UNITED REPUBLIC OF TANZANIA

IN THE FAIR COMPETITION COMMISSION

AT UBUNGO PLAZA, DAR-ES-SALAAM

AND

IN THE MATTER OF FAIR COMPETITION COMMISSION COMPLAINT

Consolidated Docket No. FCC/Comp. No.1A & IB of 2012
(Concerning Acquisition of Morani Dairy Company Limited and International Food Processors Limited)

BETWEEN

FAIR COMPETITION COMMISSION- COMPLAINANT

&

TANGA FRESH LIMITED - RESPONDENT

FINAL FINDINGS

(Made under Rules 24 (1) and 25 (1) of the Fair Competition Commission Procedure Rules, 2013, G.N.73 OF 2013)

PRESIDING MEMBERS OF THE COMMISSION

Col. (Rtd) Abihudi N. Nalingigwa	- Deputy Chairman
Ms. Itika-Hilda Mafwenga	- Member
Ms. Blandina S. Gogadi	- Member
Dr. Frederick S. Ringo	- Member

1.0 INTRODUCTION

This is a consolidated '*Final Decision*'*(*Findings*)* of the Commission in respect of two Complaints, Dockets Nos. FCC/Comp. No.1A & IB of 2012, filed against the Respondent. During the Commission's 63rd Case Meeting, held on 29th August 2014, we made a decision that the two complaints should be consolidated for purposes of this Final Decision. By this decision to consolidate the two complaints, we vacated our earlier position made during the Commission's 46th Case meeting held on 20th September 2013 of which we had ordered that the Respondent be served with two separate provisional findings in respect of the two complaints. However, before we state the background leading to the filing of the two complaints, we find it necessary to state some facts by way of this introduction.

During its 49th Case Hearing Meeting held on 6th December 2014, the Fair Competition Commission (hereinafter referred to as " *the Commission"*), resolved that pursuant to the provisions of the Fair Competition Act No. 8 of 2003; (hereinafter referred to as "*the FCA*") and Rule 19 (1) and (2) of the Fair Competition Commission Procedure Rules, 2013, (hereinafter referred to as "*the FCC Rules"*); Tanga Fresh Limited (the Respondent) infringed the provisions of Section 11(1) and (2) of the FCA when it acquired assets of its competitors, namely: *Morani Dairy Co. Ltd* and *International Food Processors Limited* without first notifying the Commission. On the

basis of such an un-notified acquisition, we held that it was in the public interest to issue "*Provisional Findings*" against Respondent.

Furthermore, the Commission resolved that since the acquisition of the two competitors by the Respondent involved two separate transactions concluded on two different dates, the said transactions constituted two separate complaints. In view of this, on 22nd October 2013 the Respondent was served with two separate "*Provision Findings*" and was required to file responses to the Commission's findings within 21 days from the date of their receipt. On 23rd October 2013, the Commission issued a *Notice to the Public* concerning the said "*Provision Findings*" as required by Rule 19(7) of the FCC Rules, 2013.

On 11th November, 2013 the Commission received a written communication from the Respondent, in reply to the *Provisional Findings*. In its response, the Respondent also requested for an opportunity to be heard orally. The Respondent's request for oral hearing was granted and the hearing of its oral submissions took place on 6th December 2013. It is on record that on the hearing day the Respondent appeared and entered admission of all four offences as they appeared in the two *Provisional Findings* earlier served upon the Respondent.

In the course of the oral hearing, however, the Respondent, having admitted to have breached the provisions of the FCA, 2003 as alleged by the Complainant, applied for settlement discussions under Rule 19(6) and 21 of the FCC Rules 2013. Pursuant to the Respondent's admission of the infringements and the subsequent application to settle the matter, the Commission advised the Respondent to file its application for settlement discussion in writing.

On the 18th December 2013 the Respondent lodged a *Settlement Application* to the Commission, confirming their oral application made on the 6th December 2013 during the oral hearing meeting. The Commission granted the Respondent's prayer and a settlement discussion meeting was scheduled to be held on 10th January 2014 at

the FCC Offices. This meeting, which involved the FCC negotiation team and the Respondent's Representatives, was as scheduled. During the meeting, however, the Respondent delegation requested for extension of time that would allow the Respondent to consult its shareholders on the issue of proposed quantum to be paid as 'settlement amount' (fees). The parties agreed to adjourn the settlement discussions to be resumed later on 31st January 2014 at 10.00hrs at the same venue.

On 31st January 2014, however, the Respondent's delegation lodged a request for a further three months extension of time to allow a carrying out of 'sufficient consultations' with its shareholders, since some of them are from the Netherlands and that they needed to be present at an Annual General Meeting which was on plan to discuss and agree on the matter pending before the Commission. The Respondent's Settlement Discussion Team insisted that the Respondent's Management and its Board of Directors did not have the mandate to decide on the matter. Besides, the Respondent's delegation submitted that the Tanzania Dairy Cooperatives Union (TDCU), one of its majority shareholders, and, representing the interests of Tanga dairy cooperative societies and the farmers, also needed sufficient time to discuss with its members in their Annual General Meeting which was yet to be convened. The Respondent was advised to file the application for extension of time in writing. Consequently, on the 4th February 2014 the Respondent lodged an application for a further extension of time within which to consult with its shareholders noting that the matter before the Commission is beyond the powers of the Respondent's Management and the Board of Directors.

On the 7th February, 2014, the Commission, in its 53rd Case Hearing Meeting, resolved that the Respondent should be invited to appear before it on *11th February 2014*, for oral submissions on their application for extension of time. However, a day before the appointed date for oral submissions (*i.e.*, on 10th February 2014), the FCC Management received a letter from the Respondent, dated 8th February 2014 (with reference *No. TFL/FCC/2014/02),* in which the Respondent, while referring to the

FCC's letter with reference *FCC/COMP No.1A/2012/6,* of 7th February 2014, inviting them for an oral hearing of their application, regretted that on the scheduled date, i.e., *11th February 2014,* its legal counsel, Mr. Waissaka (Advocate), would be occupied in another case in the High Court of Tanzania, Commercial Division (which case number and parties were undisclosed) and, that, he would not, for that reason, be able to appear before the Commission.

The Commission tried to reach out to the Respondent's Managing Director through short message (SMS) text and later on, telephone conversations were held on 11th and 12th February, 2014 between the Respondent's officials (*Michael Karata*, *the Managing Director,* and one, *Mr. Henry*) regarding the possibility of attending the oral hearing on *12th February 2014*. However, the procurement of the attendance of the Respondent or its Legal Counsels on the proposed date was unsuccessful.

