

THE MERGER AUTHORIZATION CRITERIA IN MALAWI; AN EXAMINATION OF THE EFFECT OF CONSUMER WELFARE CONSIDERATIONS

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INTRODUCTION

S38(2) of the CFTA- mergers/acquisitions are to be authorized if on a balance, the advantages of the merger to Malawians outweigh the disadvantages. **i.e.:**

- Efficient Units at lower production/distribution costs
- Increased net exports; employment
- Lower consumer price;
- Accelerated Economic and Technological Advancement

However, unclear how this “balance” can be attained leaving room for discretionary interpretation.

Hypothesis

- The criteria for merger/acquisition authorization does not accord consumer welfare considerations adequate weight as a determining factor in merger authorization.

Main and Specific Objectives

- **Main Objective**
- To examine the weight accorded to consumer welfare considerations in applying the merger authorization criteria under the CFTA
- **Specific objectives:**
- To explore the meaning of consumer welfare considerations
- To investigate the interpretation of the criteria for merger/acquisition authorization under the CFTA
- To examine the suitability of the current merger/acquisition criteria in protecting consumer welfare

Main and Specific Research Questions

- **Main Question**

- To what extent do consumer welfare considerations inform merger/acquisition decisions under the CFTA

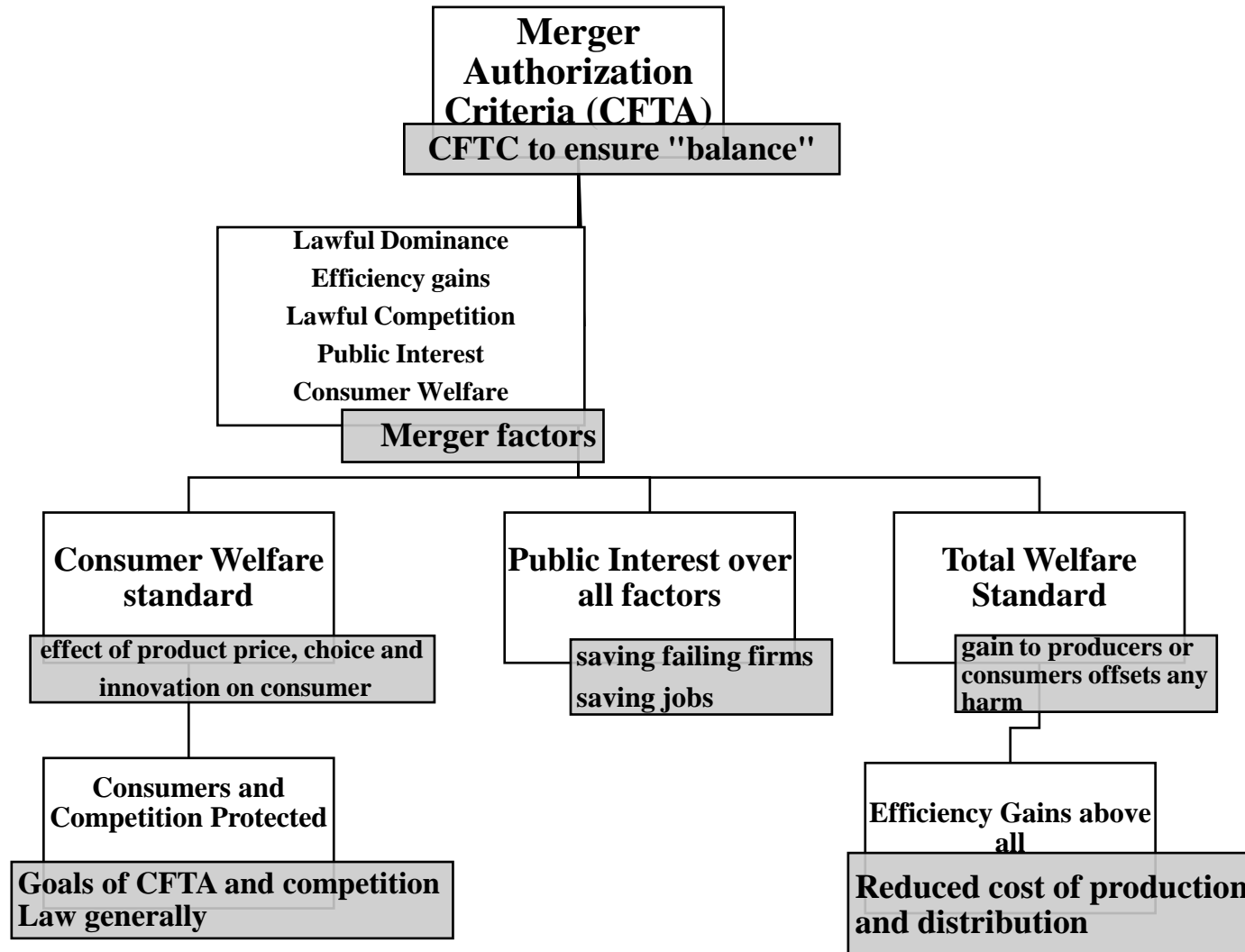
- **Specific Questions**

- What are consumer welfare considerations under the CFTA?
- How has the Commission interpreted the criteria for merger/acquisition authorization under the CFTA?
- How suitable are the current merger/acquisition criteria in protecting consumer welfare?

Methodology

- Doctrinal Approach
- Desk Research
- Statutory Interpretation
- Legal Reasoning
- Mergers identified through purposive sampling
- Inductive reasoning-to identify general rules from the selected merger decisions

CONCEPTUAL FRAMEWORK



THEORETICAL FRAMEWORK

Competition theory- competition is efficient as maximises welfare, i.e. lower prices, more products, more choice.

Law and Economics- Richard Posner- Law is efficient; Law ought to be efficient.

Oliver Wendell Holmes- Apply the law/ drafters' wish- need for objectivity+ pragmatism

Conclusion: An efficient merger authorization criteria is clear, objective, consistent with the goals of the CFTA and authorizes efficient mergers.

Under CFTA- protection of competition and consumers+ promotion of economic development.

Selected Mergers

1. **Indirect Acquisition of Celtel by Bharti Airtel-** Public Interest Advantages of employment, consumer efficiency gains from Airtel's market dominance over possible competition concerns
2. **Acquisition of Dairibord Malawi by Lilongwe Dairy-** Saving jobs + a failing firm over creation of dominant post-merger entity; reducing competition and creating possibility of adverse effects on consumer welfare
