IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 6 OF 2013

TOYOTA TSUSHO CORPORTION

(ALLIANCE AUTOS LTD)............................APPELLANT

VERSUS

FAIR COMPETITION COMMISSION......................................RESPONDENT

JUDGMENT

The appellant, Toyota Tsusho Corporation, is appealing against the decision of the Fair Competition Commission (popularly known by its acronym "FCC"), the respondent herein, made on 4th April, 2013 in respect of a merger application FCC/M&A/13/2012 between the appellant and CFAO (Alliance Autos Ltd).

In order to appreciate the gist of this matter, we find it necessary to briefly state the historical background giving rise to this appeal.

On 18th October, 2012 the appellant which is a Japanese trading house listed on the Tokyo and Nagoya stock exchanges, acting under section 11(2) of the Fair Competition Act, 2003 (hereinafter referred to as "the FCA") and rule 42(2) of the Fair Competition Procedural Rules, 2010 notified the respondent of their intention to acquire CFAO (Alliance Autos Ltd). CFAO is a publicly traded company listed on the Paris Euronext stock exchange whose core business is the distribution of automotive and pharmaceuticals. The merger application was in respect of the appellant's intention to purchase 100% shares held by CFAO in Alliance Autos Ltd following the acquisition of CFAO by the appellant. Until July, 2012 CFAO was de facto controlled by the Pinault Printemps Redoute Group (PPR), a renowned French Group active principally in luxury goods, which was holding a 41.99% stake in the company. The acquisition was predicted to lead to a horizontal overlap in the Tanzanian market for distribution of brand new motor vehicles and spare parts in so far as the appellant and CFAO were concerned.

Following the merger application, the respondent commenced investigations under section 11(3) of the FCA with a view to establishing the effects of the transaction on consumers in the relevant market. The investigations established that the appellant's market share prior to the acquisition was 40% and the targeted firm, Alliance Autos Ltd, market share was 0.055%. Thus when combined the market share of merger would be 40.055% which exceeds the 35% market share threshold provided under the FCA. This revealation and other factors that were considered in the disputed decision led the respondent to reject the application as it contravened section 11(1) of the FCA.

Being aggrieved by the aforesaid decision, the appellant filed this appeal raising five grounds of appeal namely:

1. That the respondent erred in law and fact and/or otherwise misdirected by misinterpreting the provisions of Article 8, 10, 11 and 12 of the Distribution Agreement between the appellant and Toyota Tanzania Ltd and holding that the appellant is in control of the business of Toyota Tanzania Ltd.

2. That the respondent strained into a serious error by holding that on the basis of section 5 of the Fair Competition Act, 2003 the appellant has a presence in Tanzania through its exclusive distributor Toyota Tanzania Ltd.

3. That the respondent erred in law and fact and/or otherwise misdirected itself by holding that the relevant market in Tanzania is the market for the distribution of new motor vehicles only.

4. That the respondent erred in law and fact and/or otherwise misdirected itself by holding that the appellant has a footing in the relevant market through Toyota Tanzania Ltd and in

consequence the market share of the appellant and Alliance Autos Ltd is above 35% threshold.

5. That the respondent erred in law and fact and/or misdirected itself by holding that the post merger firm (Alliance Autos ltd) has the potential of being unilaterally capable of profitably and materially reducing competition in the relevant market for a significant period of time without regard to the market dynamics in the relevant market.

The respondent has strongly resisted the appeal by filing a reply to the memorandum of appeal dated 2nd May, 2013 disputing all grounds of appeal. Both parties filed list of authorities and skeleton arguments as required by rule 22 and 28 of the Fair Competition Tribunal Rules, 2012 (hereinafter referred to as "the FCT Rules") respectively.

On the date set for hearing, Mr. Daudi Ramadhani holding brief for Mr. Zaharan Sinare, learned counsel for the appellant, prayed for an adjournment of the matter on the reason that Mr. Zaharan Sinare, the lead counsel who had the conduct of the matter, was attending funeral services of his relative in Moshi. In view of this, the Tribunal ordered that the matter be argued by way of written submission and both parties respectively complied by filing written submissions as scheduled.

The appellant adopted all grounds of appeal and made submissions in support thereof.

Arguing ground 1 of the appeal, Mr. Zaharan Sinare, learned counsel for the appellant, submitted that the respondent only relied on articles 8, 10, 11 and 12 of the Toyota Distribution Agreement and decided that the appellant is in control of Toyota Tanzania Ltd (hereinafter referred to as “TTL”) (which is a local dealer with a 100% shareholding belonging to Karimjee Jivanjee Ltd) and as a result had a presence in Tanzania thorough TTL. It was his argument that the respondent excluded other clauses under the distribution agreement in order to determine the control of TTL by the appellant. Learned counsel pointed out articles 5, 14 and 22 as articles that were excluded by the respondent in reaching its decision. Mr. Sinare stated that article 5 sets out the term of the agreement as three (3) years subject to termination or renewal. He submitted that the term is proof that exclusive distribution agreements are not perpetual but are in general concluded for 3 to 4 years and are likely to change hands regularly and contain several exit clauses for both parties prior to the termination period. Therefore, he strongly submitted that control cannot be sustained where exit/termination clauses are provided for. In support of his argument, learned counsel pointed out that Nissan has terminated the distribution agreement with CFAO Motors Tanzania Ltd to distribute Nissan branded vehicles and spare parts in Tanzania.

Learned counsel further stated that Article 14 provides that TTL shall remain solely responsible for any decision regarding its business management and the results therefrom and article 22 provides that TTL is free to, and shall independently establish its own retail price in Tanzania for each of Toyota products. These articles, learned counsel submitted, prove that TTL has absolute control over its management and other resources.

