

Table of Contents

LIST OF STATUTES	iv
STATUTES FROM MALAWI	iv
STATUTES FROM OTHER JURISDICTIONS.....	iv
LIST OF CASES.....	v
DOMESTIC CASES.....	v
CASES FROM OTHER JURISDICTIONS	v
LIST OF ABBREVIATIONS	vii
ABSTRACT.....	viii
CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE STUDY	1
1.0. Background and Introduction.....	1
Problem Statement	2
Hypothesis	3
Research Objectives.....	3
A. Main Objective.....	3
B. Specific objectives	3
Research Questions.....	3
A. Main Question.....	3
B. Specific Questions	3
Literature Review.....	4
Significance of Study.....	6
Methodology.....	7
Limitations of Study	8
CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK.....	9
2.0 Introduction and Overview	9
2.1.0 Conceptual Issues.....	9
2.1.1 Merger.....	9
2.1.2 Merger Authorization Criteria	9
2.1.4 Consumer Welfare	10
2.1.5 Consumer Protection.....	11
2.2.0 The Theory of Competition:	12
2.2.1 Law and Economics Theory of Law	12
2.2.2 Law and Economics Theory on Mergers and Acquisitions	13
2.2.3 The Law is Efficient.....	14
2.2.4 Wendell Holmes’s Theory of American Realism	14
2.2.5 Analytical Framework.....	15

2.3.0 Conclusion	15
CHAPTER THREE: CFTC’s INTERPRETATION OF THE MERGER AUTHORIZATION CRITERIA UNDER THE CFTA IN SELECTED MERGERS.....	
3.0 Introduction.....	17
3.1 The Merger Authorization Criteria under the CFTA.....	17
3.2.0 The CFTC’s Application of the Merger Authorization Criteria in Selected Merger Decisions	18
3.2.1 Indirect Acquisition of Celtel Malawi (Renamed Airtel Malawi Limited) by Bharti Airtel Limited.....	18
3.2.2 The Acquisition of Dairibord Malawi Limited by Lilongwe Dairy (2001).....	18
3.2.3 The Acquisition by SS Poultry by Central Poultry (2000) Limited.....	18
3.2.4 The Acquisition of Kulimba Cement Limited by Lafarge Cement (Malawi) Limited	18
3.2.5 Decision of the 31 st Meeting of the Committee Responsible for Initial Determination Regarding the Proposed Merger between B.I.H Brasseries Internationales Holdings Limited and Carlsberg Malawi Limited	19
3.4 Conclusion	20
CHAPTER FOUR: THE EFFECT OF CONSUMER WELFARE CONSIDERATIONS IN MERGERS CONSIDERED BY THE CFTC; THE SEARCH FOR A MORE SUITABLE CRITERIA	
21	
4.0 Introduction.....	21
4.1.0 What Problems, if any, does the CFTC’s Interpretation of the Merger Authorization Criteria Create for Consumers?.....	21
4.2.0 Merger authorization criteria in other jurisdictions	22
4.2.1 Merger Authorization by COMESA.....	22
4.2.2 Merger Authorization by the European Competition Commission	23
4.2.3 Merger Authorization Criteria in the United Kingdom (UK)	24
CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS	
5.0 Introduction.....	28
5.1 Findings.....	28
5.2 Implications of the Findings	29
5.2.1 Theory	29
5.2.2 Law Reform	29
5.3 Conclusion	30
BIBLIOGRAPHY	
BOOKS	31
ARTICLES	31
REPORTS	34

DOMESTIC REPORTS..... 34

LIST OF STATUTES

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Competition and Fair Trading Act

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EC Merger Regulation; “Horizontal Guidelines”), OJ [2004] C 31/5, at 76-88.)

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In the Matter Before the Board of the Competition and Fair Trading Commission by Lilongwe Dairy (2001) Ltd, MA/18/08

In the Matter of Section 36 of the Competition and Fair Trading Act: The Acquisition of Kulimba Cement Limited by Lafarge Cement (Malawi) Limited

In the Matter of Section 36 of the Competition and Fair Trading Act; Re: Determination on Application under section 35, regulation 8 in relation to the indirect acquisition of former Celtel Malawi Limited Now Renamed Bharti Airtel

COMESA

The Decision of the Thirty First Meeting of the Committee Responsible for Initial Determination Regarding the Proposed Merger between B.I.H Brasseries Internationales Holdings Limited and Carlsberg Malawi Limited

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Post Danmark A/S v. Konkurrenceradet [2012] (CJEU) Case C-209/10

Danish Crown/Vestjyske Slagterier, Commission decision of March 3, 1999, at 198

IV/M.50, AT&T/NCR, Commission decision of January 18, 1991, 30

MercedesBenz/Kässboher, Commission decision of February 14, 1995, case IV/M.477

De Beers/LVMH, at 102-05, Commission decision of July 25, 2001, case COMP/M.2333

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Geneva Pharmaceuticals Technology Corp. v BarrLaboratories Inc 386 F.3d 485 (2d (Cir. 2004, p489)

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United Kingdom

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Commissioner of Competition v. Superior Propane Inc. [2000] C.C.T.D. No.15,7 C.P.R. (4th)3

LIST OF ABBREVIATIONS

- CC- Competition Commission of the United Kingdom
- CCC- COMESA Competition Commission
- CFTA- Competition and Fair Trading Act
- CFTC- Competition and Fair Trading Commission
- CP- Central Poultry
- EC- European Commission
- ECMR- European Commission Regulations
- HHI- Herfindahl-Hirschman Index
- OECD-Organisation for Economic Co-operation and Development
- OFT-Office of Fair Trading
- SIEC- Significant Impediment to Effective competition
- SLC- Substantial Lessening of Competition

ABSTRACT

Mergers and Acquisitions are one way through which businesses adapt to unfavourable business climates. The merger authorization criteria under the Competition and Fair Trading Act (CFTA) demands a balance of merger effects but does not state what this is to entail; considering the stipulated merger determining factors. The CFTA aims to promote competition, consumer protection, and economic development. Yet, a sample of merger decisions in Malawi suggests inadequate appreciation of the consumer welfare protection goal. Most of these mergers seemingly prioritize public interest and efficiency gains over the protection of competition and consumer welfare. The study examined the effect of consumer welfare considerations on the merger authorization criteria. It assessed how the Competition and Fair Trading Commission (CFTC) interprets the merger authorization criteria and the potential problems therefrom. Lessons were then drawn from other jurisdictions to develop merger authorization criteria that ensure efficient mergers. The study found that the merger authorization criteria are not a clear guide for merger reviewers because they do not provide an objective method of ensuring the balance envisaged by the CFTA. Consequently, mergers are authorized to promote public interest without guaranteeing efficiency through protection of competition and consumer welfare. Thus the study proposes an amendment of the merger authorization criteria that stipulates the weight to be accorded to the merger effects on consumer and producer surplus to ensure objectivity and consistency with the CFTA and the goals of competition law generally.

CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE STUDY

1.0. Background and Introduction

Malawi's business climate is influenced by the country's economic performance. The high cost of financing is one of the biggest impediments to doing business in Malawi¹. In 2020, the country's economic growth decelerated from 5.7% in 2019 to 1.7% due to the COVID-19 pandemic, among other factors². Additionally, in May, 2022, the Malawi government devalued the Malawi Kwacha by 25%. These factors have contributed to the increased cost of doing business in Malawi. Mergers and acquisitions are one way through which enterprises adapt to the business climate³.

In Malawi, mergers and acquisitions are governed by the Competition and Fair Trading Act (hereinafter, CFTA) including the subsidiary rules and merger assessment guidelines made thereunder. Malawi's competition regime is also supplemented by the SADC Competition Guidelines; COMESA Competition Regulations; the International Competition Network (ICN) Guidelines; European Union Competition Law and relevant precedents from other common law jurisdictions.

Protection of consumer welfare is one of the objectives of the CFTA⁴. This research intends to examine the implementation of the merger authorization criteria under the CFTA to determine the extent to which consumer welfare considerations inform merger decisions.

The CFTA prohibits the authorization of a merger unless on a balance its advantages to Malawi outweigh the disadvantages⁵. However, antitrust policy rarely balances unless there is nothing to

¹ Malawi Confederation of Chambers of Commerce and Industry (MCCCI) "*The Malawi Business Climate Survey Report*," (November 30, 2018), pp 16-24 retrieved from: https://www.mccci.org/index.php?option=com_phocadownload&view=category&download=51:2018-malawi-business-climate-survey-reportpdf&id=6:surveys-and-research-reports&Itemid=158

² African Development Bank, "*Malawi Economic Outlook: Recent Macroeconomic and Financial Developments*," (2021), retrieved from: <https://www.afdb.org/en/countries/southern-africa/malawi/malawi-economic-outlook>

³ Tamosiuniene, Rima, and Egle Duksaite. "*The importance of mergers and acquisitions in today's economy*." *KSI Transactions on Knowledge Society* 2.4 (2009): 11-15. Retrieved from: <http://tksi.org/JOURNAL-KSI/PAPER-PDF-2009/2009-4-03.pdf>

⁴ Competition and Fair Trading Act, Laws of Malawi, Cap, 48:09, preamble

⁵ Ibid, [4] section 38(2)

put on one side of the scale, or the weight differences are so great that the balancing solution is simple and obvious⁶.

Additionally, legislation ought to be clear, precise, and unambiguous⁷. Without these qualities, the given criteria have no predictability⁸ and cannot effectively guide the Competition and Fair Trading Commission (hereinafter, CFTC) and other users.

The merger authorization criteria do not specify the respective weights of the factors to be considered under the criteria. Therefore, the Commission has used its discretion to decide which factors to prioritize. Effectively, the CFTC's interpretation of the "balance" seems to emphasize potential production efficiency over potential effects on consumer welfare.

Conversely, it is arguable that the criteria are efficient as they promote economic growth by enabling struggling business entities to merge with others and avoid the closure of business. Nonetheless, it is an accepted view that the ultimate objective of competition law and policy is the promotion and protection of consumer welfare⁹. For that reason, inadequate consideration of consumer welfare determinants under the merger authorization criteria is potentially inefficient.

Problem Statement

The CFTC has authorized mergers and acquisitions with negative effects on consumer welfare. Consequently, there is a discrepancy between the application of the criteria per the Act and the Act's objective to protect consumer welfare. Additionally, in pursuit of the balance envisaged in **section 38(2) of the CFTA**, it is unclear how much weight ought to be accorded to the respective factors to be considered under the merger authorization criteria. This makes the criteria an ineffective guide in merger assessment.

⁶ Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals", 81 FLR. 2471 (2013) <<https://ir.lawnet.fordham.edu/flr/vol81/iss5/11>>

⁷ Esther Majambere, "Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting," Commonwealth Law Bulletin 37 (3), 417-426 (2011), <www.doi.org/10.1080/03050718.2011.595140>, p425

⁸ Ibid

⁹ Cook John and Christopher Kerse: *EC Merger Control*, (London: Sweet & Maxwell, 2005, p278); *Geneva Pharmaceuticals Technology Corp. v Barr Laboratories Inc* 386 F.3d 485 (2d Cir. 2004, p489)

Hypothesis

This study presumes that in line with the CFTA's objective to protect consumer welfare, the criteria for merger/acquisition authorization must accord consumer welfare considerations adequate weight as a determining factor in merger authorization.

Research Objectives

A. Main Objective

To examine the effect of consumer welfare considerations in the CFTC's interpretation of the merger/acquisition authorization criteria under the CFTA.

B. Specific objectives

- i. To investigate the interpretation of the criteria for merger/acquisition authorization under the CFTA
- ii. To find out the problems that the CFTC's interpretation of the merger/acquisition authorization criteria create for consumers
- iii. To examine the suitability of the current merger/acquisition criteria in protecting consumer welfare.

Research Questions

A. Main Question

How is consumer welfare considered in the CFTC's interpretation of the merger/acquisition authorization criteria under the CFTA?

B. Specific Questions

- i. How does the CFTC interpret the criteria for merger/acquisition authorization under the CFTA?
- ii. How do consumer welfare considerations inform the CFTA's interpretation of the merger/acquisition authorization criteria under the CFTA?
- iii. What problems, if any, does the CFTC's interpretation of the merger/acquisition authorization criteria create for consumers?
- iv. How suitable are the current merger/acquisition criteria in protecting consumer welfare?

Literature Review

Consumer welfare and total welfare are the main standards of ensuring competition law goals¹⁰. A merger is authorized because it promotes or protects consumer or producer welfare respectively. However, Damien and Hendrick argue that either case, may cause different types of inefficiencies¹¹.

Hovenkamp suggests that the consumer welfare standard is the most practical goal of antitrust enforcement in terms of efficiency and administrability,¹². Consumer welfare prioritizes the combined effect on consumers in relation to product price, quality, and innovation¹³. However, where the effect on consumers cannot be determined, producer welfare becomes more important¹⁴. This suggests that prioritizing the consumer welfare effects of a merger would be more efficient unless the said effects cannot be determined.

