.

Accordingly, Paragraph 4.10 of the Share Purchase Agreement between DCC and the Respondent provides that:

> *"That the Vendor (DCC) and the Purchaser (the Respondent) agrees that on the date of signing the agreement or not later than Thirty days (30), the following documents shall simultaneously be signed and/or delivered to the Purchaser:*
>
> *a. Original Share Certificate in respect of the Shares (if any);*
> *b. Share Transfer Instrument in respect of the Shares dully executed by Vendor;*

c. Vendor's resolution approving the sale of shares under this agreement; and

d. Other related documents to this agreement."

From this clause, it is clear that, the original Share Certificate was transferred to the hands of the Respondent thus DCC was no longer a shareholder of UDA. Therefore, from the date of signing the Agreement the shares which were under the control of DCC were transferred to the Respondent and the Respondent became the majority shareholder running the management of UDA.

From the above explanation, and as per the definition of the 'merger' under the FCA, it is obvious that there was an *acquisition of shares,* (as evidenced by the said transaction wherein a purchase of ███ of allotted shares of DCC held in UDA was done by the Respondent). The issue raised above is thus affirmatively responded to.

6.3.1.2 Whether the transaction led into change of control of a business in Tanzania.

Section 2 of the FCA requires that, in order for a transaction to qualify to be a merger it must result into a ***change of control*** of the business or part of a business in Tanzania.

It is clear that, the FCA does not offer a definition of what amounts to a '**change of *control***'. Rather, section 4 of the FCA defines control in relation to sections 8, 9 & 10, excluding section 11 of the FCA.

Economically, change of control is more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise decisive influence over a previously independent firm.[6]

Based on the view above, we have considered the definition of change of control in merger transaction as defined by the Fair Competition Tribunal in *Toyota Tshusho vs Fair*

[6] http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf, The OECD Competition Committee debated Definition of Transaction for the Purpose of Merger Control Review in June 2013 (accessed on 14.3.2017)

Competition Commission, FCT Appeal No.6 of 2013 (*Unreported*)) and finds, on page 32, that change of control, for purposes of mergers and acquisitions, refers to "the possibility of exercising decisive influence on an undertaking." In this case, the FCT upheld a decision of this Commission in respect of a merger application No. *FCC/M&A/13/2012 between Toyota Tshusho Corporation (Alliance Autos Ltd) and CFAO (Alliance Autos Ltd)* issued on 4th April, 2013. In this decision, the Commission had adopted a definition of change of control as being:

> "*the potential ability of the Acquiring firm to materially influence the business policy and operations of the target firm in the post-merger scenario irrespective of the size of [the] ownership change*".

We are also persuaded to cite the case of *Blokker/Toys R Us,*[7] where, at para.13, the EU Commission stated that:

> *"...... acquisition of control is not limited to cases where a legal entity is taken over but can also happen through the acquisition of assets. In this situation, the assets in question must constitute a business to which a market turnover can be clearly attributed."*

Based on the above definition by the FCT and further elaboration from the above cited case law from the EU, the Commission in this Provisional Findings is of the view that the Respondent acquired ability to control the business of UDA. This conclusion is based on the following facts:

Firstly, immediately after the completion of the acquisition of the [redacted] allotted shares held by DCC in UDA, the Respondent became the majority shareholder, with about [redacted] of the allotted shares.

Secondly, the Management and Board of Directors of UDA has been under the control of the Respondent after the acquisition of the [redacted] un-allotted shares in 2011, and, has continued to be under the Respondent's control even after the Respondent Relinquished these shares as explained under Para 6.2 above.

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[7] (Case No IV/M.890 - *Blokker/Toys "R" Us).*

Thirdly, effectively from 1st February, 2012 to date the Board of Directors of UDA is chaired by the Executive Director of the Respondent Mr. Robert Kisena and other members being Mr. Simon Bulenganija, Mr. Said M Fikirini and the late Ms. Eugen Mwaiposa. Also, the management of UDA has been under the Respondent since 2012 to date.

The above noted facts explicitly indicate that, the Respondent, through the acquisition of the ██████ allotted shares, has a direct influence over the business strategies of the target firm (UDA). In other words, in that context, the sale of ███ shares held by DCC in UDA to the Respondent meant that the control of the business policy and strategies of UDA was changed from DCC to the Respondent. Henceforth, the UDA became a majority-owned subsidiary of the Respondent. Therefore, as a result of the merger, it is clear that the control of business of UDA changed from DCC to the Respondent.