It was also appellant's submission that control cannot be identified on the basis of a mere contract (i.e. the distribution agreement) in the absence of analyzing other means of control such as control by the acquisition of shares or assets. Mr. Sinare asserted that according to a European Union Notice (Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on Control of Concentration between Undertakings (2008)c 95/01)) which defines control for the purposes of merger and acquisitions assessment, in order to confer control on a contractual basis, the contract must lead to a similar control of the management and the resources of the undertaking as in the case of acquisition of shares or assets. Such contracts must be characterized by very long durations ordinarily without a possibility of early terminations for the party granting the contractual rights, insisted Mr.Sinare. Furthermore, referring to Blacks Law Dictionary the appellant's counsel submitted that control over an entity (or a controlled company) in the usual business practice is defined as one entity owning most of another entity's voting stock or where majority of the stock is being held by another person, which is not the case in the instant appeal.

As regards ground 2 which is similar to ground 4 of the appeal, Mr. Sinare asserted that as defined under sections 5(4) of the FCA, the respondent was wrong to take into consideration of the wholesale and retail distribution of brand new Toyota motor vehicles and was also wrong to restrict itself to only new motor vehicles. In his lengthy submission, learned counsel for the appellant stated that the respondent in its decision combined the market share of TTL, that is, 40%, (being that of the appellant) and that of Alliance Autos Ltd, that is, 0.055% and concluded that the combined total market share of the appellant and target firm will increase to 40.055% hence exceeding the prescribed threshold of 35%. Mr. Sinare further stated that the argument by the appellant in the merger notification that the market share would still be below 35% post merger is supported by the fact that TTL's 40% market share on the retail distribution market is not attributable to the appellant. He was very emphatic that the appellant supplies the Tanzanian market at wholesale level as an exporter of Toyota cars from Japan but is not directly or indirectly active on the retail market for motor vehicles, furthermore, there is no control of the appellant over TTL which, in Mr. Sinare's view, is totally independent. Learned counsel insisted that since the appellant has neither control of TTL nor any other subsidiary in the relevant market at the time of acquisition, the market share of the appellant and Alliance Autos Ltd is therefore below 35% as submitted in the merger application. The respondent's reference to the presence of TTL during hearing as proof of its control by the appellant was without any basis, vehemently submitted learned counsel for the appellant.

Submitting on ground 3 of the appeal on relevant market, learned counsel for the appellant contended that the conclusion by the respondent that importation and distribution of brand new motor vehicles and second hand motor vehicles do not belong to the same market was wrong. This conclusion, he said, resulted from the assumption that customers in these two segments of the market differ in terms of income and preferences. It was the appellant's submission that the relevant market in Tanzania is the market for both used and new motor vehicles. To cement his argument, the appellant's counsel relied on Business Monitor International Quarterly Auto Report published by Business Monitor International Ltd on August, 2012 which concluded that the market in Tanzania is one which is amalgamated because the main competitors of distribution in new motor vehicles are not new distributor of brand new cars of a different kind but resellers of second hand motor vehicles of the same brand.

Learned counsel therefore submitted that dealers in Tanzania are faced with intense competition from second hand sellers/distributors, which he said was a fact which the respondent failed to take into account.

Furthermore, the appellant's counsel maintained that the wholesale supply and retail supply market cannot be amalgamated since suppliers (offer side) and acquirers (demand side) on these markets are different and the goods and services provided by them, are also different. In addition Mr. Sinare submitted that traditionally under competition law, the market for the supply of vehicles on which car manufacturers/exporters supply local distributors is considered as upstream and thus distinct from the downstream market for the domestic/retail distribution and related services on which car dealers sell vehicles to domestic consumers. As such, learned counsel asserted that the current distribution agreement represents the wholesale supply of motor vehicles to TTL by the appellant and therefore cannot be amalgamated. Concluding his argument on this ground, Mr. Sinare insisted that the distinction between wholesale market and retail market was supported by the European Commission in its decision in **Case No. COMP/m.6718-Toyota Tsusho Corporation/CFAO** to allow the acquisition of control in CFAO by the appellant.

Arguing ground 5 of the appeal, appellant's counsel submitted that in testing **whether the post-merger will be able (when acting alone) to profitably and materially refrain or reduce**

competition for a significant period of time, the respondent stated that the relevant market is characterized by exclusive agreements which give the distributor exclusive rights to distribute certain vehicles in the market. Learned counsel stated that the consequences drawn thereof is that the appellant's post-acquisition would derive a substantial possibility of behaving unilaterally from its exclusive distributor (that is, TTL) and subsidiary (that is Alliance Autos Ltd) since they will both be under the watch of the appellant thus increasing the likelihood of taking unilateral decision in terms of pricing and supply levels. The appellant's counsel asserted that market power is in the hands of car manufacturers as the distributors' market shares are highly dependent on the manufacturers.

In his view, the appellant would not in any case be able to restrain competition in the market acting alone for a significant period of time. Learned counsel insisted that the motor vehicle retail market is in the hands of the manufacturers, and distributorship agreements, far from being everlasting agreements, are rather short-term agreements and can easily be terminated by the manufacturers should sale targets not be achieved or for any other reasons. The termination by Nissan over the CFAO distribution agreement is a best example to show manufacturer's power over distributors, insisted appellant's counsel.

In response, the respondent first adopted its reply to the memorandum of appeal, skeleton arguments and list of authorities filed before this Tribunal to form part of its submissions.

Countering ground 1 of the appeal, Dr. Deo Nangella, leading counsel for the respondent, assisted by Mr. Nyenza, Mr. Ugulla and Ms Mloge, submitted that the submission by the appellant that the distributorship agreement contains a timeframe and exit clause as in article 5, 14 and 22 of the distribution agreement is incorrect. Learned counsel submitted that, control of one entity over the other is a matter of fact and such control can either be direct or indirect. He asserted that, the level of influence one has over the other, establishes the extend for which he can exercise his control over such other person. Dr. Nangella was very categorical that in this appeal, it is not disputed that TTL acts for the appellant as its sole distributor of its products in Tanzania. In other words, TTL is an agent of the appellant in Tanzania appointed to distribute its products, Toyota brand new cars, in the Tanzanian market. Dr. Nangella insisted that the Agent-principal relationship gives the appellant indirect presence in the Tanzanian market.