On the 12th February, 2014 the Commission informed the Respondent that it had examined the Respondent's application for extension of time under the provision of Rule 25(2) of the FCC Rules; and, that, the said provision provides for a statutory period of *45 days* within which the Commission should make a decision on a matter it is handling. Since the settlement negotiations fall under Rule 24(4) (b) of the FCC Rules, 2013, the proceedings were guided by the above cited Rule 25 of the FCC Rules. The Respondent was therefore informed that the counting of the 45 working days, from the date of closing their oral submissions on the 6th December 2013, was to end on the 12th February 2014. This was the reason why the Commission had scheduled the oral hearing of the Respondent to be on the 11th February 2014 and later on 12th February, 2014, the latest. Had the Respondent appeared before the Commission on the appointed date it would mean that the settlement discussions would have been winded up well in time.

Owing to the Respondent's non-appearance and loss of interest in the settlement discussions, the Commission, during its 54th Case Meeting held on 18th March 2014,

marked the settlement discussions as having failed and ordered that the matter should proceed where it ended and, further, that the Commission would proceed to issue final findings. With this introduction, we now turn to the background regarding this Consolidated Complaint against the Respondent, Tanga Fresh Ltd.

2.0 BACKGROUND TO THIS COMPLAINT

On 3rd June 2011, the Commission (the Complainant), conducted an awareness seminar to its stakeholders in Tanga Region on competition law and policy, consumer protection, and campaign against counterfeit products. During one of the plenary sessions, the stakeholders informed the Complainant that the Respondent had acquired its competitors, *Morani Dairy Company Limited (MDCL)* and *International Food Processors Limited (IFPL)*. The two acquired Companies were incorporated under the Tanzanian Company Law, Cap 212 and were doing business of collecting raw fresh milk and processing dairy products in Tanga Region.

It is imperative at this juncture to state that the merger regime in Tanzania has a notification requirement. In principle, all intended mergers or acquisitions must be notified to the Fair Competition Commission, and, according to Section 11(5) of the FCA, all merger transactions are subject to a prohibition on implementation pending notification and clearance, and are appraised exclusively by the Commission. This is a similar approach taken also in certain other jurisdictions, for instance, in the EU.[1]

In the EU, for instance, failure to notify a notifiable merger is a serious infraction as it may attract a fine of up to 10% of a company's annual turnover. Indeed, in *Case No COMP/M.4994 – Electrabel/Compagnie Nationale du Rhône, Commissio* [2], the EU Competition Commission imposed a fined of EUR 20 million on Electrabel, an electricity producer and retailer belonging to the Suez Group (now GDF Suez) for

[1] See *Ryanair Holdings plc v Office of Fair Trading* [2011] 1174/4/1/11 (CAT), at para 47. See also Article 4(1) of the EU Merger Regulation, (Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004).

[2] Decision of 10 June 2009 which was affirmed by the EU's General Court – see Case T-332/09 – *Electrabel v Commission*, 12th December 2012. See also *case IV/M.920 - Samsung/AST15* (Commission Decision of 18 February 1998) and case *IV/M.969 - A.P. Møller* (Commission Decision of 10 February 1999).

acquiring control of Compagnie Nationale du Rhône (CNR), another electricity producer, prior to having notified and received approval of the concentration under the EU Merger Regulation.[3] Parties suspected of having implemented a concentration in breach of the standstill obligation may also be subject to unannounced inspections. For example, in 2007 the Commission carried out dawn raids for suspected gun-jumping in the *Ineos/Kerling case*.[4]

In the present consolidated complaint, therefore, having obtained the alleged information that the Respondent had acquired two of its competitors, and, might have breached the standstill obligation since the two transactions were not notified to the FCC as required by Section 11(2) and (5) of the FCA, 2003, on July 2011, acting under section 69(1) of the FCA, and the relevant provisions of the Fair Competition Procedure Rules, 2010 (the Rules, 2010), the Complainant initiated investigation against the Respondent.

On 25th May 2012 the Complainant issued a *Statement of the Case* to the Respondent setting out facts constituting the complaint and the provisions of the law alleged to have been infringed, *to wit*, Sections 10(1) read together with sections 5(4), (5) and (6), 11(1) and (2) of the FCA. Furthermore, as part of the investigation processes, the Complainant, acting under section 71(1) (a) and (b) of the FCA requested information from the Respondent vide a letter with reference No. FCC/INV/3/2011/30 dated 25th May 2012. On 13th July 2012 the Respondent submitted most of the information requested with an exception of its Pricing Policy, stating that the Respondent does not maintain a specific pricing policy. However, the Respondent offered some explanations regarding how the company calculates prices for its milk products.

On 30th July 2012, the Complainant received a letter with *Ref. No. TFL/FCC/2012/04,* dated 26th July 2012, with additional responses to the Complainant's *Statement of the*

[3] See EU Merger Regulation, Article 13.
[4] Case No COMP/M.4734 – *Ineos/Kerling*.

Case. In summary the Respondent denied all the allegations which were set out in the Statement of the Case.

3.0 FACTS CONSTITUTING THIS COMPLANT

As already pointed out, a *Case Statement* regarding this consolidated complaint was issued pursuant to Rule 12 (3) of the Rules, 2010 (similar to Rule 12(3) of the current FCC Rules 2013) and it comprised the two transactions. As pointed out earlier, it should be recalled that on the 20th September, 2013, the Commission, during its 46th Case Hearing Meeting, resolved that the two transactions were separate complaints and should be treated separately. Pursuant to that resolution, two separate Provisional Findings were prepared, one in respect of *Docket No. FCC/Comp. No.1B of 2012 for MDCL* and *Docket No. FCC/Comp. No.1A of 2012* for IFPL.

In a nutshell, the following are therefore the facts set out by the Complainant in the *Statement of the Case* and which were also reflected in the two Provisional Findings though separately depending on each case.

i. That, from 2006 to 2008 the Respondent, being a company that operated its business (and is still operating it) within Tanga Region, was a dominant player in the collection of raw fresh milk business within the relevant geographical market (i.e. Tanga Region) with an estimated market share of ……%. (Later on assessed to be ….%, ……% and …… % respectively).

ii. That on 18th February 2009, the Respondent, while in full knowledge of its dominant position in the relevant market, acquired assets of its competitor in business, to wit, *Moran Dairy Co. Ltd* at a price of TZS ……..00.

iii. That on 31st March 2009, the Respondent, while in full knowledge of its dominant position in the relevant market, acquired assets of its competitor in business, to wit, *International Food Processors Limited* at a price of USD ..... Million (the equivalent at that particular time, to TZS .....00).

iv. That the acquisitions of assets of the two competitors, as stated above, amounted to a notifiable merger and that the merger had the effect of strengthening the Respondent's position of dominance and increased its market share to ….....% in the relevant market.

v. That the conduct of acquiring *Morani Dairy Company Limited* and *International Food Processors Limited* had an adverse effect of distorting and lessening competition in the relevant market contrary to the provisions of the FCA which require such transactions to be notified to the Complainant before being consummated, a fact which the Respondent was well aware of, or ought to have been aware of, and did not comply with.

vi. That, the Respondent, by virtue of being a dominant player in the collection of raw fresh milk business in the relevant market, was (and has been) involved in anti-competitive conduct which includes: predatory pricing, creating barriers to entry by maintaining exclusive agreements with fresh milk suppliers (farmers and their cooperative societies), price discrimination and unfair pricing, and in other instances, refusal to deal, all these acts amounting to an abuse of its dominant position.

vii. That due to the facts as set out in the above paragraphs the Respondent contravened the provisions of the FCA.