In view of the above, the Commission holds that, the acquisition of majority shares in UDA resulted to a 'change of control' of the business of UDA from DCC. It therefore satisfies the requirement of Section 2 of the FCA, and constitutes a merger.

6.3.2 Whether the transaction meets the required notification threshold

After being satisfied that the transaction in question was a merger as defined by section 2 of the FCA, then it is appropriate to answer the question of *'whether the transaction at hand meets the required notification threshold'*.

Section 11 (2) of the FCA states that:

> *"A merger is notifiable under this section if it involves turnover or assets above the threshold amounts the Commission shall specify from time to time by Order, in the Gazette, calculated in the manner prescribed in the Order".*

The *Threshold Order as amended provides that* a merger is notifiable if it involves a *combined market value* of assets of the merging firms above TZS 800,000,000/=.

According to the investigation of this complaint, the Respondent acquired allotted shares of **DCC in UDA** on 25th September, 2013 as clearly shown in the Agreement for Sale of Shares. That being the case, the calculation of the combined assets of the merging firms is to be based on the submitted Financial Reports of the preceding year i.e. the Financial Report for the year ended by 31st December, 2012.

In that period, the Financial Reports submitted by the Respondent show that, the total value of Respondent's assets amounted to ████████ Thus, the value of assets of the Respondent alone without considering the value of assets of DCC exceeded by far the threshold amount of TZS 800,000,000/=.

Consequently, the Commission holds that, the transaction in question was supposed to be notified to the Complainant as provided under section 11 (2) of the FCA.

6.3.3 Whether the merger investigation is not time barred under section 60(8) of the FCA, 2003

Section 60(8) of the FCA 2003 provides that:

> *"The Commission may act upon an offence at any time within six (6) years after the commission of the offence."*

As it is mentioned earlier that, the merger transaction was consummated on 25th September, 2013 and the Complainant started its investigation on 28th August, 2014 at a time when the Respondent was served with the first letter requesting for information regarding the acquisition of shares in UDA. In other words, the investigation on this matter at hand started eleven (11) months after the consummation of the merger transaction. Consequently the Commission concludes that, investigation in within the prescribed time as provided for under section 60(8) of the FCA.

6.3.4 Whether the alleged infringements of the FCA were committed negligently or intentionally

Section 11 (6) of the FCA provides that:

"Any person, who intentionally or negligently acts in contravention of the provisions of this section, commits an offence under the FCA"

In our view, the Respondent is a legal entity registered under the Company law. The Respondent is expected to abide with all legal and regulatory requirements of the country (Tanzania) when discharging its business. It must be noted that the FCA was enacted in 2003 and came into force on 12th May 2004 through Government Notice No. 150 published on 14th May, 2004. Moreover, the Threshold Order was promulgated in 2007.

Considering these facts, it is clear that the shares of DCC were acquired in total disregard of the requirements and procedures laid down by the provisions of the FCA. This signifies a highest degree of negligence since the company of the calibre of the Respondent ought to have respected the applicable laws that regulate mergers and acquisitions in Tanzania.

It is also clear that, the merger transaction was drafted by a lawyer who proceeded to witness the agreement. If it was not negligence on the part of the Respondent, one would have expected that the Respondent and its lawyers, would have engaged in drafting the agreement having first and foremost conducted a regulatory compliance due diligence exercise. Doing so would have brought to the attention of the Respondent the fact that the transaction needed approval or clearance of the FCC and one would then say that the Respondent acted carefully and responsibly. Since the Respondent failed to do so, this was being grossly negligent. No other theory to the contrary can be advanced in this respect than that the transaction was executed without observing the regulatory requirements, thus, manifesting negligence on the part of the Respondent.

6.4 Conclusion

Based on paragraphs **7.3.1**, **7.3.2**, **7.3.3**, and **7.3.4** we hold in the interim;

(i) **THAT**, the acquisition of the [redacted] allotted shares held by DCC in UDA by the Respondent led to a change of control of business of

UDA hence constituted a merger as defined under section 2 of the FCA.

(ii) **THAT**, the combined total value of assets of the merging firms was above the amount specified in the Threshold Order (i.e. TZS 800,000,000/-), thus, the transaction was notifiable and was concluded contrary to section 11 (2), (5) of the FCA, as read together with Rule 33 (1); (2) and (7) of the FCC Rules, 2013, and the Threshold Order (as amended in 2009).