On the argument that control cannot be identified on the basis of a mere contract, Dr. Nangella submitted that it is trite law that all acts done by the agent should be authorized by the principal. In this regard, the principal is the one who dictates terms, or has control of what should be done. The respondent's counsel maintained that the relationship between the appellant and TTL is material in determining whether the appellant has direct or indirect influence over the conduct of TTL. To buttress his arguments, Dr. Nangella made reference to articles 8, 10, 11 and other articles such as article 13 and 22 of the exclusive dealership agreement.

Respondent's counsel was very emphatic that, a careful reading of articles 8, 10 and 11 of the distributorship agreement reveals what kind of acts TTL can perform for the appellant apart from being a distributor of its products in Tanzania for a commission. The said articles clearly shows that the appellant has substantial influence over TTL's decision making with regard to the sale/distribution of Toyota brand new motor vehicles in the Tanzanian market. Respondent's counsel also made reference to other articles of the distributorship agreement, that is, articles 3, 6 and 13 to further cement his argument that the appellant has an influential control of the commercial management of the operations of TTL.

In view of the above articles, the respondent's counsel submitted that, properly construed, the referred articles show that the appellant is the brain of the business conducted by TTL and hence has a footing in the Tanzanian market through TTL and that acting indirectly through TTL, has a market share of 40% in the defined relevant market. For such market share, the appellant was found to be effecting a merger contrary to section 11(1) of the FCA.

Challenging the appellant's reliance on the EU Notice (supra) in defining control for the purpose of mergers and acquisition assessment, Dr. Nangella submitted that in the Tanzanian context, the term "control" is not defined under the FCA. Notwithstanding this fact, learned counsel maintained that the term "control" does not necessarily need to be attached to the ownership of a company, but it can be ability to influence the market and business policy of the company (material influence). Citing the EU Notice referred to by the appellant, Dr. Nangella submitted that the EU Notice defines means of control at page C95/7 as follows:

> "The possibility of exercising decisive influence on an undertaking".

Dr. Nangella therefore submitted that it is very clear that the appellant satisfies this criterion as it has the potential to exert enormous powers over TTL including a wide range of possibilities to exercise decisive influence on TTL's business operations.

In addition, Dr. Nangella submitted that one of the purposes of the merger control regime globally is to control concentration of companies' business in a particular industry. Respondent's counsel pointed out that it is the duty of the respondent to analyze and determine whether one company has commercial influence over another company to which this appeal such influence clearly exists. In his view, the arguments submitted by the appellant are inconclusive since the form of control envisaged in the distribution agreement between the appellant and its appointed local distributor (TTL) clearly reveals that the appellant exercises decisive influence (material influence) over the TTL's market and business policy, hence satisfying the means of control criteria.

Dr. Nangella was emphatic that taking into account the manner in which the appellant advances his argument in the course of defining the issue of control, it is clear that the appellant's reference to the European Competition Merger Regulation (hereinafter referred to as "ECMR") is misconceived. He submitted that ECMR defines control for the purpose of determining whether there is a notifiable merger. Respondent's counsel went on submitting that in the context of this appeal, control is interpreted in order to determine kind of economic relationship between a party to a merger and non-party. In this appeal, learned counsel asserted that the appellant is not merging with TTL but their relationship has been examined to determine future contestability of the market in supply and distribution of brand new Toyota and Nissan branded cars in Tanzanian market.

As regards appellant's reliance on Blacks Law Dictionary in defining control, Dr. Nangella submitted that the definition does not restrict the respondent from taking a wide view of the concept. Learned counsel cited the case of **Commercial Solvents v. Commission (Joined Case No. 6 & 7/73) (1974) ECR 223** to support his argument.

The respondent further submitted that the submission by the appellant that Nissan Motors has terminated its distributorship agreement with CFAO has no supportive evidence and that even if it has, it cannot be relied upon in determining this appeal since this is information which ought to have been disclosed at FCC at the time the appellant was lodging its application for the merger. Dr. Nangella was of the view that it could also have been submitted at that time as information evidencing change of circumstances. In this regard, he said, it cannot even exonerate the appellant from the fact that it has control of or material influence on TTL's operations, and which control had the potential to affect competition in the relevant market had the merger been approved.

Disputing grounds 2 and 4 of the appeal which relates to the same issue as to ***whether the appellant has a presence in Tanzania through TTL and as a consequence of which the market share of the appellant and Alliance Autos Ltd is above the 35% threshold,*** Dr. Nangella maintained that the appellant has indirect control of TTL and in that regard the combined shares of the TTL (40%) (in which the appellant exert indirect influence (control)) and that of the target company (0.55%), if allowed would be in breach of section 11(1) of the FCA. It was respondent's counsel submission that it would utterly be wrong, taking into account the principles governing agency relationship, to assume that the appellant is not doing any business in Tanzania and hence, the intended merger cannot produce any anti-competitive consequences in the Tanzanian market. Dr. Nangela was of the firm view that the respondent has considered the post-merger situation and found that the appellant would increase its economic strength that would facilitate the hindering of effective competition on supply and distribution of brand new motor vehicles in the Tanzanian market

Respondent's counsel further asserted that in antitrust analysis, determining market power is not solely confined in to the market shares (statistics). Citing the case of **United State v. General Dynamics (415 US 486, 94s Ct 1186.39L Ed 530 (1974)),** learned counsel contended that while the market shares of a firm are a primary index of determining its market power, they are not a sole determinant of the anti-competitive effects of a merger. It was respondent's counsel argument that one has to look at the structure of the market itself, history and the probable future in order to ascertain the probable anti-competitive effects of the merger in question since merger analysis is ex-ate. In the

Tanzanian context, learned counsel submitted that historical analysis of the facts indicates that brand new Toyota cars are from 1965 solely supplied by TTL as the sole distributor. As such, Dr. Nangella was of the view that the argument of the appellant that the distribution agreement is only meant for a short duration is not a guarantee that it cannot last longer than that period.