Similarly, in their analysis of welfare standards in the United States of America, Blair and Sokol suggest that total welfare should drive antitrust analysis¹⁵. Total welfare is the sum of consumer and producer welfare¹⁶. This is seemingly in line with the balance envisaged by the merger authorization criteria under the CFTA.

Nonetheless, scholars agree that the differences between the consumer and total welfare standards are substantial and could affect the outcomes of merger reviews¹⁷.

For instance, Kaplow asserts that it would be important to know what magnitude of a merger's effect on producer and consumer surplus would be optimal. Although this case-by-case approach

¹⁰ Neven, Damien J.; Röller, Lars-Hendrik, "Consumer surplus vs. welfare standard in a political economy model of merger control," WZB Discussion Paper, No. FSIV 00-15, (2000) Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin, p4,

¹¹ Ibid, (n12)

¹² Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals", 81 FLR. 2471 (2013),<: https://ir.lawnet.fordham.edu/flr/vol81/iss5/11_p2496>

¹³ Ibid, (n14)

¹⁴ Ibid, (n14)

¹⁵ Roger D. Blair and D. Daniel Sokol, "Welfare Standards in U.S. and E.U. Antitrust Enforcement", 81 FLR 2497 (2013),< <https://ir.lawnet.fordham.edu/flr/vol81/iss5/12>>

¹⁶Louis Kaplow, "On the Choice of Welfare Standards in Competition Law" (Harvard John M. Olin Discussion Paper Series, No. 693, (2011) P12, retrieved from: <<http://nrs.harvard.edu/urn3:HUL.InstRepos:30064218>>

¹⁷ Barak, Y. Orbach, "The Antitrust Consumer Welfare Paradox," Journal of Competition Law and Economics, 7(1), 133-164, (2010) Oxford University Press, <[doi:10.1.1093/joclec/nhq019](https://doi.org/10.1.1093/joclec/nhq019)>, p164

can be infeasible and expensive, it does justify not placing more weight on consumer welfare if one is concerned about redistribution. This is because producers tend to be more well-off than consumers.¹⁸

Additionally, Hovenkamp states that courts almost always apply the consumer welfare test. For example, a merger will be permitted only where there is no consumer harm regardless of the size of the efficiencies¹⁹. Similarly, Everitt, and Lande advocate for a consumer choice model to antitrust because it asks the right questions and assigns antitrust to its proper position in the larger goal of protecting consumers²⁰. This suggests that a consumer welfare standard would ensure a better analysis of antitrust situations, including mergers and acquisitions.

In contrast, Meese suggests that the choice between a consumer or total welfare standard will often not matter in antitrust doctrine²¹. This is because some equate “consumer welfare” with the welfare of all consumers in society (thus including producers). Therefore, the two standards essentially mean the same thing²².

Additionally, in Farrel and Katz’s view, antitrust does not strictly promote welfare. It mainly aims to protect even where this might have the effect of reducing welfare²³. This suggests that a merger/acquisition may be authorized because it promotes other goals of competition law such as preventing anti-competitive conduct; although this may adversely affect producer or consumer welfare. Therefore, consumer welfare may not be the determining factor in a merger review process.

The literature from Malawi, only evaluates the efficiency of the CFTA and the effect of mergers and decisions on employees. In his article Tsoka provides an assessment of the competition scenario in Malawi under the CFTA, 1998. He also discusses uncompetitive mergers; their effect

¹⁸ Ibid, (n19), p12

¹⁹ Herbert Hovenkamp, “Implementing Antitrust’s Welfare Goals”, 81 FLR 2471 (2013), <<https://ir.lawnet.fordham.edu/flr/vol81/iss5/11>>; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, (Aug. 19, 2010), <www.justice.gov/atr/public/guidelines/hmg-2010.pdf>

²⁰ Neil W. Averitt & Robert H. Lande, “The Consumer Choice Approach to Antitrust Law,” ALJ, Vol. 74. No. 1 pp.175-264, (2007), pp262-263, <www.jstor.com/stable/27897545>

²¹ Alan J. Meese, “Reframing the (False?) Choice Between Purchaser Welfare and Total Welfare”, FLR, Vol. 81, p2199, (2013), <<https://ir.lawnet.fordham.edu/flr/vol81/iss5/5>>

²² Ibid, (n24), p2199

²³ Joseph Farrel & Michael Katz, “The Economics of Welfare Standards in Antitrust,” Competition Policy Center, Institute of Business and Economic Research, UC Berkeley, (2006) <www.escholarship.org/uc/item/1tw2d426>

on the economy and how they were handled by the CFTC²⁴. Some student dissertations have also made contributions to the research on mergers and acquisitions in Malawi. This includes Musopa's *Consumer Protection Under Competition Law: A Critical Analysis of Enforcement Mechanisms Against Anti-Competitive and Unfair Trade Practices by Mobile Phone Operators in Malawi*²⁵ and Maseko's *Critical Analysis on the Assessment Process of Mergers and Acquisitions and The Impact on the Protection of Employees Under Section 32 (2) of The Employment Act 2000*²⁶.

Conclusively, the available literature has contributed to the knowledge on the effects of mergers and acquisitions on consumers and employees; available standards that inform competition law, and suggested standards for merger/acquisition authorization. However, it has not attempted to assess how much weight ought to be accorded to the various considerations that constitute the particular standards or criteria informing merger authorization in Malawi. This study attempts to contribute towards filling that knowledge gap by assessing the influence of consumer welfare considerations in merger authorization decisions and effectively how this affects consumer welfare.

Significance of Study

Mergers and acquisitions have various effects on consumers and producers in any economy. Therefore, the method for merger/acquisition assessment must be consistent with goals to safeguard consumer and producer welfare. Whether or not this is achieved depends on the criteria for merger authorization and the founding goals of competition law.

This study will inform legislators on whether the CFTC's interpretation of the merger enforcement criteria under the CFTA is in line with the Act's objective to protect consumer welfare. Therefore, it will help inform legislators how the provision can be rectified to effectively guide the CFTC and merger/acquisition applicants and also ensure it is consistent with the CFTA's goal of protecting consumer welfare.

