

Africa

Enhancing the Effectiveness of Competition Regulation in Malawi

By George Naphambo | Naphambo and Company



Edited by John Oxenham & Andreas Stargard

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Background

According to the United Nations Conference for Trade and Development (“UNCTAD”), the goal of both competition and consumer policies is to enhance consumer well-being² by ensuring that markets function effectively and market failures are addressed. Competition policy is concerned with the supply-side of the market and aims to ensure that consumers have adequate and affordable choices, while consumer policy tackles demand-side issues and ensures that consumers can exercise their choices effectively. As a result, a competition and consumer protection regulatory framework that functions properly will improve the welfare of consumers and promote development.

Malawi, in recognition of this fact, enacted the Competition and Fair Trading Act (henceforth referred to as the CFT Act) in 1998, and provided for the establishment of the Competition and Fair Trading Commission (henceforth referred to as the “Commission”) which has the powers to enforce the CFT Act. However, the Commission was only established in 2005 under the Ministry of Trade and Industry, and it was only in October 2012 that the Commission was set up as a fully-fledged standalone regulator supported by the Government of Malawi.

On the other hand, although the Consumer Protection Act³ (“CPA”) was also enacted, the Consumer Protection Council (henceforth referred to as the CPC), the body responsible for administering and enforcing the CPA, has not been set up. This, however, does not mean that there are no enforcement mechanisms for consumer protection in Malawi. The Commission has the power to enforce

consumer protection provisions under the CFTA, and the CPA grants lower courts the power to enforce consumer protection provisions where there are violations. As a result, the Commission has become the *de facto* authority responsible for enforcing consumer protection and indirectly the CPA.

Since its inception, the Commission has driven the integration of Competition law and policy in Malawi especially through its determinations and through advocacy. As a result, awareness of its existence and activities has increased, which in turn has led to an increase in cases handled. For instance, the number of consumer protection cases handled by the Commission increased from 22 in 2013 to 347 in 2022⁴ (the Commission has 25 members of staff which is relatively small). The Commission also conducts public awareness campaigns such as business clinics in various districts and public lectures at universities. All these activities have enhanced the public’s awareness of the Commission’s activities and role in the economy.

Challenges in Enforcing Competition Law and Policy

Despite these advances, Competition law enforcement has faced significant challenges which impede the proper implementation of these laws and policies. Some of these challenges stem from gaps in the regulatory framework, as it does not provide certain powers or functions necessary for the Commission to efficiently enforce the laws. For instance, the only sanction that the Commission could issue was criminal in nature as all violations under the CFT Act are criminal in nature. Under Section 40 of the CFT Act,

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² United Nations Conference on Trade and Development The Benefit of Competition Policy for Consumers available at https://unctad.org/system/files/official-document/ciclpd27_en.pdf.

³ Act 14 of 2003 which came into force on 21 November 2003.

⁴ Table 4 2017/2018 Competition and Fair Trading Commission Annual Report at page 12 available at <https://www.cftc.mw/annual-reports/#> read together with Table 8 2021/2022 Competition and Fair Trading Commission Annual Report available at <https://www.cftc.mw/annual-reports/?tax%5Bwpdmcategory%5D=annual-reports>.

offences are punishable by imprisonment of up to 5 years or a fine of MK500,000.00 (US\$288) or an equivalent of the financial gain from the transaction, whichever is higher.

In the case of *Airtel Malawi plc v. the Competition and Fair Trading Commission Commercial Cause 404 of 2021* (the “Airtel Case”), Airtel Malawi, a telecommunications services provider that also offers mobile money services, was sanctioned with an administrative fine equivalent to US\$2.6 million by the Commission for unconscionable conduct. After the Company appealed the Commission’s decision, the High Court held that:

Since Section 35 of the CFT Act provides that consummating a merger that substantively lessens competition without seeking the Commission’s authorization is a criminal offence, all violations of the CFT Act are criminal offences and only criminal sanctions should be imposed rather than civil or administrative sanctions.

Consequently, the Commission does not have the mandate to prosecute such crimes without first conducting a criminal trial and, prior to that, seeking consent to prosecute from the Office of the Director of Public Prosecutions, as the authority responsible for all criminal prosecutions in Malawi. Alternatively, the Commission should refer all of its findings to the Director of Public Prosecutions for criminal prosecutions.

The court further questioned whether once the Commission’s determination has been filed with the high court and it then becomes a civil judgment, such a judgment is appealable to another high court judge when they have equal jurisdiction. Rather, they determined, the appeal should go to a Justice of Appeal at the Supreme Court of Appeal.