After a second stage investigation these facts were further established:

(i) That, in the said Statement of the Case, the Respondent was informed the basis upon which the Complaint was being established, *i.e.*, Section 8(1) and (3), Section 10(1) read together with Section 5(4), (5) and (6) of the FCA; Section 11 (1) and (2) of the FCA.

(ii) That the Respondent's acquisition of assets of *Morani Dairy Company Limited* and *International Food Processors Limited* (the "Acquisition") substantially lessened competition for raw fresh milk collection in Tanga Region which had hitherto been beneficial to the farming community in that region.

(iii) That the Acquisition eliminated vigorous competitors in the primary market; i.e., the collection of raw fresh milk Tanga Region.

At a later stage of the investigations, the allegations concerning breach of Section 8(1) and (3) and section 10(1), read together with Section 5(4), (5) and (6) of the FCA were dropped, hence two allegations in respect of each transaction, remained against the Respondent: the first, regarding breach of Section 11(1) of the FCA read together with Section 11(5) and (6) of the FCA and, the second, concerning breach of section 11(2), (5) and (6) of the FCA read together with paragraph 2(2) of the Fair Competition Commission (Threshold for Notification of a Merger) Order 2007 as amended (herein in referred as Threshold Order).

4.0 THE RESPONDENT'S ARGUMENTS

In the course of exercising its legal rights, on 30th July 2012, the Respondent submitted a written response (submission) in form of a letter *Ref. No. TFL/FCC/2012/04 dated 26th July 2012* to the Complainant. In a nutshell, the Respondent denied all allegations in respect of the acquisitions of the assets of *Morani*

Dairy Company Limited and *International Food Processors Limited*, as set forth in the Statement of the Case. The denial was as follows:

(i) that, in respect of the allegations raised in paragraph (i) of the Statement of the Case, in terms of relevant geographical market, the Respondent's business covers the whole of Tanzania and therefore **its market is not concentrated in a particular or a geographical location of Tanzania** (say Tanga region).

(ii) That, the Respondent supplies milk products country-wide and, as a resident milk processor, its market share, according to a study conducted by Tanzania Milk Processors Association (TAMPA), is ....% and not .....% as contended in the *Statement of the Case*.

(iii) That, the Respondent has been collecting raw fresh milk from farmers in three regions: namely, Tanga (..... %), Coastal Region (..... %) and Morogoro (..... %) respectively, the percentages as shown being on the average percentage of collections of raw milk at each region per day.

(iv) Further that, according to the *Tanga Region Livestock Report 2011/2012*, milk production in Tanga in 2010 was ..... litres and, in 2011, it was at the average of ..... litres *per annum* (i.e. ..... and ..... litres per day in 2010 and 2011 respectively).

(v) That, in the same years, the Respondent collected and processed an average of ..... litres *per day* (in 2010) and ..... *litres per day* (in 2011). The Respondent further stated (in its submissions) that its milk collection share in Tanga region was ...% *in 2010* and ...% in 2011, which, according to the Respondent, are percentages that are far below the ..... % estimated by the Complainant.

(vi) That, in addition to the above, according to the Respondent's business operation model, its relevant market is the whole of Tanzania, and that its market share is [redacted]% which is below the 35% required by FCA if a firm is to be considered dominant. (The Respondent admitted, however, that it does not have sufficient knowledge as to whether it was profitably and materially restraining or reducing competition in the market).

(vii) That, the Respondent disputes paragraphs (ii),(iii) and (iv) of the *Statement of the Case* by stating that it did not acquire its competitors, **Morani Dairy Company Limited** and **International Food Processors Ltd** but admitted that it *bought some parts of the assets from the companies* after the MDCL and IFPL had stopped production and their assets were lying idle.

To quote from the Respondent's submission at page 2, it is stated as follows:

> *'In 1997, Tanga Fresh started with installed capacity of [redacted] litres per day. [I]n 2007 we were processing 21,000 litres per day which was risky for the farmers' milk at the small plant of [redacted] litres capacity. [W]e planned to expand our capacity to [redacted] litres per day by importing machines and constructing another big factory in new location, then in 2009 we realised that there were idle buildings and machinery for sale by the above two companies. [I]nstead of constructing new structures we decided to buy those assets which were brought in market for sale and make good use of them.'*

Accordingly, the Respondent concluded that:

'the purchase of those assets had no adverse effect of distorting competition in the relevant market… instead ensured the best alternative use of the fixed assets of those two companies which had stopped their operations by then.'

Further, that:

'The transaction[] did not violate section 11(1) of the [FCA] since the amount involved the turnover or assets that were below the threshold set by the [Complainant] [and] the need of notification was not justified and therefore [the Respondent] did not violate Section 11(2) of the FCA….'

(viii) The Respondent submitted that the purchase of MDCL and IFPL assets had no adverse effect of distorting competition in the relevant market but ensured the best alternative use of the fixed assets of that companies which had stopped its operations by then. As such, the transactions did not violate section 11(2) of the FCA since the amount involved, the turnover or assets that were all below the threshold set by the Complainant and the need for notification of the acquisitions were not justified.

(ix) The Respondent denied the facts set out in paragraph (v) of the Statement of the Case by stating that its business conduct are in line with the industry best practices and could not in any way neither directly nor impliedly amount to anti-competitive conduct. The exclusive contracts entered between the Respondent, the farmers and the Cooperatives Societies are in line with best practices in the milk processing industry and are aimed at improving the quality of milk, steady flow of production, safe environment and prices.

(x) The Respondent, in its written response, drew attention to the provisions of Section 5(6)(a) and (b) of the FCA. In short, the Respondent argued that it cannot be said to be dominant while there is plenty of imported milk in Tanzania.

(xi) The Respondent refuted the content of paragraph (vi) of the Statement of the Case on the basis that due to the responses and facts he has given, nowhere can it be said that the Respondent had infringed the provisions of the FCA as alleged by the Complainant.