²⁴ Maxson Tsoka, *Competition Scenario in Malawi*, University of Malawi, Center for Social Research, (2006), p31

²⁵ Mapopa Kumwenda Daire Musopa, (2015), *Consumer Protection Under Competition Law: A Critical Analysis of Enforcement Mechanisms Against Anti-Competitive and Unfair Trade Practices by Mobile Phone Operators in Malawi*, Dissertation submitted in partial fulfillment for LLB Hons, Chancellor College, Faculty of Law

²⁶ Aubrey Ulemu Sunganani Maseko, (2018), *A Critical Analysis on Assessment Process and Protection of Employees under Section 32 (2) Of The Employment Act 2000*, Dissertation submitted in partial fulfillment for LLB Hons, Chancellor College, Faculty of Law

Methodology

The study adopted a doctrinal research approach. This entails the analytical study of legal doctrine²⁷. This approach was appropriate because the study aimed to examine how the CFTC interprets the criteria for merger/acquisition authorization under the CFTA; in light of its goal to protect consumer welfare.

Methods included desk research which entailed analysis of statutes, merger decisions, and authoritative scholarly texts. The researcher used inductive reasoning which involves reasoning from specific cases to a general rule²⁸. The researcher sought to derive applicable rules from unifying principles and differences identified in the selected mergers²⁹. This was done through variative induction; where the inferences from analysis of the selected mergers are supported by the law³⁰. The researcher also used statutory interpretation tools; legal reasoning and synthesis skills.

In answering the first specific question, reference was made to merger decisions by the CFTC and the CCC, that were chosen through purposive sampling. Purposive sampling was deemed appropriate herein because it is cheaper than probability sampling; quicker and not limited by the availability of participants³¹.

To identify mergers that contain information necessary for the purpose of this study, the researcher identified mergers relating to the study. This included a merger between a small and a big entity (Kulimba Cement and Lafarge), a merger with an international element (Celtel Malawi by Bharti Airtel); and mergers which have resulted in competition or consumer complaints to the CFTC- (Central Poultry and SS Poultry and Carlsberg and Castel mergers). The researcher then made inductive inferences to determine how the CFTC has interpreted the merger enforcement criteria.

For the second specific question, the researcher used definitions of consumer welfare from comparable case law and authoritative journal articles to infer how it informed the selected merger

²⁷Duncan, Nigel. J. and Hutchinson, Terry, *“Defining and describing what we do: Doctrinal legal research,”* Deakin Law Review, (2012). 17(1), pp. 83-119.

²⁸ Dan Hunter , *“No Wilderness of Single Instances: Inductive Inference in Law”* Journal of Legal Education, Vol. 48, No. 3 (1998), pp. 365-401, Association of American Law Schools, <www.jstor.org/stable/42893559>

²⁹ In *MacPherson v. Buick Motor Co* 217 N.Y. 382, 111 N.E. 1050 (1916) @39, Judge Cardozo identified the significant unifying principles and differences to derive a new rule that remains essentially good to date.

³⁰ *Ibid*, (n3), p12

³¹*Ibid*, (n37)

decisions. In response to the third question, the researcher referred to comparable case law and scholarly journal articles in law and economics to ascertain the effects of the selected merger decisions. In answering the final specific question, the researcher evaluated the standards used in merger determination and assessed which one would be suitable for the Malawian context by drawing lessons from other jurisdictions.

Limitations of Study

Malawi has limited literature on welfare standards for enforcement of competition law, particularly mergers/acquisition law. Therefore, the researcher used her skills in legal reasoning, statutory interpretation, and analysis to examine the criteria for merger enforcement using selected CFTC merger decisions, comparable foreign case law, and relevant scholarly articles.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.0 Introduction and Overview

The conceptual framework will define the key terms used in this research and confine their meanings to help clarify the research. The key concepts include Merger, criteria for merger authorization in Malawi; efficiency; consumer welfare, and consumer protection.

The chapter also provides the theoretical framework which grounds the study. This analysis will first look at the institution of competition law in which the doctrine of mergers and acquisitions is enshrined. It will then analyse the criteria for merger and acquisition authorization in Malawi using the theory of competition; Richard Posner's theory of Law and Economics and Holmes's theory of American Realism. Finally, the chapter considers the theoretical operation of the criteria for merger and acquisition authorization in Malawi. By providing the theoretical structure, the study intends to present a framework for merger/acquisition criteria that protect consumer welfare.

2.1.0 Conceptual Issues

2.1.1 Merger

The study will focus on horizontal mergers which are mergers between parties that are competitors at the same level of production and/or distribution of a good or service³².

2.1.2 Merger Authorization Criteria

Section 38(2) of the CFTA provides that the CFTC shall not authorize a merger/takeover unless, on a balance, its advantages to Malawi outweigh the disadvantages. A merger/takeover is advantageous to Malawi if it is likely to result in: substantially more efficient units at lower production or distribution costs; increased net exports; increased employment; lower consumer prices; accelerated economic and technological advancement rates by enterprises in Malawi³³.

³² CFTC Merger Assessment Guidelines, (2015), p4

³³ CFTA, s38(1)(b)

However, the CFTA does not state what the balance ought to entail. This leaves room for discretionary interpretation of the criteria by the CFTC. Additionally, it only lists product price as a consumer welfare indicator leaving out others, such as product quality and choice.

The **Malawi Merger Authorization Guidelines** explain how the CFTC assesses the legality of mergers but are not prescriptive guides³⁴. Therefore, the CFTC may depart from them depending on the circumstances of a case³⁵. Similarly, effects on competition are to be determined with reference to all relevant factors in a market³⁶.

In assessing the competitive effects of a merger, the following are key: (i) the relevant market; (ii) the likelihood of substantially lessening competition (iii) possible efficiencies (iv) other advantages or disadvantages to the industry, general public, and the economy as a whole³⁷.

In evaluating whether a merger is likely to substantially lessen competition, the CFTC considers a non-exhaustive list of ‘merger factors’. This includes the merger’s potential effects on competition, market concentration, innovation, product price, and substitutability³⁸.

2.1.4 Consumer Welfare

A consumer will refer to a person who:

(a) purchases or offers to purchase technology, goods, or services otherwise than for resale; but does not include a person who purchases any technology, goods or services for the production or manufacture of any other technology, goods or services for sale³⁹.

Most competition authorities consider consumer welfare as a criterion for assessing the competitiveness of behaviour. However, the priority given to consumer welfare as a primary goal in competition law varies across countries. This is partly because of the difference in the definition

³⁴ CFTC Merger Assessment Guidelines, p2

³⁵ *ibid*

³⁶ CFTA, s 2(5)

³⁷ CFTC Merger Assessment Guidelines, (2015)

³⁸ CFTC Merger Assessment Guidelines, p10

³⁹ Consumer Protection Act, Laws of Malawi, Cap 48:10, s2

of consumer welfare⁴⁰. In this study, “consumer welfare” will mean the product effects on consumers; concerning price, choice, quality, or innovation⁴¹.