In light of this decision, the Commission’s fine was found to be *ultra vires* and the Commission had to refund the fine it imposed on Airtel Malawi.

The result of this case was that the Commission was restricted to issuing criminal fines of not more than US\$288 or imprisonment of not more than five years. In addition, it could only impose

such a fine after instituting criminal proceedings against entities which had violated the CFT Act. This meant that the Commission’s powers and functions were severely curtailed and restricted to only conducting investigations and awareness campaigns/advocacy. More importantly, it could not issue administrative fines.

Another challenge is that Malawi operates under a voluntary notification regime whereby members are required to notify the Commission of a merger only if, after conducting their own assessment, they conclude that the transaction will result in the substantial lessening of competition in any market. Consequently, unless parties involved in a merger notify the Commission before the transaction is completed, the Commission must independently track every merger that occurs. In such events, it may be difficult to reverse a transaction after it has been completed and any post-merger assessment becomes cosmetic. This was the case in the takeover of Zain Malawi, a mobile telecommunications company, by Bharti Airtel. This merger occurred in June 2010 and the parties did not notify the Commission because they resolved that, since the transfer of shares was going to happen in another jurisdiction, the transaction was non-notifiable in Malawi. By the time the Commission completed its investigation and ordered the parties to notify the merger, the transaction had been completed. The Commission was then involved in a protracted legal battle where the Supreme Court ruled that the transaction was notifiable in an order dated November 26, 2018. This order came 8 years after the date of completion of the merger and the company had already rebranded in Malawi. Subsequently, Bharti Airtel notified the Commission of the merger, and the Commission was forced to approve the transaction as, in reality, it could not feasibly be reversed.

There is also an overlap with some sectoral regulators that implement consumer protection and competition law provisions in sectors such as financial services and telecommunications. In some instances, the enabling legislation for these sectoral regulators allows them to cooperate with the Commission on all matters

relating to competition and consumer protection. So, under Section 55(2) of the Communications Act of 2016, the Malawi Communications Regulatory Authority (“MACRA”) has the duty to promote competition in the telecommunications sector and should coordinate with the Commission when promoting competition.⁵ However, this provision does not state what happens if there are conflicting determinations on a matter. For instance, what would happen in a scenario where the Commission determines that a merger creates a dominant entity and should not be authorized, while MACRA – on different grounds – determines that the merger should be authorized? The Communications Act does not stipulate which determination should prevail. In addition, as the Commission and other regulators may have concurrent jurisdiction on competition disputes or complaints, it is foreseeable that some complainants may file complaints with multiple authorities and lead to multiple decisions (sometimes conflicting) from different regulators on the same issue.

There is also a question as to the enforceability of determinations made by regional regulators. Malawi is a member of the Common Market for Eastern and Southern Africa (“COMESA”), a regional integration treaty aimed at promoting trade among Eastern and Southern African countries. Under Article 55 of the COMESA Treaty,⁶ Member States agree to prohibit any agreement between undertakings or concerted practices which have as their objective or effect the prevention, restriction or distortion of competition within COMESA. Furthermore, in order to operationalize this agreement between the member states, the COMESA Council is mandated to make regulations which regulate competition in Member states. Consequently, in 2004, the Council issued the COMESA Competition Regulations which, among other things, established the COMESA Competition Commission (“the CCC”) which is a regional body established under Article 6 of the

COMESA Competition Regulations and is headquartered in Malawi. The CCC’s core mandate is to enforce the provisions of the COMESA Competition Regulations with regard to trade between Member States and to promote competition within the COMESA region through monitoring and investigating anti-competitive practices of undertakings within the COMESA and mediating disputes between Member States concerning anti-competitive conduct.

Furthermore, Article 5 of the COMESA Competition Regulations requires every Member State to take steps to meet its obligations as provided in the COMESA Competition Regulations⁷ or decided by the CCC and refrain from taking any action which hinders the implementation of the COMESA Competition Regulations in the particular Member State. According to UNCTAD,⁸ most mergers that occur in Malawi are approved by the CCC rather than the Commission, as most of them have a cross-border effect. The challenge for Malawi, unlike countries such as Angola and Mozambique, is that Malawi follows a dualistic approach to the domestication of International Agreements i.e. an International Agreement will only be domesticated if there is a specific legislation that incorporates it into the laws of Malawi. A monist approach on the other hand provides that once a treaty is ratified, it becomes part of the national law of that country and can therefore be enforced through the courts. That means that strictly speaking, the COMESA Treaty including Article 55 and the COMESA Competition Regulations are not directly applicable in Malawi. This is specifically because Section 211(1) of the Constitution of the Republic of Malawi specifically states that for an international agreement to form part of the laws of Malawi, Parliament must pass an act providing that the international agreement is part of the laws of Malawi. Since such an act has not been enacted, it can be argued that the

⁵ Communications Act of 2016 available at <https://malawilii.org/akn/mw/act/2016/34/eng@2017-12-31>.

