**CONSIDERATION OF THE “FAILING FIRM DEFENCE" IN MERGER REGULATION**

1. **Background**

In the dynamic world of business, companies may face challenging financial difficulties emanating from liquidity constraints and market shifts among other factors. When entities faced with such situations intend to merge with another firm, it raises a crucial issue for the competition regulator on whether such a merger should be allowed, even if it might reduce competition. This is where the "**failing firm defence**" comes into play – a complex but vital concept that the Competition & Tariff Commission **(“Commission”)** carefully considers in its merger regulation landscape.

1. **Failing Firm Defence**

At its heart, the "failing firm defence" is an argument made by merging parties that a proposed acquisition should be permitted because one of the companies is on the verge of financial collapse and would otherwise exit the market entirely. The premise is that allowing a merger, even with potential competition concerns, is preferable to the complete disappearance of the struggling firm, which would lead to a total loss of its competitive contribution and job losses.

A "**failing firm**" is generally defined as a company that:-

* is operating at a significant loss;
* carries substantial debt;
* is unlikely to continue as a viable business; and
* faces imminent exit from the market if the merger doesn't proceed.

In an economy like Zimbabwe's, where businesses often navigate challenging operational environments, the failing firm defence becomes particularly relevant. It offers a pathway for distressed companies to find a buyer, preserve market presence, and potentially save jobs.

1. **The Criteria for Scrutiny of “the Failing Firm Defence”**

The Commission adopts a rigorous approach to scrutinizing the failing firm defence. **Each case is considered on its own merits**, implying there is no blanket approval as the unique circumstances and evidence presented for every proposed merger are thoroughly assessed. For a merger to be cleared on the basis of a failing firm defence, two critical tests must be met as shown below:-

* 1. ***Imminent Failure: Proving the Firm is Truly Failing***

The first criterion requires compelling evidence that, without the proposed merger, the firm faces a **grave probability of business failure** and would inevitably exit the market. This goes beyond just showing declining sales or net losses; and demands clear indicators of an imminent inability to meet financial obligations. In Zimbabwe, specific local contexts provide crucial evidence namely:-

* **Corporate Rescue:** a company already under **corporate rescue** provides strong substantiation. This legal status indicates that the entity is already under a court-supervised process due to financial distress. Merging parties would typically present evidence of the firm's placement under such administration.
* **Inability to Pay Debts:** concrete proof of an inability to pay debts as they fall due is paramount should be evident.

The Commission primarily relies on financial metrics such as revenue trends and profitability to ascertain the severity of the financial distress.

* 1. ***No Less Anti-Competitive Alternative Purchaser***

The second crucial test requires demonstrating that the proposed acquirer is the **only available purchaser** whose acquisition would result in a less anti-competitive outcome than the failing firm's complete exit. This isn't just about finding *any* buyer; it's about finding the *least harmful* buyer from a competition perspective. To satisfy this, the failing firm must show:-

* **Reasonable Efforts:** that it made reasonable and exhaustive efforts to solicit alternative offers from other potential buyers.
* **Lack of Viable Alternatives:** that no other viable buyers emerged who could acquire the firm or its assets, or whose acquisition would be less detrimental to competition.
1. **Timelines and High Scrutiny for the Commission's Consideration**

Parties contemplating a merger, especially those considering relying on the failing firm defence, must be acutely aware of the regulatory timelines. In Zimbabwe, merger notification to the Commission must be done within 30 days of **(a) the conclusion of the merger agreement between the merging parties; or (b) the acquisition by any one of the parties to that merger of a controlling interest in another**. Failure to adhere to this strict timeline can lead to significant penalties, undermining any potential benefits from the merger.

1. **Conclusion**

The failing firm defence remains subject to a very high level of scrutiny by the Commission. Companies must provide extensive and detailed evidence to substantiate their claims. This is the evidence that is required by the Commission for it to authorize a merger that would otherwise be expected to substantially lessen competition, ensuring that struggling firms can find a lifeline and avoid market exit.