(xii) The Respondent refuted the content of paragraph 3(f) of the Statement of the Case on an account that due to the responses and facts already given in its written submissions it cannot be said that the Respondent had infringed the provisions of the FCA as alleged by the Complainant. In view of that, the Respondent concluded his reply by praying:

(a) that the Complaint be withdrawn because the Respondent's business conduct do not and is not likely to harm competition, and;

(b) that, the Respondent be granted an opportunity to have an interparty meeting to discuss the issues raised by the Complainant and provide more clarifications in relation to the responses that have already been given.

In response to the Respondent's prayer for an interparty meeting, and taking into account the avenue given to the Complainant under *Rule 11(2)(c) and (3) of the Rules 2010* (*which were in force at that stage of the complaint*), on 15th August 2012, an interparty meeting was convened by the Complainant and the Respondent was given an opportunity to provide oral clarifications to its written submissions and ask for clarifications in the discussion regarding the behaviour complained of. On the

appointed date a meeting was held and the Respondent was represented by the following:

(a) [redacted] (TFL Chief Executive Officer),
(b) [redacted] (TDCU- Vice Chairperson),
(c) [redacted] (One of its Company Director),
(d) [redacted] (a legal consultant), and
(e) [redacted] (Respondent's Managing Director).

During the meeting the Respondent's representatives repeated what was stated in the written submission adding to its paragraph (a), that, although the data submitted indicated that the availability of raw milk per day in Tanga is about [redacted] litres; such quantities may not be obtained unless one possessed collection facilities. Furthermore, the poor infrastructure in Tanga complicated the collection process from farmers living some interior parts of the region unreached.

With regards to the rest of the facts set-out in the *Statement of the Case*, the Respondent's Representatives maintained that the Respondent did not acquire the targeted companies (the MDCL and IFPL). The Respondent maintained further that buying the assets of the rival companies did not amount to a merger or acquisition as alleged by the Complainant. It was argued by the Respondent's Legal Counsel, that since the target companies do not hold shares in the Respondent; and, because the transactions were based on a *willing buyer-willing seller,* then the Respondent's act of buying its assets did not amount to a merger or acquisition at all.

In a further submission, the Respondent's Legal Counsel maintained that the Respondent was offered to buy buildings and storage tanks belonging to *Morani Dairy Company Limited* and *International Food Processor Limited* and, that, this was ideal since the Respondent was looking for such assets to expand their business.

On the issue of price differentials per a litre of milk which FCC investigators had observed at different collection points within same locality (those owned by Tanga Dairy Cooperative Union (TDCU) and those owned by the Respondent), the Respondent Representatives responded that the differences were a result of change in operational costs and weather conditions.

Based on the Respondent's submissions made vide its letter with *Ref. No. TFL/FCC/2012/04 dated 26th July 2012*, and the inter-party meeting held on 10th August 2012, as well as the earlier documents submitted to the Complainant (vide the Respondent's letters *Ref.TFL/FCC/2012/01*; *Ref.TFL/FCC/2012/02*; *Ref.TFL/FCC/2012/03*; the Respondent's e-mail dated 4th June 2012 with attachment to the Complainant); and taking into account other information obtained from the Business Registration and Licensing Agency (BRELA)), we shall now embark on a comprehensive competition assessment of all such collected information and the Complainant's own investigation/enforcement report.

5.0 THE MARKET AND MARKET DEFINITION

5.1 THE MARKET

The market in question is a *monopsonistic market,*[5] meaning that it has a buyer who controls a large proportion of the market and is able to influence the prices by driving them down. Monopsony or Monopsonist markets are thus descriptive terms often used to describe a market of this nature where a single buyer substantially controls the market as the major purchaser of goods or services. Basically, it is assumed that the buyer is able to dictate terms to its suppliers (sellers) as the only purchaser of such product or service. The Characteristics of a Monopsonist market is therefore as follows:

[5] Monopsony is a term used to describe a market where a very large buyer typically dominates the price action. In a monopsony, the large buyer is typically able to force prices to decline and this type of market contrasts with a monopoly where a large seller is able to drive up prices. Read more: *http://www.businessdictionary.com/definition/monopsony.html#ixzz3BgpX11kN* (as accessed on 5/7/2014).

(1) There is a single firm buying all output in a market,

(2) There is a lack of viable alternative buyers, and

(3) There is a prevalence of restrictions on entry into the particular market or industry.

- **Single Buyer**: First and foremost, a monopsony is a monopsony because it is the only buyer in the market. As the only buyer, a monopsony controls the demand-side of the market completely.
- **No Alternatives**: A monopsony achieves a single-buyer status because sellers (who are on the supply side) have no alternative buyers (on the demand) for their goods. This is the key characteristic that usually prevent monopsony from existing in the real (competition) world in its pure, ideal form. (Sellers almost always have alternatives).
- **Barriers to Entry**: A monopsony often acquires, and generally maintains, single buyer status due to restrictions on the entry of other buyers into the market. The key barriers to entry are: (1) government license or franchise, (2) resource ownership, (3) patents and copyrights, (4) high start-up cost, and (5) decreasing average total cost.

In this complaint, the Commission finds that, in respect of the first characteristic, the raw fresh milk supply market is characterised by having many farmers (who are sometimes organised through cooperative societies and farm groups) that produce raw fresh milk and sell their produce to single processor (buyer) or to a very few buyers. In our case, in the pre-merger scenario, reliable buyers were only four and, after the mergers, the number of buyers was further reduced and remained two.

It is also worth noting that raw fresh milk is a perishable product which requires specialised handling and special facilitates such as cold storage tanks. And, because of its perishability, the handling facilities should be within the areas of collection. Proximity of the specialised facilities is a paramount issue. Besides, it is also necessary to point out that the dairy industry is regulated by the Dairy Industry Act

No. 8 of 2004 and also it requires capital to start-up a business ranging from procurement of milk processing machines, cold storage tanks for storage and preservation of raw fresh milk at collection points, to mention but a few aspects that may constitute a barrier to entry. From these factors it is hereby concluded, therefore, that the market in question is monopsonist.

In terms of the relevant geographical market, the Respondent has averred in its submission, that, its business covers the whole of Tanzania and therefore its market is not concentrated in a particular or a geographical location of Tanzania. The Respondent has argued further that it has been collecting raw fresh milk from farmers in three regions: namely, Tanga (..... %), Coastal Region (.... %) and Morogoro (..... %) respectively, these being average percentages of raw milk collections at each region per day from these regions.

We have considered all submissions by the Respondent, and the Complainant's enforcement report. We have also reviewed section 2 of the FCA which provides that the words: "competition", "market", and "dominant position in a market", are economic concepts and, subject to the provisions of the FCA, shall be interpreted accordingly. Furthermore, the section provides for the definition of the term 'market' to mean that which is provided for under Section 5 of the Act. According to Section 5 (4) of the FCA, a market is defined to mean 'a market in Tanzania or a part of Tanzania and refers to the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services and between suppliers or acquirers, or potential suppliers or acquirers, of those goods or services.'