On the issue of extension to both wholesale and retail in defining market, respondent's counsel submitted that guidance is given under section 2 of the FCA which provides that competition, market and abuse of market power are economic concepts hence they will be interpreted on the basis of economic principles. Learned counsel contended that the business of TTL is vertically integrated hence in defining market it is necessary to consider the supply chain in both the wholesale and retail levels. Dr. Nangella was very emphatic that the respondent examined the relationship of the appellant and TTL and established that they cannot be separated as it is evident from the articles of the exclusive distributorship agreement between the appellant and TTL.

Attacking appellant's submissions on ground 3 of the appeal that the relevant market should be a combination of both brand new motor vehicles and used motor vehicles and that the market for wholesale and retail sale is a separate market, Dr. Nangella submitted that the relevant market in the transaction is the supply and distribution of brand new motor vehicles and that due to the vertical relationship nature of the relevant market, the wholesale and retail market cannot be separated. In support of his submission, Dr. Nangella cited the case of **Nederlandsche Banden-Industrie Michelin NV v. Commission (1983) ECR 3461** (popularly known as **"the Michelin's case")** to buttress his argument.

Furthermore, learned counsel submitted that there are many factors to support respondent's conclusion that the relevant market is that of brand new motor vehicles and not used motor vehicles. In his view, buyers of the cars consider so many factors before they make a decision to buy a certain car. This is more important especially for the government, ministries, public institutions and international agencies because the procurement rules restrict them when they are to decide which kind of car they should buy as between new and used motor vehicle, learned counsel submitted. Citing section 66(1) of the Public Procurement Act, 2011 learned counsel submitted that government agencies, ministries and public institutions can only purchase used railway machinery, ship or aircraft but cannot purchase used cars. In Tanzania, two brands compete in this market. These are Toyota and Nissan, vehemently asserted respondent's counsel.

Dr. Nangella submitted that in assessing the strength of chains of substitution, the question should be whether a hypothetical monopoly supplier of new cars would find it profitable to raise its price out of line with those charged by suppliers of used cars. In this regard, learned counsel pointed out that the brand new cars and used cars are not in the same market due to a number of factors such as warranties, after sale service, and reputation for reliability and safety. It was respondent's counsel submission that used vehicles are not substitute for new vehicles. To support his argument, respondent's counsel stated that in **Case No. Comp/m.6718 – Toyota Tshusho Corporation/CFAO,** the European Commission maintained a distinction between used and new vehicles by citing the **Case of COMP/M.5347 – Mapfre/Salvador Caetono/JV's.**

In his submissions, learned counsel pointed out two other reasons why second hand motor vehicle constitutes a separate market segment from brand new motor vehicles. **Firstly,** demand-wise for new cars, is not the same as for used motor vehicles in a small and developing economy like Tanzania. Most poor customers cannot afford a new brand Toyota or Nissan Car. Consequently, they go for the second hand market. Dr. Nangella cited by way of analogy **the Michelin's case (**supra) and **Commercial Solvents' case** (supra), to buttress his argument. Learned counsel submitted that in the **Michelin's case** (supra) there was an issue whether new tyres and replacement tyres (retread tyres) belong to the same relevant market and the European Commission found that they belong to different relevant market. Structure of demand for each group of product was also found to be different.

Secondly, learned counsel pointed out that price-wise there is a huge difference between used and new cars, and that after-sale services are purely a reserve for new cars and as such it is not offered to clients who buy used cars. Respondent's counsel again cited the **Michelin's case** where retreads (used tyres) were excluded from new tyres market because they cannot replace new tyres, and submitted that this is so because their quality is inferior and even safety issues are not at par with the new ones. This by analogy, submitted learned counsel, is applicable to the case at hand and in this regard, new cars and used cars cannot be in the same market. Respondent's counsel further cited the case of **Toyota Tshusho Corporation and Penult Printemps Redoute v. The Competition and Consumer Protection Commission (Case No. CCPC/MER/070)** (popularly known as "**the Zambian case"**) which he said was a similar case by the appellant where its merger application was rejected by the Zambia Competition and Consumer Protection Commission, where it was held that new cars and used cars are in a separate market and that new cars are not substitutes for used cars as they do not compete on price or quality. Learned counsel also pointed out that the distinctive market argument is further supported by the UK Report on New Cars Market, 2002 (popularly known as "**the New Cars Report**") (at paragraphs 2.64(c); 2.75-2.76 and 2.79n-2.80).

Respondent's counsel concluded his submission on ground 3 forcefully by submitting that from the above analysis the brand new cars and used ones are in separate market and in defining market, wholesale and retail market are in the same market.

Coming to the last ground of appeal, Dr. Nangella submitted that the appellant has erroneously faulted the respondent's interpretation and analysis of the provision of the FCA regarding the post-merger market dominance by the appellant (acting alone and profitability test). In this regard, learned counsel pointed out that the appellant erroneously submitted that the market power is in the hands of manufacturers as distributor market share, depended highly on manufacturers. Respondent's counsel contended that had the merger application been allowed, both competing brands would be under the watchful eye of one distributor, thus suffocating the chances of inter-brand competition.

Dr. Nangella further pointed out that as it may be gathered from the appellant's submissions, the market for motor vehicle is controlled by manufacturer and that if one wants to determine the market share of the distributor, he cannot do it minus the manufacturer, because the two are linked together. To this argument, Dr. Nangella submitted that the respondent was correct to hold that the TTL is controlled by the appellant who controls the power to terminate the agreement in case TTL failed to reach the target agreed. Therefore, the market share of TTL is the market share of the appellant and is the market share of the manufacturer.

Dr. Nangella strongly submitted that every merger or transaction is and should be analyzed so as to detect its future effects to the economy. Citing section 11(1) of the FCA, learned counsel submitted that, a merger is prohibited if it creates or strengthens a position of dominance in a market. Therefore, learned counsel was very emphatic that the test is whether the post-merger firm will result into either creation of a dominant position or strengthening the existing dominant position. Dr. Nangella also cited the provisions of section 5(6) of the FCA to buttres his argument.