⁶ Available at <https://comesacompetition.org/wp-content/uploads/2023/01/COMESA-Treaty-English.pdf>.

⁷ Available at <https://comesacompetition.org/resources/regulations/comesa-competition-regulations-english/>.

⁸ UNCTAD “Voluntary Peer Review of Competition Law and Policy: Malawi” available at https://unctad.org/system/files/official-document/ditccplp2021d1_en.pdf.

decisions of the CCC are not enforceable in Malawi.

In light of these challenges, the government of Malawi revised the CFT Act in April 2024, with the new act coming into force in July 2024. Under Section 22(1)g of the CFT Act 2024,⁹ the Commission now has powers to issue administrative fines of up to 5 percent of annual turnover if imposed on an individual or up to 10 percent of annual turnover if imposed on an enterprise depending on various aggravating and mitigating factors.

The new Act also introduces mandatory notification of all mergers and acquisitions, thereby eliminating the voluntary notification regime¹⁰. All mergers and acquisitions will now have to be notified to the Commission, or else the transaction will have no effect, or the parties may be fined.¹¹ Notification is to be given once the enterprise and all other parties to the merger have reached a good faith intention to conclude an agreement, or in the case of a public bid, once the intention to make such a bid has been announced.

The CFT Act 2024 further provides for the setting of transactional thresholds¹² based on combined annual turnover or value of assets. This is important because the thresholds will reduce the number of *de minimis* notifications, allowing the Commission to focus on only those transactions which pose a significant risk. However, the downside is that specific thresholds were not set, as the legislature chose to include these in secondary legislation or regulations so that they could be changed to adapt to any changing economic circumstances. Nevertheless, it is not clear when these thresholds will be introduced and, now that Malawi has adopted a suspensory mandatory notification regime, their absence means the Commission will likely be inundated with applications for approval of mergers from parties with low risk tolerance who would rather comply than face the possibility of their

transaction being declared null and void in future.

Part X of the CFT Act 2024, authorizes the Commission to refer investigations to multilateral or regional Competition Authorities such as the CCC. Under Section 61 of the CFT Act 2024, provides that decisions of multilateral or regional competition authorities will be binding and may be enforced as court orders in Malawi. This means that the enforceability of decisions of the CCC has now been partly resolved. It has been partly resolved because Section 211 of the Constitution of Malawi envisages the ratification of a specific treaty or international agreement by passing a specific act which incorporates that particular treaty or international agreement. It does not provide for ratification of treaties in general terms. It is therefore doubtful that the wording of part X of the CFT Act 2024 actually ratifies, for instance, the COMESA Competition Regulations.

Finally, for the Commission's decisions to be enforceable, the CFT Act 2024 has maintained the requirement that its orders must be filed with the High Court and shall have the effect of a civil judgment. The CFT Act 2024 has in turn removed the provision that a violation of the Act is a criminal offence. This then resolves the confusion highlighted in the *Airtel* case where the judge found that if violation of the CFT Act is criminal in nature, then a determination of the CFT Act cannot be civil in nature. Still the Act leaves out the question of where the appeal should be heard if a party intends to appeal the Commission's decision once it has been filed with the Court. Under the definition section, reference to the "Court" refers to a High Court which would still raise the same issues that the *Airtel* case raised i.e. whether a civil judgment of the High Court can be appealed to a high court judge. The judge in that case opined that that is not possible, and the appeal should go to the Supreme Court of Appeals.

In conclusion, the regulatory framework for Competition and consumer protection matters

⁹ Available at <https://www.cftc.mw/legislations/#>.

¹⁰ See Section 43.

¹¹ Section 43(1) of the CFT Act 2024.

¹² Section 40 of the CFT Act 2024.

has been tested by the courts and been found to be lacking in some respects. The legislature eventually took steps to enhance the regulatory framework and this has resolved some of the issues which affected the functioning of the

commission and the enforcement of competition law in Malawi generally. There is still room for improvement and the legislature has shown a willingness to keep reshaping the law so that it serves the needs of the country.