



INTERGOVERNMENTAL GROUP OF EXPERTS ON COMPETITION LAW AND POLICY, 7-9 July



UNITED NATIONS
UNCTAD



INTERGOVERNMENTAL GROUP OF EXPERTS ON
Competition law and policy

Voluntary Peer Review on Competition Law and Policy: Malawi

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Foundations and History of Competition Policy and Law in Malawi

- The Competition Policy for Malawi was adopted in 1997 with a focus on business behaviour that eliminates or reduces competition.
- Before the liberalization era, the power of dominant firms, monopolies and oligopolies were kept in check by extensive price controls and other government policies.
- The Government enacted the Competition and Fair-Trading Act (CFTA), which the President assented on the 30 December 1998, was gazetted on 31 December 1998, and took effect on 1 February 2000.
- On 14 November 2003 the Consumer Protection Act, 2003 (CPA) was enacted, establishing the Consumer Protection Council as a body corporate.



Objectives of the CFTA

The objectives of the Malawian competition law are to encourage competition in the economy by:

- Prohibiting anti-competitive trade practices;
- To establish the Competition and Fair-Trading Commission;
- To regulate and monitor monopolies and concentrations of economic power;
- To protect consumer welfare;
- To strengthen the efficiency of production and distribution of goods and services;
- To secure the best possible conditions for free trade; and to facilitate the expansion of the entrepreneurship base; and
- To provide for matters incidental or connected therewith.



Legal Framework Governing Competition Policy and Law in Malawi

➤ **The Competition and Fair-Trading Act (CFTA)**

- The CFTA was enacted to encourage competition in the economy by prohibiting anti-competitive trade practices namely:
 - Vertical and horizontal anti-competitive agreements;
 - Abuse of dominant position; and
 - Merger control.
- It contains provisions relating to unfair trading practices and consumer protection;
- It establishes the Competition and Fair-Trading Commission (CFTC);
- It applies to all economic activities within or having an effect within Malawi; and
- It does not draw a distinction between regulated and non-regulated sectors.

➤ **The Competition and Fair-Trading Regulations (CFTR) 2006**

The CFTR have been made under section 53 of the CFTA to operationalise its provisions and to enable and facilitate its enforcement.



Substantive Competition Law Issues ...1

➤ **Anti-competitive Agreements (Per se Prohibited)**

- Provided for under section 33(3) and Section 44(2) of the CFTA, for which the construction of the letter and spirit of the two provisions reflect that of per se prohibition with a wide ranging and exhaustive list of prohibited conduct.
- The said list contains issues that are not typical prohibitions under per se rule such as concerted refusal to supply goods by competitors under section 33(3) (f) of the CFTA and collective denials of access to an arrangement or association under section 33(3) (g) CFTA.
- The typical prohibited practices under per se rule are not defined to provide better and further details to the types of conduct that would constitute the prohibition and technically ease the establishment of aspects to be proven for the said prohibitions to stand.
- The CFTA does not have a detailed procedure on handling of per se prohibited agreements (trade agreements as written in the CFTA text) in terms of orders of the CFTC.



Substantive Competition Law Issues ...2

➤ **Anti-competitive Agreements (Prohibited by Rule of Reason)**

- The CFTA provides for notifications for rule of reason agreements under its Section 44(1) and the Regulations 3 to 7 of the CFTR thus restricting what qualifies for such consideration.
- The provision lacks a threshold for which the agreeing parties are prohibited to the extent of their potential effects in a particular market thus leaving a wide room for agreements to be notified.
- Numerical thresholds such as those in section 8 of the Fair Competition Act in the United Republic of Tanzania or section 28 of the Botswanan Competition law can be helpful to establish the said effects and thus easier to be complied with as compared to other more flexible approaches which require in-depth understanding of competition, which is vividly lacking in the developing world.
- The CFTA also has not provided for block exemption for activities in key sectors including price setting for cash crops in agricultural markets from competition law.



Substantive Competition Law Issues ...3

➤ Abuse of Dominance

- Section 41 of the CFTA deals with abuse of dominance. The CFTR are silent on the matter. Generally, abuse of dominance is scantily provided for under the CFTA as it lacks a definition of dominance or market power.
- The CFTA does not provide for market definition or a level of market share that a firm must attain to be considered dominant. Neither has CFTC adopted guidelines on how it assesses market power, i.e., the types of factors to consider as an alternative to the market share threshold, which would assist its operationalization.
- Therefore, the CFTA is silent as to what constitutes a dominant position and what types of conduct are considered as abuse and therefore prohibited.
- It is recommended that the CFTA clearly provides for a definition of a dominant position, maintains the existing prohibitions as a rule. This general rule can then be followed by a non-exhaustive list of examples for abusive behaviour that are based on best practices such as those provided in Section 16 (2) of the Zambian competition law.