Dr. Nangella further submitted that in reviewing merger application, the respondent had to consider both unilateral and coordinated effects of the transaction in the relevant market. As regards unilateral effects, respondent's counsel submitted that the analysis is intended to establish whether the resulting firm will be able to unilaterally exercise market power through rising prices, reducing output, quality or variety in a bid to gain unjustifiable profit. Learned counsel stated that this is particularly provided for under section 5(6)(a), read together with section 5(6)(b) and that for this case both (a) and (b) must apply. In testing whether the post-merger firm by acting alone can profitably and materially restrain or reduce competition in the market for a significant period of time, Dr. Nangella asserted that two questions may be asked. **Firstly**, **is the appellant able to exploit customers through excessive price?** And secondly, is the appellant being able to exclude its competitors through for instance, **a margin squeeze strategy (wholesale price lower than manufacturers' price:, power over price and exclude?)** Learned counsel pointed out that, in addressing these two questions, the respondent found the answer to both to be in the affirmative for the reason that if the merger application was cleared, the appellant would acquire its fierce competitor under one roof so as to kill competition. This being the case, Dr. Nangella submitted that the respondent rightly prohibited the proposed merger because of the post-merger result.

Respondent's counsel further pointed out that the relevant market is characterized by franchise agreement between manufacturers, dealers and distributors which grant exclusive rights to distribute certain brands of motor vehicles in the market. With regard to appellant's submissions that the post-merger firm will increase investment and expand business in Tanzania, Dr. Nangella strongly submitted that the combined market power has substantial possibility of behaving unilaterally through their exclusive distributor and subsidiaries, since they will be sister companies and in so doing increasing their likelihood of reducing competition, reducing choices and rising prices to the detriment of consumers in the relevant market. In his view, the appellant will be in control of both competitors in the Tanzanian market and be able to decide what should be supplied in order to promote certain type of car and to what amount and therefore reducing choices and increasing prices.

As for coordinated effects of the transaction, Dr. Nangella on behalf of the respondent asserted that in analyzing the merger in question, the respondent satisfied itself that the proposed merger will result into collusion. Learned counsel was of the view that parties through a merger can coordinate their affairs which can arise to coordinated effects whereby the appellant could be able to coordinate prices of both CFAO and TTL. It was also his view that the appellant could be able to co-ordinate output of the two competing brands in the market, hence reducing competition for significant period of time. Further, learned counsel submitted that the appellant could also coordinate customer allocation and that such coordination would result in a loss to consumers' welfare due to high prices, citing the provisions of section 3 of the FCA, insisting that this would be against the main objective of the FCA.

Dr. Nangella concluded his submission by inviting this Tribunal to uphold the decision of the respondent as sound and correctly arrived at and dismiss the appeal in its entirety with costs.

We have carefully considered the submissions and arguments advanced by the contending learned counsel in this matter in the context of statutory framework, together with the exclusive distribution agreement entered between the appellant and TTL, and case law from other jurisdictions which we found to be very persuasive.

Before we proceed with our decision, we would first like to express our appreciation to the contending learned counsel for their well researched submissions and the able manner in which they presented their arguments.

We would like to start by pointing out that generally, the Competition Policy addresses the problem of abuse of dominance, anti-competitive agreements and market imperfection arising from monopolistic behavior. Its objectives are well reflected under section 3 of the Fair Competition Act 2003 which is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and to prevent unfair and misleading market conduct throughout Tanzania, in order to increase efficiency in the production, distribution and supply of goods and services, promoting innovation, maximizing the efficient allocation of resources and protecting consumers. We should add that, the appeal before us is centered on the protection of effective competition and consumers welfare.

Starting with ground 1 of the appeal, the key issue before this Tribunal for determination is ***whether the appellant is in control of the business of TTL through Articles, 8, 10, 11 and 12 of the exclusive distributorship agreement between TTL and the appellant.*** It was a submission by the learned counsel for the appellant that the appellant is not in control of TTL since under the exclusive distributorship agreement there are exit/termination clauses and therefore control cannot be sustained where exit/termination clauses and time frame are provided for. In support of his argument, learned counsel for the appellant made reference to Articles 5 which sets out the term of the agreement as three (3) years subject to it being terminated or renewed, article 14 which provides that TTL shall remain solely responsible for any decision regarding its business management and the results therefrom and Article 22 which provides that TTL is free to, and shall independently establish its own retail price and the suggested retail price in Tanzania for each of Toyota products. It was also appellant's submission that control cannot be identified on the basis of a mere contract (exclusive distributorship agreement) in the absence of analyzing other means of control such as control by the acquisition of shares or assets.

In our considered opinion, we find it extremely difficult to agree with these submissions. We share the same view as submitted by the respondent that control of one entity over the other is a matter of fact and such control can either be direct or indirect. The level of influence one has over the other establishes the extent for which he can exercise his control over such other person. We should point out that in this appeal, it is not disputed that TTL acts for the appellant as its sole distributor of its products in Tanzania. In other words, we would say that TTL is an agent of the appellant in Tanzania appointed to distribute its products, Toyota brand new cars in the Tanzanian market. The relationship between the appellant and TTL is material in determining whether the appellant has direct or indirect influence over the operations and conduct of the TTL. The materiality of the relationship between the apellant and TTL is clearly envisaged through articles 8, 10, 11 and 12 of the exclusive distributorship agreement when read and analyzed together with other provisions, and the entire agreement as a whole.

A careful reading of Articles 8, 10 and 11 of the exclusive distributorship agreement, for instance, reveals what kind of acts TTL can perform for the appellant, apart from being a distributor of its products in Tanzania for a commission. The said articles clearly shows that the appellant has substantial influence over the TTL's decision making with regard to the sale/distribution of Toyota brand new vehicles in Tanzanian market.