Defining a relevant market is an important step in any competition assessment. According to the OECD Policy Roundtables, 2012 (DAF/COMP (2012)19), a market definition is as an essential analytical framework to examine 'whether a particular

conduct or transaction is likely to produce anticompetitive effects.'[6] With it, one can assess 'the existence, creation or strengthening of market power, which is defined as the ability of the firm to keep the price above the long-run competitive level.'[7] In this *Final Findings* of the Commission we have been mindful of these principles, together with the guidance given in Section 2 of the FCA, in the course of defining 'markets'.

For the purposes of competition assessment; and, as the starting point for the assessment of final remedies as a result of the alleged infringement of the FCA provisions, we are primarily concerned with defining the narrowest set of relevant markets which could be reasonably expected to have been affected by the infringements. As earlier indicated, the complaints concern the supply of raw fresh milk to processors (buyers). The market definition will therefore involve consideration of both the products and geographical and each is analysed below.

5.1.1 Product Market

In defining product market the Commission depends usually on direct evidence of the sellers' switching ability (i.e., in terms of the changes in quantities supplied) in response to relative price changes which demonstrate substitutability for the purposes of market definition.

As noted in part 5.1 above, the market in question is monopsonist competitive market characterised by presence of few buyers (on the demand side) with the power to dictate terms of the business, including the ability to drive price down, (price maker) and many sellers (on the supply side) of the demanded product(s).

In analysing this complaint, considerations were made as to whether there are any other close substitutes for fresh raw milk that could be included in the same product market for the purposes of this '*Final Findings*'. The Complainant's submission was

[6] The OECD Round Table Discussions (DAF/COMP (2012)19) is Available from http://www.oecd.org/daf/competition/Marketdefinition2012.pdf (as accessed on 27/9/2013). (see generally, page 11.)
[7] Ibid.

that other products are not necessarily and directly substitutable (either because of price or the characteristics of the product). For the purposes of this *Final Findings*, therefore, we have decided to take 'a conservative approach' and exclude others milk products from the product market's definition and, we hereby conclude that **the product market is defined as 'raw fresh milk collected from the farmers, farm groups and cooperative societies by processors**.'

5.1.2 Geographical Market

In determining the geographical market we have considered the issue of geographical proximity within which farmers can sell their raw fresh milk in the event of a small non-transitory but significant increase or decrease in price; (using SSINP test (*Small but Significant and non-Transitory Increase in Price*).[8] The results of running such a test mainly indicate that the proximity cannot go beyond Tanga Region because of the nature of the product in question (which is perishable and requires specialised cold storage facilities that farmers do not have). Indeed, this is further corroborated by the Respondent's own submission that the essence of establishing a factory in Tanga was to enable farmers to sell their raw fresh milk without travelling long distances.

In view of the above analysis, we find that the geographical market cannot be the whole of Tanzania as submitted by the Respondent but it is Tanga Region.

5.2 THE RELEVANT MARKET AND MARKET STRUCTURE

5.2.1 The Relevant Market

The relevant market is a consideration of both product and geographical market under which the Respondent operates. Based on foregoing assessments in part **5.1.1** and **5.1.2** above, we are of a firm conclusion that the relevant market in this particular

[8] In competition law, before deciding whether companies have significant market power which would justify government intervention, the test of small but significant and non-transitory increase in price (SSNIP) is used to define the relevant market in a consistent way.

case is buying of raw fresh milk from the farmers, farm groups and cooperative societies by processors in Tanga Region.

5.2.2 The Market Shares

Based on the information submitted by the Complainant the market players (processors) and their market shares are as shown hereunder.

Table 1: Market Shares Distribution (by volume) for Raw Fresh Milk

Raw Fresh Milk Collected (volumes in ltrs)				
Years	**Tanga Fresh Limited**	**Morani Dairy**	**International Food Processors Limited (IFPL)**	**Others (Individuals and small firms)**
2006	[redacted]			
2007				
2008				
2009				
2010				
Market Shares of the Companies (based volumes of the Raw Milk Collected in ltrs)				
Years	**Tanga Fresh Limited**	**Morani Dairy**	**International Food Processors Limited (IFPL)**	**Others (Individuals and small firms)**
2006	[redacted]			
2007				
2008				
2009				
2010				

SOURCE: FCC Investigation Survey Data, 2011

Table 1 above shows that the Respondent has consistently held market shares above the threshold of 35% as stipulated in section 5 (6) (b) of the FCA, 2003.

6.0 COMMISSION'S LEGAL AND ECONOMIC ARGUMENTS

The Commission recalls that in its 49th Case Hearing Meeting, it had the opportunity to consider the evidence collected and the Respondent's responses thereto and found

that there is no sufficient evidence to establish a case concerning breach of Sections 8 and 10 of the FCA. As such the Commission resolved to drop allegations based on these provisions.

6.1 LEGAL ARGUMENTS

As noted in the above discussion, the current consolidated complaint against the Respondent is made up by four counts, two in respect of each transaction, to wit:

(a)Acquisition of the Assets of International Food Processors Ltd (IFPL)

(i) Failure to Notify a Merger between TFL and IFPL contrary to Section 11(2), Section 11(5) and 11(6) of the FCA, 2003 read together with the Threshold Order (*as amended by GN No. 93 of 17th April 2009*;

(ii) Strengthening the Position of Dominance in the market Contrary to Section 11(1) and 11(6) of the FCA, 2003.

(b)Acquisition of the Assets of Morani Dairy Company Ltd (MDCL)

(i) Failure to Notify a Merger between TFL and MDCL contrary to Section 11(2), Section 11(5) and 11(6) of the FCA, 2003 read together with the Threshold Order (*as amended by GN No. 93 of 17th April 2009*;

(ii) Strengthening the Position of Dominance in the market Contrary to Section 11(1) and 11(6) of the FCA, 2003.

In discussing the above counts the Commission will combine items (a) (i) and (b)(i) in both transactions and also items (a)(ii) and (b)(ii) because of their similarities and avoid duplication of efforts.

6.1.1 Failure to Notify a Merger Contrary to Section 11(2), Section 11(5) and 11(6) of the FCA, 20039 (as read together with the Threshold Order (*as amended by GN No. 93 of 17th April 2009*));

In its written response, the Respondent submitted that the transactions in which it was involved did not violate section 11(2) of the FCA because their amounts involved a turnover or assets value that was below the required threshold set by the Commission, and, for that reason, the need for notification of the acquisitions were unjustified. However, the Respondent did not demonstrate further on this argument.