2.1.5 Consumer Protection

Consumer protection laws aim to protect consumers and enhance their welfare⁴². Competition law and consumer protection can be mutually reinforcing. Competition laws ensure competition so that consumer welfare is unhindered by anti-competitive practices⁴³. The net effects of competitive markets include reduced prices and increased innovation⁴⁴; as competitors strive to remain relevant and appealing to consumers⁴⁵. This study focuses on protection accorded to consumers in merger review; in ensuring affordable price, good quality, and adequate product choice.

In Malawi, the Consumer Protection Act (hereinafter, CPA)⁴⁶ establishes the Consumer Protection Council whose functions include: monitoring the frequency and magnitude of price increases⁴⁷ and investigating consumer complaints⁴⁸. The CPA also provides for consumers’ right to the protection of economic interest, health, and safety in the consumption of goods, and services⁴⁹. Consequently, increases in product price or reductions in quality would be a violation of this consumer right.

Therefore, failure to understand the relationship between competition and consumer protection may result in them adversely affecting each other⁵⁰. However, the preoccupation with protecting consumers may be short-sighted because producers can opt to leave the market than comply with unreasonable competition law⁵¹.

⁴⁰ ICN, (2011) Competition Enforcement and consumer Welfare; Setting the Agenda, 10th Annual Conference; Hague

⁴¹ Post Danmark A/S v. Konkurrenceradet [2012] (CJEU) Case C-209/10 (electronic reports of cases)

⁴² Timothy J Muris, “The Interface of Competition and Consumer Protection” (Fordham Corporate Law Institute’s Twenty-Ninth Annual Conference on International Antitrust Law and Policy, New York, October 31, 2002) 2

⁴³ Neil Averitt, Robert H. Lande, “*Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*,” 65, *Antitrust L.J.* 713, (1997)

⁴⁴ Katalin J Cseres, *Competition Law and Consumer Protection*, (European Monograph Series Set)

⁴⁵ William Evan Kovacic, ‘Competition Policy, Consumer Protection, and Economic Disadvantage’, *Washington University Journal of Law & Policy* 25 (2007): 109

⁴⁶ Consumer Protection Act, Part III, section 10

⁴⁷ *Ibid*, (n60), (Part IV- section 18(b))

⁴⁸ *Ibid*, (n54), section (18j)

⁴⁹ *Ibid*, (n54), Part II- section 3(a)

⁵⁰ *Ibid*, (n60), p7

⁵¹ Robert H. Bork, “The Antitrust Paradox” (1978) p21

2.2.0 The Theory of Competition:

Neo-classical Economic theory states that perfect competition maximises social welfare⁵². Social welfare involves the attainment of allocative and production efficiency which increase society's overall wealth⁵³.

Allocative efficiency is achieved because economic resources are allocated among goods and services so that it is impossible to make anyone better off without making another worse off. Consumer surplus is also maximised because goods and services are valued at prices consumers are prepared to pay⁵⁴. Conversely monopolists produce less output, leading to allocative inefficiency⁵⁵.

Similarly, production efficiency is attainable under perfect competition because production is done at the lowest cost and producers cannot sell above cost because customers will desert them⁵⁶. Contrariwise, monopolists can produce at high cost because they are not constrained by competition.

However, the conditions for the existence of perfect competition such as infinite number of buyers and homogenous products are highly unlikely and producers are not always rational⁵⁷.

2.2.1 Law and Economics Theory of Law

The law and economics theory seeks to make the study of law scientific through comprehensible theory, from which precise hypotheses can be construed and then empirically tested⁵⁸. Economics offers external perspective on legal issues. This helps uncover new insights and relationships that explain the law and its effects more clearly⁵⁹.

⁵² Lipsey and Chrystal, *Economics*, (Oxford University Press, 12th edn. 2011), Ch 7.

⁵³ Ibid, (n74), p5

⁵⁴ Richard Whish and David Bailey, *Competition Law*, 8th Edn. (Oxford University Press Inc. 198 Madison Avenue, New York, 2015)

⁵⁵ Ibid, (n74), p5

⁵⁶ Ibid, (n74), p5

⁵⁷ Ibid, (n69), p3

⁵⁸ Judge Richard A. Posner, in MICHAEL FAURE & ROGER VAN DEN BERGH, EDS., *ESSAYS IN LAW AND ECONOMICS* (1989)

⁵⁹ Ibid, (n68)

The economic analysis of law helps explain what the law *is* and its expected effects (positive dimension) and, it provides a framework for critical analysis and an definitive view of how the law *ought* to be (designed, reformed, interpreted, or enforced), to realize socially desirable goals (normative dimension).⁶⁰ The theory is based on the pursuit of economic efficiency as a proxy for the maximization of social welfare⁶¹.

Economic efficiency is a measure of public benefits that include: firm profits, consumer well-being, and the wages of workers⁶². The logic of maximizing efficiency is very similar to the logic of maximizing one of its components (profits)⁶³. A good legal system keeps the profitability of a business and the welfare of people aligned so that the pursuit of profits also benefits the public.⁶⁴

Therefore, economic theory aims to structure law- in this case, competition law, in a way that maximizes economic efficiency. This paper adopts Kaldor-Hicks definition of economic efficiency, which states that there is no increase in economic welfare unless, the implementation of a rule or policy results in a situation where those who gain would *in principle* be able to fully compensate those who lose and still be better off themselves⁶⁵.

2.2.2 Law and Economics Theory on Mergers and Acquisitions

Under the law and economics theory, a merger/acquisition authorization criterion is efficient if it results in a net social gain of economic welfare. This suggests that merger criteria may be optimal regardless of the negative effects on consumers as long as those who gain would *in principle* be able to fully compensate those who lose and still be better off themselves. Therefore, a merger would be efficient if its benefits to producers would compensate consumers for adverse product implications.

⁶⁰ Dawn Hawkins and Mandy Burton, *Research Methods in Law*, (2nd edn. Taylor and Francis: NY, 2018)

⁶¹ Richard A. Posner, "Antitrust Law," (1976); See Also Robert H. Bork, *The Antitrust Paradox* (1978)

⁶² J.L. Coleman, *Efficiency, Utility and Wealth Maximization*, Hofstra Law Review 8(3), 1980,509

⁶³ *ibid*

⁶⁴ *Ibid*, (n70), p5

⁶⁵ *Ibid*, (n81), p177

The traditional law and Economics view of antitrust holds that the purpose of antitrust law is the enhancement of consumer welfare through wealth expansion and improvements in product availability, price, choice, and innovation⁶⁶.