Article 8 makes reference to setting of business target, that is, the number of targets to be reached such as how many new motor vehicles should be sold per annum. It is our view that from the competition perspective, this is a very **important piece of market information since it has a repercussion on price competition versus competing brands**. Considering this fact alone, if the merger in question was to be approved by the appellant and the two car brands, Toyota and Nissan, were to be under the control of one distributor, the possibilities of creating artificial scarcity of a particular competing brand, in order to rise prices could be deliberately made since all would be under the watch of the appellant which indirectly controls TTL through the exclusive distributorship agreement regardless of the existence of the exit/terminations clauses. This would ultimately have negative repercussions on consumers in Tanzania in respect of the two competing brands, Toyota and Nissan.

Article 8 also makes reference to an agreement on sales plans, market share targets of Toyota products in Tanzanian market and annual turnover target. All these, in our view comprise purely sensitive business information which is not disclosed to competitors. If CFAO brands are to be under the same roof as Toyota brands, with all these information already gathered and supplied to the appellant, it is very clear that the appellant **being the sole distributor of both competing brands will have an upper hand in setting targets for each brand and there will be no more competition for the benefit of consumers**. In other words, if the appellant also controls the distribution of Nissan brand new cars in the Tanzanian market, it can **choose what to supply, how many units to be supplied**, **and when to be supplied, when to promote what and when to reduce the amount of which brand.** In this sense, we have no doubt whatsoever that the **main victim will be consumers** and particularly the government, ministries, agencies and other public institutions who are the main consumers of brand new cars. It is therefore our firm view that if the transaction was allowed, the entire process and meaning of inter-brand competition would have been lost.

It is worth noting that, competition is at the end of the day, promote consumer in terms of beneficial choices between competing bands price-wise. If the merger was to be allowed, this benefit would have been lost. Control of the TTL by the appellant through the exclusive distributorship agreement can also be observed under article 12 of the agreement. Under this article, TTL is obliged to avail all key business information as may be requested by the appellant periodically. If one reads clause 12(8) of the agreement, this information includes that of competing brands (that is, Nissan). Since TTL will be acting as an agent of the appellant, it is clear that by availing such information to the appellant, indirectly the appellant sets its presence in the Tanzanian market and the merger would have significantly strengthened its dominance in such a market and therefore negatively affecting competition.

Furthermore, influential powers of the appellant over TTL can be seen under Article 10 of the agreement as the appellant is enabled to restrain or prohibit TTL from distributing and selling products supplied outside Tanzania. Article 11 also provides that, TTL cannot question or challenge the decision of the appellant or Toyota Motors Corporation (TMC) where they decide to direct or, through a third party, sell or distribute Toyota products within the territory. In addition, TTL is required to cooperate and comply with inspection or other service requests from the appellants/TMC or a designated third party.

Article 12 expresses TTL's obligations towards the appellant that at anytime or periodically, TTL is supposed to furnish the appellant with sales, stock, promotion and financial information. Basically, the article requires TTL to furnish the appellant with all the needed information that will assure the survival and growth of the appellant's business in Tanzania. This, we would say, is another clear indication that the appellant has its presence in Tanzanian market indirectly through TTL.

We should also point out that the articles referred to above are not the only ones which give the appellant control and indirect presence in the Tanzanian market. There are other articles such as article 3 which empowers the appellant to change the models supplied in Tanzania. Article 6 requires TTL to cooperate with the appellant. Article 13 requires TTL not to implement any executive employees and shareholders changes unless is authorized by the appellant. All these articles, and many others prove that the appellant has an influential control of the commercial management of the operations of TTL.

In view of the above articles, we are of the firm view that the appellant is the brain of the business conducted by TTL and hence has a footing/presence in the Tanzanian market through TTL and that acting indirectly through TTL, has a market share of 40% in the defined relevant market and therefore the finding by the respondent on this issue cannot be faulted.

It was also a submission by the appellant that "control cannot be identified on the basis of a mere contract (that is, exclusive distributorship agreement) and made reference to the EU Notice (supra) defining control for the purposes of mergers and acquisitions assessment. Learned counsel also relied on Black's Law Dictionary and submitted that control should have been looked at from the vantage point of ownership of an entity's voting stock or majority shares.

We would first like to point out that the term "control" is not defined in the FCA. In our view (and as correctly submitted by the respondent) the term "control" does not necessarily need to be attached to the ownership of the company, but it can be ability to influence the market and business policy of the company (that is, material influence). Indeed, the EU Notice referred to by the appellant's counsel himself defines "means of control" at page C95/7 as follow:

> "**the possibility of exercising decisive influence on an undertaking"**. (Emphasis ours)

It is apparent from the provisions of the exclusive distributorship as we have already stated above, the appellant satisfies this criterion as it has the potential to exert enormous powers over TTL including a wide range of possibilities of exercising decisive influence on TTL's business operations.

It is important to note as correctly submitted by the respondent that, one of the purposes of the merger control regime is to control concentration of the companies' business in a particular industry. Therefore, the term of relationship between companies matters a lot in determining the effect of concentration of control. It is therefore the duty of the respondent to analyze and to determine whether one company has commercial influence over another company to which this appeal such influence exists. In view of this fact, we are of the settled mind that, the arguments advanced by the appellant are not conclusive since the form of control envisaged in the exclusive distributorship agreement between the appellant and its appointed local dealer/distributor (TTL) clearly reveals that the appellant will potentially exercise decisive influence over the TTL's market and business policy hence satisfying the means of control criterion.

We also find it important to point out that taking into account the manner in which the appellant advanced its argument in its submissions in the course of defining control, it is clear that the appellant's reference to the European Competition Merger Regulations' (ECMR) is a total misconception. We agree with the respondent's counsel that, ECMR define control for the purposes of determining whether there is a notifiable merger. But in the context of this appeal, control is interpreted in order to determine the **kind of economic relationship between a party to a merger and non party**. In this appeal, the appellant is not merging with TTL but their relationship has been examined to determine future contestability of the market power in supply and distribution of brand new Toyota and Nissan cars in Tanzanian market.