The Commission has examined the allegations set out in 6.1 (a)(i) and (b)(i) above (regarding breach of the obligation to notify), and the submissions made by the Respondent in response to such allegations. Before much ado, we find that it is imperative to define what amounts to a '*merger*' according to the FCA and what amounts to '*a notifiable merger*' according to the Fair Competition Commission (Threshold for Notification of a Merger) Order 2007 as amended.

Section 2 of the FCA provides as follows:

> "**merger**" means 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*'. (Italics and underlines added).

The above definition indicates that *a merger* includes also *an acquisition*. Section 2 of the FCA defines the term '*acquisition*' as follows:

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[9]**Section 11(2) of the Act provides**: '[a] merger is notifiable under this section if it involves turnover or assets above threshold amounts the Commission shall specify from time to time by Order, in the Gazette, calculated in the manner prescribed in the Order.'
Section 11(5) provides : 'Without limiting the operation of sub-section (1), a person shall not give effect to a notifiable merger unless it has, at least 14 days before doing so, filed with the Commission a notification of the proposed merger supplying such information as the Commission may by Order require to be included in such notification.'
Section 11(6) provides: 'Any person who intentionally or negligently acts in contraven**tion** of the provisions of this section, commits an offence under this Act.'

> "**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.

In the present complaint, there is no dispute that the Respondent acquired the assets of the Morani Dairy Company Limited and International Food Processors Limited, and that the acquired assets were '*assets of a business*' which, without them, MDCL and IFPL could not be able to operate.

As regards 'a notifiable merger' Section 11(2) of the FCA requires all transactions which qualify to be a merger and which meet the threshold provided for under the Fair Competition (Threshold for Notification of a Merger) Order, 2007 ("*The Threshold Order*") as amended, to be notified to the Commission. The Threshold Order provides that a merger is notifiable if it involves a ***combined market value*** of assets of the merging firms above TZS 800,000,000/=.

In view of the provisions of Section 2; Section 11(2) of the FCA, and the *Threshold Order,* the Commission is of the view that the transactions alleged by the Complainant as constituting an infringement of the FCA need to be further assessed in order to establish two things: *firstly,* whether they met the legal requirements of a merger, and, *secondly,* if the first question is in the affirmative; whether they met the required notification threshold. In so doing, the Commission is compelled to address the following issues:

(a) *Whether the purchase of the assets of MDCL and IFPL constituted a merger as defined under section 2 of the FCA.*

It is not disputed that the Respondent purchased all assets of MDCL and IFPL (although these companies were the Respondent's competitors in business). This is evidenced by the two Asset Purchase Agreements (i.e., the Agreement between

Respondent and MDCL which was executed on 18th February 2009 and between the Respondent and IFPL which was executed on 31st March, 2009 with IFPL.

From the above evidence, we are of the settled view that, first, the Asset Purchase Agreements indicate that the transactions were complete transfer and ownership of the said assets, hence a total control of the same by the Respondent. Second, there are also additional sales completion documents which indicate change of control of the assets of the acquired companies. From these two facts we find that since the assets acquired were '*assets of a business in Tanzania*', and since there was a '*change of control of those assets*' (as they passed from MDCL and IFPL (the target companies) to the Respondent (the acquiring firm)), there was a complete satisfaction of the requirements of Section 2 of the FCA and the two transactions were mergers.

The answer to the first issue leads to the second issue below.

(b) *Whether the transaction meets the required notification threshold (in other words: Whether the combined market value of assets of the merging firms exceeds the threshold as provided in the Threshold Order; that is TZS 800 million).*

In its submission, the Respondent averred that the transaction did not violate Section 11(2) of the FCA since the amount involved a turnover or assets of a value that was below the threshold set by the law and, that, for that reason, the need for notification was unjustified. Consequently, the Respondent concludes that there was no violation of Section 11 (2) of the FCA. However, as already pointed out, it is the '*Threshold Order*' that provides for the threshold to be considered when determining whether a particular transaction is notifiable or not. The '*Threshold Order*' requires a calculation to be done and such should be based on the *combined market value of the assets of the merging companies.* Where the '*combined market value* of assets of the merging firms is above TZS 800,000,000/=, then such transaction should be notified to the

Complainant. As it shall be demonstrated below, it is clear that the combined market value of the assets of the merging companies exceeded this given threshold.

It is not disputed that the Respondent purchased assets of Morani Dairy Company Limited for TZS [redacted] and those of International Food Processors Limited for USD [redacted] Million (by then equivalent to TZS [redacted].00). As noted above, both the FCA and the Threshold Order require that the threshold calculation should be based on the combined market value of assets of the merging firms and not the transaction value. In 2009, the Respondent's Financial Statement showed that, alone the Respondent had assets of market value amounting to TZS [redacted]. Consequently, if this assets value is to be combined with the assets acquired as a result of the merger transaction between the Respondent and MDCL, the total market value of assets involved in this transaction alone was TZS [redacted]. If this is further combined with the assets of the IFPL, the combined assets value of the merging firm stood at TZS [redacted]. These combined values exceeded by far the threshold amount provided for by the Threshold Order, (i.e., the combined market value of assets amounting to TZS 800 Million).

In view of the above, we are unable to accede to the Respondent's argument that the transactions were not a merger, and, hence, not subject to the notification requirement. For the reasons demonstrated above, we hold that the Respondent's conduct of acquiring the assets of the targets companies amounted to a merger as defined under section 2 of the FCA. And, since the combined market value of the assets of the merging companies exceeded the threshold amount as established by the Fair Competition, (Threshold for Notification of a Merger) Order, 2007 (as amended, 2009) the Threshold Order, the transactions ought to have been notified as per the requirements of the provisions of Section 11(2) of the FCA, as read together with the relevant Threshold Order.

Having responded to the two issues above, there is yet one important issue that needs to be addressed. This is:

> *Whether the period in which the merger transactions took place is within the time frame of the coming into force of the FCA and does not exceed six (6) years since investigation started.*

According to the submissions and the evidence made available to us in the course of investigating the two transactions, it was made clear to us that the Respondent acquired the assets of MDCL on 18th February, 2009 and those of the IFPL on 31st March 2009 as evidenced by the Asset Purchase Agreements. In terms of limitation of time, Section 60(8) of the FCA 2003 provides that: *'[t]the Commission may act upon an offence at any time within six (6) years after the commission of the offence.'* The two transactions were separately consummated in early 2009 and their investigation by the Complainant started in July 2011. The *Threshold Order,* as amended, was gazetted in 2007. It is clear, therefore, that the transactions in question were consummated after the promulgation and Gazettement of the Threshold Order. Consequently, the investigation commenced three (3) years after the acquisitions of assets, hence, the matter at hand is not subject to the limitation of period of six (6) years as provided for under section 60 (8) of the FCA, 2003.