However, proponents of the theory condemn antitrust rules which go beyond the prohibition of output-reducing, price-enhancing behaviour, and attack conduct with plausible efficiency justifications-as damaging to competition or consumers⁶⁷.

2.2.3 The Law is Efficient

Posner advances that the law is efficient⁶⁸. Consumer protection is an overarching aim of the CFTA. Therefore, ensuring that consumers are protected in all parts of the CFTA (including merger enforcement) is efficient.

The relationship between optimal merger authorization, consumer protection, and efficiency can be explained by Posner's proposition that the law is efficient or ought to be efficient. Bearing this in mind, 'consumer welfare' can be used as a goal, guide, and also test of competition law. For instance, the test for merger law can be that if merger authorization criteria are efficient or ought to be, they will promote consumer welfare. Similarly, a guiding tool may provide that merger authorization criteria are efficient if they promote efficient mergers and/or prohibit inefficient ones. Arguably, a merger is efficient if it promotes goals of the CFTA, such as consumer welfare. However, the goals of the Act also include the promotion of competition and economic development. This suggests that promotion of any one of these would be efficient. This raises the question of how much weight should be accorded to each of them to ensure efficient mergers.

2.2.4 Wendell Holmes's Theory of American Realism

Legal realism assumes that judging is not impersonal or mechanistic, but contaminated by the judges' values⁶⁹. While formalists opine that judges apply the law logically, and deliberatively,

⁶⁶Ibid, (n77)

⁶⁷ Brooklyn Law Review, [Vol. 59:1443], p1454

⁶⁸ Richard Posner, *Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, Hofstra Law Review 8(3), 1980,487;

⁶⁹ William M. Wiecek, *Liberty Under Law: The Supreme Court In American Life* 187 (1988)

realists say they decide by feeling and hunching and not judgment or ratiocination and then later deliberate to justify their decision and make it acceptable.”⁷⁰

Supporters of the theory state that when interpreting legislation, judges (or reviewers) should implement the wishes of the drafters of the regulation and not impose their personal views⁷¹. Likewise, reviewers of prospective mergers ought to apply the wishes of the legislators and not their assessments of which mergers to authorize.

Holmes also emphasizes the need for objective rules that do not allow for use of personal attributes⁷². Therefore, to ensure objective application of the merger authorization criteria, the law must not give the reviewers unlimited discretion.

Holmes also acknowledges the need for pragmatism. The law cannot be expected to interfere with forces of nature such as the invisible hand in economics and the unavoidable results of free trade⁷³. Therefore, merger reviewers cannot be responsible for unfavourable effects on consumer welfare that result from these.

2.2.5 Analytical Framework

In light of the foregoing, for the merger authorization criteria to be efficient they must: (i) be clear; ii) objective (iii) consistent with the CFTA’s goals, and (iv) authorize efficient mergers. Accordingly, in the upcoming chapters, the merger authorization criteria will be analysed in light of how well they do this.

2.3.0 Conclusion

The theory of competition suggests that competition is efficient. Based on Posner’s theory, the ideal scenario is what the efficient law posits- which for the CFTA includes that consumers and competition ought to be protected. Holmes encourages the need for objectivity and pragmatism in the application of the merger authorization criteria. Consequently, although consumer protection is an aim of the CFTA, pragmatism may call for prioritization of other considerations such as

⁷⁰ Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1707&context=facpub>

⁷¹ Ibid, (n90)

⁷² Morton Horowitz, *The Transformation of American Law, 1870-1960*, At 110 (1992).

⁷³ *McFarland v. American Sugar Ref. Co.*, 241 U.S. (1916)

saving jobs, over the prevention of negative effects on consumers, as long as the outcome is efficiency.

CHAPTER THREE: CFTC’s INTERPRETATION OF THE MERGER AUTHORIZATION CRITERIA UNDER THE CFTA IN SELECTED MERGERS

3.0 Introduction

This chapter investigates which standard the CFTA prescribes and which standard the CFTC has used in its application of the merger criteria under the CFTA. This includes an examination of how consumer welfare considerations have informed the merger review process under the CFTA.

3.1 The Merger Authorization Criteria under the CFTA

The CFTA prescribes a number of tests for merger determination, these include:

Substantial Lessening of Competition or “Effect” Test- Section 35(1)

This assesses the likelihood of a merger to prevent, restrict, or distort competition in the relevant market through altering the market structure and negatively influencing other players in the market.

i. Dominance Test- Section 41(1)

This tests whether the transaction, through abuse or acquisition of a dominant position of market power, would or is likely to limit access to markets; unduly restrain competition or harm trade or the economy generally.

ii. Efficiency Gains/Test – Sub-section 38 (1) (b)

Mergers are expected to improve and not reduce efficiency. The CFTC estimates the possibility of production, distribution/allocative efficiencies.

iii. Public Interest- Sub-section 38(1)(b)

This assesses how a merger/acquisition would affect the public and the economy. The CFTC can authorize an anti-competitive merger based on public interest concerns.

3.2.0 The CFTC's Application of the Merger Authorization Criteria in Selected Merger Decisions

3.2.1 Indirect Acquisition of Celtel Malawi (Renamed Airtel Malawi Limited) by Bharti Airtel Limited

This was an application for the takeover of Celtel Malawi Limited by Bharti Airtel Limited. Airtel's acquisition of Zain International B.V. changed Celtel's entire shareholding.

Finding: The public interest advantages of employment, consumer benefits and efficiency gains from Airtel's market dominance outweighed the prospect of possible competition concerns.

3.2.2 The Acquisition of Dairibord Malawi Limited by Lilongwe Dairy (2001)

The proposed transaction involved the acquisition of 100% of Dairibord Malawi by Lilongwe Dairy.

Finding: Advantages of saving jobs and a failing firm deemed greater than disadvantages of creating a dominant post-merger entity and reducing competition; while adverse effects on consumer welfare explained away.

3.2.3 The Acquisition by SS Poultry by Central Poultry (2000) Limited

This was an application for the acquisition of assets of SS Poultry Agrotech Limited by Central Poultry (2000) Limited (CP).