Substantive Competition Law Issues ...4

➤ **Control of Mergers and Acquisitions**

- Section 2 of the CFTA has defined a merger whereby it covers both horizontal and vertical types. It however does not include joint ventures resulting in green field investment and the general provision on the definition of a merger under Section 2(2) cannot justify the omission of a specific provision to cover for such mergers.
- Since the inception of the CFTA, Malawi has had a voluntary notification system, whereby the parties are not prevented from closing a merger deal and implementing the transaction in advance of having applied for and received merger clearance from the Commission.
- Section 35 (1) of the CFTA has provided for control of mergers invoking the substantial lessening of competition test which has not been defined. Likewise, section 38(2) of the CFTA provides that CFTC shall not authorize a merger or takeover unless on balance the advantages to Malawi outweigh the disadvantages. Both are considered as prohibitions of a merger.
- It may be correct to say that in Malawi a merger is prohibited if it substantially lessens competition and /or unless on balance the merger results in advantages that outweigh the disadvantages it brings to Malawi. This is a shortcoming that should be rectified preferably by following the substantial lessening of competition route.
- Section 36 and 39 of the CFTA provides for 45 days as allowable turnaround time for clearance of merger authorizations; based on experience of peers in the region, it is relatively short.
- CFTA does not clearly provide which among the merging parties (acquiring or target firm) is responsible for notifying the CFTC of the intended merger transaction.



Institutional Issues: Enforcement Structures and Practices ...1

➤ **The CFTA**

- CFTA is established by Section 4 of the CFTA, as an independent institution. Section 5 of the CFTA provides that the CFTC shall be constituted by ten (10) members nominated by the Minister and appointed by the President including 3 ex-officio. The members other than the 3 ex-officio serve for a tenure of 3 years.
- The Chairman is appointed by the CFTC, and the process or procedure to be followed can vary from time to time as it is not prescribed by the CFTA.
- Section 14 of the CFTA provide for establishment of committees (which includes co-option of non-Commissioners) to ensure smooth operations of the CFTC's functions. It follows therefore, the CFTC is entitled to limitlessly delegate its functions (including duties to make decisions on anticompetitive agreements, misuse of market power and regulation of mergers) to even persons who are not members of the Commission. This situation requires rectification.

➤ **Powers and Decisions of the CFTC**

- Under section 4 of the CFTA, the CFTC is an independent institution to be treated as not part of the Ministry and can be a proper party in civil proceedings arising from its administrative functions or as an employer.
- Given the quasi-judicial functions of the CFTC, it is not clear as to whether it can be sued “as a body corporate” during adjudication competition cases.



Institutional Issues: Enforcement Structures and Practices ...2

➤ Sanctions

- Under the CFTA, competition violations are criminal in their nature, with penal sanctions being imposed on both natural and legal person. Further that, the CFTA does not categorically provide for the procedure to be followed when a natural person is to be committed to prison.
- The minimum fine is equivalent to US\$640, which is considered too low for competition offences such as cartels; there is a possibility for a mismatch of gravity of offences between competition and other offences that may make the CFTA less deterrent as is supposed.
- The ideal situation would be for CFTA to link sanctioning of offences to turnover of the guilty person to ensure offences are accorded commensurate penalties.

➤ Role of the Courts in CFTA Enforcement

- Section 40 of the CFTA provides for enforcement of the orders of the CFTA by the High Court; it also sparingly establishes the procedure on how the transfer of orders of the CFTA to the respective Courts for enforcement should be done.
- The High Court in Malawi is also the **appellate body of the decisions of the CFTC**.
- Further, the CFTA **does not expressly acknowledge the inherent judicial review powers** of the High Court, which could bear similar effects as those provisioned in the appeals thus raising a possibility of parallel appeals to the High Court and the judicial review of the High Court, which may lead to conflicts in practice.



Institutional Issues: Enforcement Structures and Practices ...3

➤ **Other Enforcement Methods: Interface Between COMESA Common Market for Eastern and Southern Africa Competition Commission (CCC) and the CFTC**

- Under the CFTA, competition violations are criminal in their nature, with penal sanctions being imposed on both natural and legal person. Further that, the CFTA does not categorically provide for the procedure to be followed when a natural person is to be committed to prison.
- The CCC and CFTC are municipal and supranational institutions dealing with enforcement of competition in Malawi.
- The impact of their co-existence is significant, approximately 67 % of mergers occurring in Malawi are dealt with by the CCC. Further, competition in the sectoral regulators in Malawi are subject to the jurisdiction of the CCC and the only way that the CCC can reach to the sectoral regulators is through the CFTA thus CFTC. The problem is that the CFTA has neither recognised the sectoral regulators, nor has it defined the way the duo should engage.