6.1.2 Concluding the prohibited mergers in order to strengthening the Position of Dominance in the market Contrary to Section 11(1) and 11(6) read together with section 5 (6) (a) and (b) of the FCA

In its submissions the Respondent has drawn our attention to the provisions of Section 5(6)(a) and (b) of the FCA and has argued that it cannot be said that the Respondent holds a dominant position in the market while there is plenty of imported milk in Tanzania. It seems that the Respondent has defined the relevant market as the market for milk products in Tanzania without considering that the milk industry has many different market segments. As earlier stated, we are in

agreement with the submissions made to the effect that the relevant market is the buying of raw fresh milk from farmers, farm groups and cooperative societies by processors in Tanga Region. In view of this, we reject the Respondent's argument.

We now turn to the analysis of section 11 (1) of the FCA and the available evidence, in order to establish whether there was an infringement of this provision. Section 11(1) of FCA prohibits a merger which strengthens a position of dominance in the market. Under this section, companies that merge with a view to strengthen their dominant positions in the market commit an offence. In finding whether the offence has been committed under this section, however, the following must be proved:

(i) that there was a merger as defined under section 2 of the FCA;

(ii) that the acquiring company is dominant in that market as defined under section 5 (6) of the FCA; and,

(iii) that the merger strengthened a position of dominance.

The first element has been established in part **6.1.1** above and we find it unnecessary to repeat the earlier considerations on this point. It suffices to affirm that the two transactions were mergers.

The second element is whether the acquiring company (the Respondent) wields a dominant position in the buying of raw fresh milk from farmers, farm groups and cooperative societies in Tanga Region**.**

The Respondent has argued that it cannot be regarded as a dominant firm in the relevant market because there is plenty of imported milk all around the country. However, as we have pointed out earlier, the relevant market in this complaint is confined to the buying of raw fresh milk from farmers, farm groups and cooperative societies in Tanga Region. In this regard, one would note that while the Complainant

is defining product market as unprocessed raw fresh milk, the Respondent includes imported milk which, obviously, is processed and thus falling outside the precincts of the defined relevant market.

However, as already demonstrated in our analysis of the relevant market we find that the Complainant was correct to define the market by specifically targeting the raw fresh milk segment in exclusion of processed milk. Therefore, in examining whether the Respondent is dominant or not, we shall base our analysis on the buying of raw fresh milk from farmers, farm groups and cooperative societies as defined in para 5.2.1 above.

Section 2 of the FCA states that '"dominant position in a market' has the meaning provided for in section 5' and, that, the term 'dominance' has a corresponding meaning. The full appreciation of the meaning of the concept of 'dominant position in the market' is, however, found under Section 5(6) of the FCA. This provides that a person will be considered to hold a 'dominant position in the market' if (a) and (b) applies:

(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.

We have analysed the FCA's provisions and we have not found an elaborate definition of the term 'dominance'; rather, the FCA provides for the definition of 'a position of dominance in the market'. However, the term dominance has been considered in other jurisdictions and, we consider such definition to be useful and applicable to our jurisdiction as well. The ECJ, in *United Brands vs Commission,* defined dominance as:

> "…a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[10]

Briefly, stated, therefore, the term 'dominance' refers to the economic strength enjoyed by a company which enables it to prevent effective competition from being maintained. With this in mind, the crucial factor is whether the Respondent, at the time of acquisition of MDCL and IFPL, had a dominant position as defined under the FCA. As noted above, Section 5(6) of the FCA lays down conditions that ought to be considered in determining whether the Respondent held a dominant position in the relevant market. These are as hereunder, that is to say:

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

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

The first condition, under section 5 (6) (a) of the FCA has the following elements; i.e. the firm in question can:

(i) acting alone (to);

(ii) profitably and materially,

restrain or reduce competition over a significant period of time.

With regard to 'the acting alone' element, we find that for this to take place the company involved should be able to acting independently; meaning that it must have the ability to decrease prices below competitive level (profitably) without the prospect that it will loose customers to other companies and make the price changes to be unprofitable for a significant period. Any price changes, therefore, will trigger expansion or entry of rivals in buying the raw fresh milk and make the initial price

[10] Case 27/76 *United Brands V Commission* (1978)ECR 207, (1978) 1 CMLR 429.

decrease to be unprofitable; in other words, the rival companies will respond to a price fall imposed by the Respondent. However, in order to prove that the Respondent acted alone, and was able to profitably and materially restrain competition for significant period of time, we have reviewed price trend from 2006 to 2011 (this is the period before the merger and after the merger) and it is shown in the table below. The review is as indicated below.

Price Trends among Key Competitors of Raw Fresh Milk in Tanga

(Deleted)

Source: FCC Investigation Survey, 2012.

The graphical presentation above demonstrates that the price of raw fresh milk was increasing yearly from TZS [redacted] (in 2006) to TZS [redacted] (in 2008), which is equivalent to [redacted]% increase. Thereafter, between 2008 and 2010, the price remained stagnant. We find no doubt to state that the price increase noted between 2006 and 2008 was mainly triggered by the introduction of the two vigorous competitors, i.e., *Moran Dairy Co Ltd* and *International Food Processors Ltd* in the raw fresh-milk-buying market. It is also worth noting that the abrupt price increment between 2006 and 2008 is an apparent indication that farmers in Tanga Region were being paid low prices due to lack of competition. Hence, the introduction of competition in the raw fresh milk buying market in 2006 was the source of the price increase.

On the other hand, stagnation in prices, as shown in the above graphical presentation, is an indication that the Respondent did not have any incentive of increasing the price after becoming the sole and main buyer of raw fresh milk in the region because there was no other rival company to respond to a price stagnation imposed by Respondent (profitably and materially). Consequently, between 2008 and 2009, the price of raw fresh milk was stagnant, as shown in the above graph, and, it did not trigger expansion or entry of rivals in the market for the buying of raw fresh milk; making the initial price stagnation unprofitable. It has also been established that since

2009 up to date there had been no new entry in the relevant market or expansion of the same. This is an indication that, although the price of raw fresh milk has been stagnant for some times, it has not triggered the entry of any new company to compete with the Respondent.

It should also be recalled that, it was in the year 2009 that the Respondent acquired the assets of its two main competitors, thus becoming dominant in the in the relevant market. By acquiring its competitors the Respondent remained the only main buyer of fresh milk in the market. Moreover, between 2008 and 2010 the price of raw fresh milk in the market remained constant whilst the quantity purchased by the Respondent increased from [redacted]M litres to [redacted]M litres of milk. This shows that, despite the stagnation of prices for three years the farmers continued to sell their produce to the Respondent. Indeed, because raw fresh milk is perishable in nature and its preservation costs are too high, it would not have been economically viable to farmers to sell their produce to long distant market which might have given them higher prices.