Finding: The merger was authorized with conditions aimed to address competition concerns. The advantage of saving a failing firm deemed to have outweighed disadvantages of competition concerns due to dominant post-merger entity and adverse product price, choice and convenience to consumers.

3.2.4 The Acquisition of Kulimba Cement Limited by Lafarge Cement (Malawi) Limited

This entailed the acquisition of Kulimba Cement assets by Lafarge cement. The transaction would marginally change the market share of Lafarge from 27% to 28% and would not create a dominant player.

Finding: Advantages from creation of employment and new products outweighed possible insignificant negative effects from changes in market structure.

3.2.5 Decision of the 31st Meeting of the Committee Responsible for Initial Determination Regarding the Proposed Merger between B.I.H Brasseries Internationales Holdings Limited and Carlsberg Malawi Limited

The COMESA Competition Commission (hereinafter, CCC) approved the acquisition of Carlsberg by B.I.H. Through its subsidiaries in Malawi, Carlsberg produces and distributes alcoholic and non-alcoholic beverages.

Finding: Efficiency gains from transaction were prioritized over competition and employment loss concerns while effects consumer welfare not discussed.

3.3.0 The Merger Authorization Standard Applied by the CFTC

From the selected mergers, CFTC considers the effect of mergers on consumer welfare. However, the length of the discussion on consumer welfare considerations and the tendency to explain them away suggests that the CFTC accords more weight to considerations of dominance, efficiency and public interest, to the exclusion of their respective effects on consumer welfare. This suggests that the CFTC does not implement the consumer welfare standard. Additionally, the CFTC recognizes the efficiencies defence because, in the majority of the selected mergers herein, production efficiencies were prioritized over competition or consumer welfare concerns. This supports the view that the CFTC does not use the consumer welfare standard and is relatively more inclined towards the total welfare standard.

3.3.1 How Do Consumer Welfare Considerations inform Merger Authorization under the CFTA

The CFTC considered how the proposed mergers would affect consumer welfare. In the CP and Dairiboard mergers, the CFTC considered the effect of the mergers on product choice. However, in both mergers, the CFTC opined that the availability of product substitutes would prevent dominant post-merger from raising product prices because consumers could easily switch to substitutes.

Conversely, in the Carlsberg merger, the CCC considered the possible effect of abuse of market dominance and collusion of competing entities in which Castel had shareholding. However, the CCC opined that the merger was in the public interest and authorised it with conditions. This is arguably an application of the efficiencies defence by the CCC. Similarly in all the other mergers, the CFTC prioritized potential efficiency gains and public interest over competition or consumer welfare concerns. This suggests that consumer welfare considerations are not a decisive factor in merger review.

3.4 Conclusion

The CFTC seems to prioritize public interest considerations over the CFTA's goals of promoting and protecting competition and consumer welfare. However, it is questionable whether advancement of public interest is always efficient. Additionally, the CFTC seems to undermine the symbiotic relationship between competition and protection of consumer welfare. In mergers where dominant entities were created, the CFTC overemphasized resultant production efficiencies which would result into reduced product price for consumers. This is an application of the efficiency defence. However, it ignored how reduced competition could result in abuse of market dominance and consequently increased product prices or reduced product quality. Conclusively, it is debatable whether the CFTC actually weighed the various merger factors to find the envisaged balance.

CHAPTER FOUR: THE EFFECT OF CONSUMER WELFARE CONSIDERATIONS IN MERGERS CONSIDERED BY THE CFTC; THE SEARCH FOR A MORE SUITABLE CRITERIA

4.0 Introduction

This chapter appraises the CFTC's interpretation and application of the criteria in selected merger decisions, in light of the aims of the CFTA to promote competition, efficiency and consumer welfare. It then considers merger criteria from other jurisdictions to find a criteria suitable for the Malawian context.

4.1.0 What Problems, if any, does the CFTC's Interpretation of the Merger Authorization Criteria Create for Consumers?

As discussed earlier, a merger is efficient if consumers are likely to be at least as well off after the merger as they were before it. However, even in the case of price-lowering mergers like the CP merger, not all consumers may be better off. Arguably, consumers that preferred SS Poultry products are worse off⁷⁴.

Market dominance results in cost savings which lower product prices and raise total welfare⁷⁵. However, it could lower total welfare after adjusting for the net negative effect on all producers⁷⁶. This is exemplified by the complaint from small scale poultry farmers to the CFTC over CP's post-merger dominance. Moreover, CFTC recently threatened to revoke CP's licence for stifling other entities in the market⁷⁷.

⁷⁴ *ibid*, (n52) pp11-12

⁷⁵ *ibid*, (n52),pp 12-13

⁷⁶*ibid*, (n52), 12

⁷⁷ "Central Poultry Risks Revocation of Licence Due to Unfair Business Practices," 20 July,2021, retrieved from: <https://www.theatlasmw.com/central-poultry-risks-licence-revocation-for-unfair-business-practices/>

Further, in the Dairibord and CP merger reviews, the CFTC opined that buyers could easily switch to substitutes. However, only buyers with such power can do that and smaller buyers would still be harmed.⁷⁸ Moreover, product substitution may entail a trade-off in product quality.

Furthermore, production efficient mergers may also result in reductions in product quality. For instance, the acquisition of Carlsberg by Castel did not have any adverse effects on product price. However, post-merger, consumers complained to the CFTC about finding foreign objects in Castel drinks. Consequently, the CFTC fined Castel MK35, 416,000.00 for supplying harmful products⁷⁹.

Similarly, some batches of Sobo Squash contained tartazine which is hazardous to consumers. The Malawi Bureau of Standards ordered that the drink be recalled from stores⁸⁰. This protected consumers from harm but it also denied them choice of the drink. Additionally, consumers of Carlsberg products complained that their favourite drinks do not taste as good produced by Castel.

Conversely, the merger between Celtel and Bharti Airtel resulted into innovation in the form of 3G and 4 G networks, although at a higher price for consumers.

4.2.0 Merger authorization criteria in other jurisdictions

4.2.1 Merger Authorization by COMESA

The **COMESA Merger Assessment Guidelines** state that the (CCC) ought not to authorize mergers that will more likely than not give rise to a Substantial Prevention or Lessening of Competition in the common market (SPLC)⁸¹.

The objective of the CCC's merger policy is to promote and encourage effective competition and ultimately enhance consumer welfare. There is no such policy under the CFTA, perhaps it can be read in from the fact that consumer protection is one of the aims of the CFTA.