➤ **CFTA Versus International Best Practice in Competition Law Enforcement**

The provisions of CFTC as compared to the recommendations by UNCTAD for a model law on competition, is such that:

- The CFTA is only fully aligned with 1 out of 13 recommendations on substantive possible elements for a competition law, as per commentaries and alternative approaches in existing legislations as provided by UNCTAD model law.
- There has been identified 24 shortcomings related only to the said recommendations on substantive possible elements for a competition law, as per commentaries and alternative approaches in existing legislations as provided by UNCTAD and there have been made by this review 28 recommendations related thereto.



Agency Resources and Caseload

➤ Agency Resources

- With regards to the Human Resources, CFTC has an approved human resources base of 49 staff. The CFTC is headed by the Executive Director assisted by four directors who head the directorates. There are also 11 sections and units.
- None of the staff has undergone competition training at University, other than a few who have undergone competition related training in their university degrees.
- Staff at CFTC are paid salaries pegged on civil service scales, as opposed to those of sectoral regulators, for which according to alternative sources that the consultant could not independently verify, the average difference between scales of CFTC and regulators could be estimated at 200%.
- As for Information and Communication Technology (ICT) Resources, CFTC through assistance from European Union is implementing a project to address the inadequacy in ICT systems, services from 2020.
- Regarding financial resources, the CFTC has limited funds to carry out its broad statutorily given mandate.
- The CFTC may consider exploring section 27 of the CFTA and source funds from the regulated sectors.

➤ Caseload

- On average, 44 cases of Restrictive Business Practices cases are handled by the CFTC annually.
- Between 2012 – 2020, the CFTC handled a total of 136 mergers. The trend shows an annual average of 17 merger cases, CCC handles 14 (66.7%) whereas the CFTC handles 3 cases annually.



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Competition Advocacy and Public Education

➤ Competition Advocacy

- The CFTC does coordinate media engagements and production of radio and TV programs, organizing stakeholder sensitization meetings and other related activities as well as coordinating commemorations of World Competition Day and World Consumer Rights Day.
- CFTC has universities been engaged with the academia by providing public lectures in and other tertiary institutions as well as to secondary schools in Malawi as reported in the Annual Reports.
- CFTC should operationalize the policy and research departments to improve capacity in carrying out market research and related advocacy in the short run.
- CFTC should designate separate staff for investigations and advocacy respectively, to give competition advocacy the prominence it requires.



Findings and Possible Recommendations 1

➤ Recommendations to the Government

- The Government should increase CFTC's budget to optimal levels with comparisons with sector regulators.
- Introduction of a statutory regime that will provide for a mechanism for CFTC to receive funds from the regulated sectors.
- Salaries for the CFTC personnel should also be substantially increased for staff motivation and retention and on for the CFTC as an employer.
- Placement of the competition and economic regulation institutions under one central Ministry for ease of policy harmonization between competition and economic regulation regimes.

➤ Proposals for Amendment of the Current Competition Law

- Considering the identified gaps in the CFTA and learning from experiences of the peers in the region such as Zambia and the United Republic of Tanzania; most of the reasons that made Zambia in 2010 and the United Republic of Tanzania in 2003 repeal their competition laws exist in the Malawian competition legal and institutional framework.
- Drafting of the new law should be preceded by a comprehensive study that examines the economics and legal aspects of the competition regime based on requirements of the contemporary Malawian social, economic, and political contexts. The study should form basis for development of a new, more comprehensive competition policy replacing the 1997 one and eventually the new law replacing the CFTC



Findings and Possible Recommendations 2

➤ **Recommendations to the CFTC**

- CFTC should consider introducing an inquisitorial approach to its enforcement practice including its case determination function.
- The CFTC should focus its advocacy component for competition issues by separating the same from consumer protection.
- The CFTC should use readily available opportunities such as engagement with the Government, the business community, Bar association and the Academia.

➤ **Overview and Technical Assistance Needs**

- Strengthen the existing ICT department at the CFTC.
- Establishment of a Competition Law and Policy Course at the University in Malawi to ensure availability of basic competition training in Malawi.
- Tailor made training and training of trainers on competition to staff, Commissioners, appellant bodies, academia, practising lawyers and regulated sector staff as a routine for 3 to 5 years.

➤ **Specific Policy Options and Follow-up Actions for Consideration**

- Placement of competition and regulatory authorities under one central ministry, to avoid competing and conflicting policy objectives as well as the disjoint between the competition and economic regulation in Malawi one hand and economic regulation in Malawi with the CCC on the other.