At this juncture, however, it is important to establish: the "*what if the price of raw fresh milk from farmers is reduced by say 5% from TZS* [redacted] *to TZS* [redacted]*, would the farmers still sell their produce to the Respondent*"? Hypothetically, and according to the figures above, the answer would be yes. The reason behind is that, since raw fresh milk is perishable and the Respondent is the only main buyer of raw fresh milk in the relevant market, the farmers would have no option but to sell their produce to the Respondent. Consequently, this shows that the Respondent had power to manipulate the price of raw fresh milk without negatively affecting the quantity of milk collected in the market for significant period of time.

It is also worth noting, that, according to the investigation conducted by the Complainant, and even from the Respondent's own submission, (*i.e.*, its 2009-2011 annual turnover records sent to the Complainant), from 2009 when the Respondent

acquired the targets (MDCL and IFPL) to the present the Respondent has been making profits consistently, a fact which one can only attribute it to the increased processing capacity resulting from the assets acquired from its budding competitors in the market.

We are also mindful of the fact that even in the pre-acquisition period, i.e., 2008, the Respondent was a dominant player in the market, in terms of the number of market shares it held in that relevant market, (which was [redacted]% as shown in **Table 1** above) (while its competitor, MDCL had [redacted]% and IFPL had [redacted]% of the market share); the estimated market share that the Respondent had was far beyond the minimum requirement of 35%. By virtue of the acquisition of the MDCL and IFPL the Respondents increased its market share to [redacted]% at the end of 2009 from [redacted]% market share in early 2008.

From the above analysis, we are of the conclusion that all two criteria set out under Section 5(6) of the FCA have been proved and the Respondent has a dominant position in the relevant market as defined in the FCA. We have also found that since 2009 no other company has entered the relevant market and; since up to now it is six years after the acquisitions, we find that competition has been restrained for a significant period time.

6.2 ECONOMIC ARGUMENTS: EFFECTS OF THE TRANSACTIONS (MERGERS)

We have examined the Complainant's submissions and conclude that the two mergers have caused negative impact to the economy and adversely affected competition. Observably, the fact has remained, to-date, that, the Respondent's acquisitions of the MDCL and IFPL resulted into the reduction of number of players in the relevant market.

Essentially, as observed from **Table 1 above,** MDCL and IFPL (the targets) were effective competitors of the Respondent and had shown all signs of progressive aggressiveness in terms of their competitiveness trends. Their elimination from the market in 2009, therefore, had impact on competition process since the remaining small competitors are less effective in terms of their processing capacity and market shares. According to the Complainant's submission, the percentage of amount of raw fresh milk processed by the small players per day is [redacted]%. Moreover, from **Table 1 above**, the combined market share for the small players is also insignificant as it is less than [redacted]%, (i.e., [redacted]%, hence in our view negligible). From the foregoing, we hold that the Respondent's decision to use its profits to acquire or eliminate competitors from business was tainted with ill motive of monopolising the market, a fact which was contrary to the spirit and tenets of competition.

7.0 FINDINGS

We have laboured, through examining the available evidence and carrying out the required competition assessment regarding the relevant market (i.e., the buying raw fresh milk from farmers, farm group and cooperative society in the Tanga Region), and, our analysis provides justifications or reasons as to why we hold that the Respondent has infringed the FCA. We, however, wish to note, as part of our findings, that while the Commission laboured to settle the matter upon the Respondent's own application made under Rule 19(6) and Rule 21 of the FCC Rules, 2013, and which the Commission granted, the Respondent abandoned the settlement process it had initiated.

Finally, while we see no reasons to restate what we have already stated at length in the preceding sections as our justifications for this decision, it suffices to state that it is our *Final Findings* that the Respondent committed infractions that were against the provisions of Section 11(1) of the FCA (Strengthening a position of dominance) as well as Section 11(2) of FCA as read together with the Fair Competition, (Threshold

for Notification of a Merger) Order, 2007 (as amended, 2009), for not notifying the two merger transactions to the Commission.

8.0 DECISION

Pursuant to the analysis carried out in this decision, we find that the Respondent is liable on the following counts:

> **Firstly***:* Failure to Notify a Merger Contrary to Section 11(2), (5) and (6) of the FCA, 2003 read together with the Fair Competition (Threshold for Notification of a Merger) Order, 2007 as amended by GN No. 93 of 17th April 2009), as explained in detail in paragraph 6.1.1 above (in respect of both transactions); and ,
>
> **Secondly**: Strengthening a position of dominance in the market Contrary to Section 11(1) and (6) of the FCA, 2003 as explained in detail in paragraph 6.1.2 above (in respect of both transactions).

The Respondent, however, has a right to appeal against this verdict within 28 days from the date of the Final Findings.

9.0 REMEDIAL ACTIONS

We have considered all factors as stipulated under Rule 28 of the FCC Rules and we have decided to compound all counts in all transactions for purpose of ordering remedial actions. Consequently, having held that the Respondent has infringed the FCA, 2003 we hereby issue a Compliance Order that requires the Respondent to execute the following remedial actions:

> **(i) That, pursuant to section 60(1) of the FCA 2003, and Rule 28 and 32 of the FCC Procedure Rules 2013; the Commission orders the Respondent to pay an Administrative Monetary fine of amounting to TZS 460, 945,000 Million, (i.e.** ***Four Hundred and Sixty Million Nine Hundred and Forty Five Thousand Tanzanian Shillings*****) which is equal to [redacted] % of its**

2009 annual turnover of [redacted] as per its audited accounts for the period ended 31st December, 2009. Pursuant to Rule 29 of the FCC Procedure Rules 2013, the said amount shall be paid to the Commission within thirty (30) days from the date of this Decision.

(ii) That, pursuant to section 58(1) and (3) of the FCA, 2003 we order that, within three years from the date of this decision; the Respondent refrains from conduct in contravention of the FCA, 2003, failure to which a maximum penalty of 10% annual turnover calculated from the last audited accounts will be meted out on the Respondent.

10.0 CONCLUSION

For the foregoing reasons, we find that the Respondent has breached the provisions of the FCA as stated in this *Final Findings* and the remedial actions against the aforesaid infringements are as stated in para 9.0 above. As pointed out earlier, the Respondent has a right to appeal against these final findings of the Commission within 28 days from the date of this decision as per Section 61 of the FCA.

The Final Findings be **DELIVERED and SERVED** upon the Respondent. The Respondent's right of appeal explained.

Accordingly, **IT IS SO ORDERED**.

Dated and Signed on this ……..date of ……..2014 at Dare-es-salaam

QUORUM **SIGNATURE**

Col. (Rtd) Abihudi N. Nalingigwa -Deputy Chairman …….

Ms. Itika-Hilda Mafwenga -Member .....

Ms. Blandina Gogadi -Member ……..

Dr. Frederick S Ringo -Member ……..