3. **Acquisition of SS Poultry by Central Poultry** – Merger authorized with conditions to address competition concerns -to save a failing firm although- competition concerns due to dominant post-merger entity.
4. **Acquisition of Kulimba Cement by Lafarge-** Advantages from creation of employment + new products over possible negative insignificant effects from changes in market structure
5. **CID's Decision on Merger between B.I.H & Carlsberg Mw Ltd.** – Possible efficiency gains from transaction prioritized over competition and public interest concerns of loss of employment. Not much discussion on consumer welfare.

Observations

- A Majority of Decisions by CFTC, production Efficiencies and Public Interest concerns prioritized over their respective effects on consumer welfare.
- CFTC does consider consumer welfare e.g. CP and Dairibord Mergers on product choice
- Carlsberg Merger (CCC) – Possible abuse of market dominance and collusion in competing entities in which Castel had shareholding but authorized in public interest
- **Conclusion:** Application of Efficiencies Defence and Public Interest over effects on competition and consumer welfare. Questionable if authorization due to public interest concerns is always efficient.
- Under emphasis of symbiotic relationship between competition and consumer welfare.

Post-Merger Effects on Consumers

- Small Scale Poultry Farmers complained to CFTC over CP's post-merger dominance
 - ***CFTC threatened to revoke CP's licence for stifling other entities in the market***
- Reduction in product quality and product choice e.g. Carlsberg Castel merger
 - ***Consumers complained to CFTC about finding foreign objects in drinks- Castel fined by CFTC for the same***
 - ***Consumers complained that some of their favourite drinks by Carlsberg did not taste the same under Castel***

Celtel + Airtel Merger led to more innovation e.g. Introduction of 3G internet

Conclusion:

Production Efficiency gains and Public Interest Concerns given more weight over Competition and consumer welfare concerns

- ***While public interest concerns prioritized in developing countries like Mw, debatable whether this is always efficient i.e. Increases total welfare.***

Recommendations

- Amendment of CFTA to provide for an objective test when to use the efficiencies defence e.g. proof that efficiencies will benefit consumers.
- **Superior Propane Case**-Merger resulted in a monopoly but benefits to Canadian Government outweighed anti-competitive effects.
- *Balancing weights approach- calculation based on econometric evidence the minimum weight on consumer surplus relative to profits that would render a merger unacceptable.*
- **IV/m.50 v. AT & T/NCR**- potential advantages from synergies dismissed because they did not benefit consumers.




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THANK YOU, QUESTIONS AND COMMENTS ARE WELCOME