We are of the firm view that reference as to the meaning of control under the Blacks Law Dictionary to which the appellant has relied on, does not restrict the respondent from taking a wide view of the concept. We find authority to hold so from the **Commercial Solvents' case** (supra) which we find to be very persuasive, where it was held as follows:

> **"under competition law, it is possible to go even further into the complex of legal and factual in order to discover reality of control than is possible under company law**" (Emphasis ours).

Based on the foregoing, we find that the finding by the respondent that the appellant was in control of the operation and conduct of TTL was correctly arrived at. Therefore, ground 1 of the appeal lacks merit and we accordingly dismiss the same.

Grounds 2 and 4 of the appeal relates to the issue as to ***whether the appellant has a presence/footing in Tanzania through TTL and as a consequence of which the market share of the appellant and CFAO (Alliance Autos Ltd) is above the 35% threshold.*** It was the appellant's argument that since the appellant does not have control over TTL which has a market share of 40% in the relevant market, the market share of the appellant and the target company (Alliance Autos Ltd) is below 35%. It is not disputed that the market share of TTL is 40% and that of the target company is 0.055% and when combined together the market share would be 40.055%.

Without wasting a lot of time on this issue, having found that the appellant has indirect control of TTL through exclusive distributorship agreement in which the appellant exerts indirect influence over the operations of TTL, we are of the settled mind that the appellant has a presence/footing in the Tanzanian market and its post-merger market share would be 40.055% which is beyond the threshold prescribed in the FCA. Equally, grounds 2 and 4 of the appeal also collapse and we accordingly dismiss the same.

Coming to ground 3 of the appeal, the issue is ***whether the relevant market in Tanzania is the market for the***

distribution of new motor vehicles only (as opposed to new and used) and whether the supply at wholesale level and the supply at retail level can be amalgamated. The appellant vehemently submitted that the relevant market should be a combination of both used and brand new cars and that the market for wholesale and retail sale are two distinct markets. The appellant relied on Business Motor international Quarterly Auto Report which concluded that dealers in Tanzania are faced with competition from second hand car sellers/distributors.

With much respect, we cannot accede to that submission. Sincerely, after giving the matter careful consideration, we find that the relevant market in the transaction is that of supply and distribution of brand new motor vehicles and not a combination of both brand new and used cars as asserted by the appellant. As correctly submitted by the respondent (and which argument we strongly share), brand new cars and used cars belong to separate markets due to the following factors: Firstly, brand new cars are characterized with warranties whereas used cars have none. Secondly, brand new cars further are characterized by after-sale service as against used cars where the seller does not offer any assurance that they will be benefiting from after-sale service. Thirdly, brand new cars are characterized by reputation for reliability and safety as against used cars which are sold "as they are basis" and that the customer buys at his or her own risk.

And fourthly, in Tanzania used cars cannot be bought by public institutions as specified in the Public Procurement Act. Clearly, these features distinguish the two markets.

We should also point out that used motor vehicles are not substitutable for new motor vehicles. In the case of **Toyota Tshusho Corporation/CFAO** (supra) the European Commission maintained a distinction between used and new vehicles by citing the decision in **COMP/M.5347 Mapfre/Salvador Caetano/JV's** (EU-Public version Case No. Comp/m.6718 – Toyota Tshusho Corporation/CFAO, Brussels 13.11.2012, para 11-13).

The argument that second-hand motor vehicles constitute a separate market segment from brand new motor vehicles is also justifiable in terms of **demand and price**. In terms of demand, the demand for new cars, for instance, is not the same as the demand for used cars in a small and developing economy like Tanzania. Most poor customers cannot afford to buy brand new Toyota or Nissan car and as a result they go for second hand market. By way of analogy, in **Michelin's case** (supra), there was an issue whether new tyres and retread (used) tyres belong to the same market. It was found that structure of demand for each group of product was different. In this case, the appellant had been angered because the European Commission had differentiated between new tyres and used ones (retreads) arguing that the market definition was too narrow.

In terms of price, there is a huge price difference between used and new motor vehicles. As already stated above, after-sale services are purely a reserve for new cars and such is not offered to customers who buy used cars. In the **Michelin's case** (supra) retreads (used tyres) were not found to be in the same market with new tyres because they could not replace new tyres as their quality is inferior and even safety issues are not at par with the new ones. Also in this case, it was stated that "**the market in the renovated tyres is a secondary market which depends on supply and prices…"** The prices were thus different in the two markets and we are of the firm view that this is similar to the case at hand. By way of analogy, we find this case to be very persuasive and is applicable to the instant case and therefore new cars belong to a separate market as against used ones. We should say that these factors make **the two products distinct from each other and therefore they squarely fall under different markets**.

In addition, we find it necessary to point out that the argument that brand new and used cars belong to different market is further supported by the decision of Zambia Competition and Consumer Protection Commission **in the case of Toyota**

Tshusho Corporation and Pinault Printemps Redoute v. The Competition and Consumer Protection Commission (supra) a similar case by the appellant, where the Zambian Competition and Consumer Protection Commission rejected the merger application by the appellant and held that new cars and used cars are in a separate market and that new cars are not substitutes for used car as they do not compete on price or quality. Citing with approval the decision of the European Commission in the case of **Toyota Tshusho Corporation/CFAO** (supra) the Zambian Competition and Consumer Protection Commission held that new vehicles and imported used vehicles were not in the same relevant market. The distinctive market argument is further supported by the New Cars Report where the report clearly defines the relevant product market to be that of **"all new cars and is separate from the market of used cars of all ages".**

As regards amalgamation of both wholesale and retail in defining market, guidance is given under section 2 of the FCA which provides that competition, market and abuse of market power are economic concepts hence they will be interpreted on the basis of economic principles. The business of TTL is vertically integrated hence in defining market, it is necessary to consider the supply chain, in both the wholesale and retail levels. As correctly submitted by Dr. Nangella, examination of the relationship between the appellant and TTL, clearly shows that the wholesale and retail market cannot be separated. As already stated above, the requirement of TTL to sell exclusively Toyota brand, to provide servicing and repair services with many additional restrictions and obligations imposed on TTL, covering such matters as sales targets, standards of showrooms and other facilities, stock levels, customer service, advertising and promotion, organization and staffing, training, accounting systems and the provision of detailed business information to the appellant by TTL, earning bonuses for meeting sales targets and a variety of other objectives clearly confirms that the appellant has control of TTL operation. The appellant has also control over the units of Toyota Cars to be supplied in the Tanzanian market regardless of whether or not the appellant has management control of TTL.