(iii) **THAT**, the investigation of the alleged infringement of the FCA started eleven months after the consummation of the transaction hence the investigation is within the prescribed period as provided under section 60 (8) of the FCA.

(iv) **THAT**, the Respondent acted negligently in the processes of consummating the merger transaction hence committed an offence as provided under section 11 (6) of the FCA.

(v) **THAT,** the Respondent acted negligently in the processes of consummating the merger transaction hence offended the FCA.

From the above assessments of facts and the supporting evidence, the Commission, acting in accordance with Rule 19(3) of the FCC Rules, hereby, provisionally, finds that the Complainant, on a high preponderance of probability, occasioned an infringement of the FCA. The Respondent is thus held liable for failure to notify a merger contrary to section 11(2), (5) and (6) of the FCA, as read together with Rule 33 (1); (2) and (7) of the FCC Rules, 2013, and the Fair Competition (Threshold for Notification of a Merger) Order, 2007 as amended by G.N No. 93 of 17th April 2009 (the Threshold Order).

Consequently, the Commission, issues these *Provisional Findings* and reasons thereof and requires the Respondent to make written and/ or oral representation within a specified period of time.

7.0 PROPOSED REMEDIAL ACTIONS

Having held in the interim that the Respondent has infringed the FCA, the Commission intends, subject to the Respondent's written or oral representation in response to this 'Provisional Findings', to issue a Compliance Order that requires the Respondent to execute the following remedial actions:

(i) **THAT**, pursuant to section 60 (1) of the FCA, and Rules 28 and 32 of the FCC Rules, to demand from the Respondent, *an administrative monetary fine of TZS* [redacted] *being **8%** of the Respondent's annual turnover (* [redacted] calculated from the Respondent's audited accounts for the year ended 31st December, 2013 and which should be payable to the Commission by the Respondent.

The rationale for imposing this amount of fine is based on the nature of the violation itself, this being a non-notification of a merger, which, as it was emphasised by the Fair Competition Tribunal in *Tanga Fresh v FCC, Tribunal Appeal No.5 of 2014*, (unreported) is a serious violation since notification is 'a standstill obligation' to be complied by the merging parities. On page 51 of the Judgment the Tribunal had the following to say (and we quote):

> *"……that violation of the standstill obligation (non notification of a merger) constitutes a serious breach of the FCA which attracts imposition of fines. Indeed, the FCC/Respondent has discretion to impose fines on the parties (of up to 10% of the aggregate turn-over of the undertaking concerned) if they fail to notify a merger prior to its implementation or if they otherwise breach the standstill obligation by implementing the merger prior to having been cleared by the FCC."*

(ii) **THAT**, pursuant to section 58(1) and (3) of the FCA, the Respondent will be required to refrain from all future conduct that are against the FCA.

(iii) **THAT**, the Commission may proceed to issue any other orders which we may deem necessary and proper to impose in the due course.

8.0 THE RESPONDENTS'S RIGHTS TO BE HEARD ORALLY

Although the Commission adopts an inquisitorial approach in the course of handling complaints, **Rule 22 of the FCC Rules,** provides an avenue to the Respondent to exercise its rights to be orally heard by the Commission, over and above the right which the Respondent has under **Rule 20 of the FCC Rules** (i.e., the right to submit a written submission in reply to the Provisional Findings).

In terms of Rule 19(3) of the FCC Rules, **the Respondent is hereby required to file, in terms of Rule 20(1) of the FCC Rules, a written submission in reply to these Provisional Findings within 21 days from the date of receipt of these 'Provisional Findings'** and **within 14 days** after the prescribed date of submission of written representations, the Respondent will have to **make an application to the Commission for an oral audience.**

We also wish to reiterate that under **Rules 19 (6) and 21** of the FCC Rules, there is a room for **Settlement between the parties** involved in a complaint. The Respondent may also wish to utilise the avenue before a final decision is arrived.

The Commission directs that these Provisional Findings be issued to the Respondent.

It is so ordered.

Signed, sealed, dated, and issued on this 2nd day of May 2017.

QUORUM		**SIGNATURE**
Prof. Samuel M. Wangwe	Chairman	SIGNED
Fadhili Manongi	Member	SIGNED
Felix Kibodya	Member	SIGNED

To be served Upon the Respondent by Order of the Commission

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SEAL OF THE COMMISSION