As we have seen above, due to the nature of vertical integration relationship of the relevant market, the wholesale and retail market cannot be separated. In **Michelin's case**, it was held that although when defining the market, the Commission had regard to the chains of dealers at the level of which the abusive conduct took place, this does not mean that the existence of a dominant position must be proved separately in the case of suppliers, competitors, buyers, dealers and users. "**The dominant position affects all of them ....because to obtain**

the products in question they must always approach the undertaking…”.

Therefore, in view of the above, we find that brand new cars and used/second-hand cars belong to two distinct markets and in defining the market, wholesale and retail markets cannot be separated. Consequently, ground 3 of the appeal must fail for lack of merit and we accordingly dismiss the same.

Coming to ground 5, which is the last ground of this appeal, the issue is ***whether the post merger firm has the potential of being unilaterally capable of profitably and materially reducing competition in the relevant market for a significant period of time without regard to the market dynamics in the relevant market***. It was the appellants' submission that market power is in the hands of manufacturers as the distributors', market shares highly depended on manufacturers. Counsel for the appellant therefore submitted that the appellant would not in any case be able to restrain competition in the market acting alone for a significant period of time and vehicle retail market is in the hands of manufacturers and the distributorship agreement is for short term and can be terminated at any time. Sincerely, we respectfully find it extremely difficult to agree with this submission. We find the answer to this question to be in the affirmative. We share the same view as submitted by the respondent that had the merger application been approved, this would exactly be the case as both competing brands would be under the watchful eye of the appellant, thus suffocating the chances of inter-brand competition.

As we have already stated when addressing ground 1 of the appeal, the respondent was correct to hold that TTL is controlled by the appellant and consequently the market share of the merger transaction if allowed would be 40.055% which is beyond the threshold prescribed in the FCA. Further, we should point out that the appellant also controls the power to terminate the distributorship agreement. We are therefore of the firm view that the respondent properly analyzed the merger transaction so as to detect its future effect to the economy. Section 11(1) of the FCA expressly provides for prohibition of a merger if it creates or strengthens a position of dominance in a market. Section 5(6) again provides that a firm will be considered to have a dominant position if (i) acting alone the post merger firm can profitably and materially restrain or reduce competition for a significant period, and (ii) the post-merger firms' share of the relevant market exceeds 35%. The analysis clearly shows that by acting alone, the resulting firm would be able to unilaterally exercise market power in terms of or through rising prices, reducing output, quality or variety in a bid to gain unjustifiable profits to the detriment of consumers. Thus, we find that the respondent's argument that the intended acquisition by the appellant of its fierce competitor (CFAO – Nissan) and make the two competitors under one roof would lessen competition in the relevant market to be sound and correct. This being the case, we are of the firm view that the respondent rightly prohibited the proposed merger because of the post – merger results.

We find it equally important to state that, the relevant market is characterized by franchise agreements between manufacturers, dealers and distributors which grant exclusive rights to distribute certain brands of motor vehicles in the market. Despite the appellant's submission that the post merger firm will increase investment and expand business in Tanzania, the combined market power would have substantial possibility of behaving unilaterally through their exclusive distributor and subsidiaries. Post merger firm will be sister companies and in doing so increasing the likelihood of reducing competition, choices and rising prices to the detriment of the consumers in the relevant market. In other words, the appellant will be in control of both competitors in the Tanzanian market and be able to decide what should be supplied in order to promote certain type of cars and to what amount.

Apart from unilateral effects, the intended merger could also result into co-ordinated effects – that is, collusion. As correctly pointed out by Dr. Nangella, the parties through a merger can coordinate their behavior which would arise to co-ordinated effects whereby the appellant could be able to coordinate output of the two competing brands in the market, hence reducing competition for significant period of time. Furthermore, the appellant could coordinate customer allocation which would result in a loss to customers' welfare due to high prices and thus defeating the objectives of the FCA set out in section **3 which is to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in market and preventing unfair and misleading market conduct throughout Tanzania.** Sincerely, we should say that if the merger was to be allowed, it would have facilitated coordination of the market between two previously competing brands, and this would have adversely affected competition in the relevant market. Therefore, we find the decision of the respondent to be sound. Equally ground 5 is dismissed.

Before we conclude our judgment, we would like to say something by passing. We have observed with interest the submission by the appellant that Nissan has terminated its distributorship agreement with CFAO Motors Tanzania Ltd to distribute Nissan Motors branded vehicles and spare parts vide a letter dated 25th June, 2013. What is interesting is that this information is not supported by any evidence since the alleged letter is not part of the Tribunal's records. It is our firm view that this information cannot be relied upon in determining this appeal even if there was supportive evidence. This is a kind of information which could have been submitted before the respondent as information evidencing change of circumstances and not raising it on appeal.

In the premises, and for the reasons stated above, we find the appeal lacks merit. Accordingly, we uphold the decision of the respondent and dismiss the entire appeal with costs.

It is so ordered.

Signed by

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Onesmo M. Kyauke – Member
21/10/2015

Judgment delivered this 21st day of October, 2015 in the presence of Mr. Heri Mwapachu for the appellant and Dr. Nangella assisted by Ms Selina Mloge for the respondent.

Signed by

Judge Z.G. Muruke – Chairman

Dr. M.M.P. Bundara – Member

Mr. Onesmo M. Kyauke – Member
21/10/2015