⁷⁸ Richard Whish, *Competition Law*, 6th edition, (Oxford University Press Inc.) p926

⁷⁹ CFTC, Press Release, 2018

⁸⁰ The Times Group, Tom Sangala, (10th January, 2018), "*Bad Sobo on the Market*," retrieved from: <https://times.mw/bad-sobo-on-market/>

⁸¹ COMESA Merger Guidelines, part 8.6

The CCC may consider substantiated claims of efficiencies if they are shown to be to the requisite standard; timely, significant, merger specific and beneficial to customers⁸².

A failing undertaking argument is only acceptable if: it was inevitable that the concerned undertaking would have exited the market; no alternative purchaser would have caused a substantially less anti-competitive effect and the exit would be a substantially less anti-competitive outcome than the merger⁸³.

4.2.2 Merger Authorization by the European Competition Commission

The European Commission Merger Regulations (ECMR) provide that the substantive test for merger control is whether the merger would significantly impede effective competition as a result of creating or strengthening a dominant market position⁸⁴. A merger may also be allowed for the efficiency gains it provides⁸⁵. Additionally, the ECMR recognize a failing firm defence⁸⁶ where: the failing firm would be forced out in future due to difficulties; there is no less anti-competitive alternative and the firm would otherwise exit the market⁸⁷.

The substantive analysis criteria for merger authorization is the Significant Impediment to Effective competition test (SIEC test)⁸⁸ which assesses whether the concentration impedes effective competition in the market⁸⁹. The European Commission (EC) also considers whether a merger would have anticompetitive effects, efficiencies, countervailing buyer power, block entrants; or fall within the failing firm defence. The EC has discretion on which factors to consider or not⁹⁰.

Additionally, while efficiencies may offset potential harm to competition and consumers, there is no efficiencies defence where there is SIEC⁹¹. In any case, the efficiency must be merger specific⁹²,

⁸² COMESA Merger Guidelines, part 7.8

⁸³ COMESA Merger Guidelines, part 7.20

⁸⁴ ECMR Art. 2(2) and 2(3))

⁸⁵ *European Commission- Horizontal Merger Guidelines-para 76-88*

⁸⁶ *European Commission's Horizontal Guidelines, para 76-88*

⁸⁷ *Ibid.* paras 89-90

⁸⁸ ECMR, Art 2(3)

⁸⁹ ECMR, Art. 2(1)

⁹⁰ *Sun Chemical Group BV and Others v Commission Case T-282/06- [2007], ECR II-000*

⁹¹ *Ibid.*, para 78

⁹² *Ibid.*, para 85

benefit consumers⁹³ and be verifiable⁹⁴. In **Inco Falcon Bridge**, the EC prohibited a merger because the parties failed to show that alleged efficiencies were merger specific and for consumers⁹⁵. The EC also permits mergers for public interest concerns⁹⁶.

4.2.3 Merger Authorization Criteria in the United Kingdom (UK)

UK, merger law is governed by the Enterprise Act, 2002 and Merger Substantive Assessment guidelines by the Office of Fair Trade (OFT)⁹⁷ and Merger References: Competition Commission Guidelines by the Competition Commission (CC)⁹⁸.

In reviewing mergers, the key question is whether a merger would result into a SLC. Under the Horizontal Guidelines, factors to consider when reviewing a merger include: market structure and concentration⁹⁹. The guidelines also consider countervailing buyer power.

Section 30 of the Enterprise Act provides for the efficiencies defence subject to various conditions. These include: whether customer benefits offset SLC and the efficiencies are demonstrable, merger specific and beneficial to consumers and quantifiable¹⁰⁰. In **Vue Entertainment Holdings (UK) Ltd./ A3 Cinema Ltd**¹⁰¹, the CC rejected arguments that the efficiencies would benefit consumers¹⁰². Similarly, in **Stagecoach/ Scottish Citylink**¹⁰³, the CC stated that although the efficiencies were identifiable, they did not offset benefits from competition.

⁹³ Ibid, para 79

⁹⁴ Ibid, para 86-88

⁹⁵ Case M 4000- decision of 4 July, 2006

⁹⁶ ECMR, Article 21(4)

⁹⁷ OFT-516, 2003

⁹⁸ CC-2 June, 2003

⁹⁹ Chp 4 of OFT and part 3 of CC Guidelines

¹⁰⁰ OFT Guidance para 7.7

¹⁰¹ No. ME/1858/05

¹⁰² final report available at www.competition-commission.org.uk/inquiries/ref2005/vue/index.htm para 7.62-7.69

¹⁰³Final report available at www.competition-commission.org.uk/inquiries/ref2006/citylink/index.htm para 8.62-8.67

UK merger law also allows a merger based on the failing firm defence if: it results in benefits to customers¹⁰⁴; the firm is unable to reorganize its operations¹⁰⁵ and it meets the same conditions stated under the COMESA and ECMR guidelines.

UK merger law also allows the CC to interfere in mergers that involve public interest. For instance, section **58(1) of Enterprise Act** provides that National Security is a public interest concern.

4.2.4 Lessons for Malawi

All the above discussed jurisdictions including Malawi permit mergers based on public interest concerns. They also provide for the failing firm defence. In Malawi this is provided for under public interest concerns. However, unlike the other jurisdictions, Malawi does not subject the failing firm defence to an objective test that assesses: whether purchase by an alternative firm would result in less adverse effects on competition; the failing firm would be forced out in future due to difficulties; or the firm would otherwise exit the market¹⁰⁶.

Notably, public interest considerations weigh more heavily in emerging economies like Malawi¹⁰⁷. Where unemployment is high governments tend to prioritise job creation when considering merger applications¹⁰⁸. This may explain why three of the five selected mergers were authorized to save failing firms and jobs, regardless of competition and consumer welfare concerns. This presumes that public interest considerations increase total welfare. However, without concrete proof, it is debatable whether, if at all, they do. Adding such an objective test to the criteria under the CFTA would help provide the necessary proof of efficiency.

Secondly, the other jurisdictions also provide for an objective test to determine when to employ the efficiency defence. The test entails: whether customer benefits offset SLC and the efficiencies are demonstrable, merger specific, beneficial to consumers and quantifiable¹⁰⁹. For instance, in

¹⁰⁴ OFT para 4.38

¹⁰⁵ OFT para 4.37

¹⁰⁶ Ibid. paras 89-90; *European Commission's Horizontal Guidelines*, para 76-88; COMESA Merger Guidelines, part 7.20

¹⁰⁷ OECD, “*Executive Summary of the Roundtable Discussion on Public Interest Considerations in Merger Control*,” (14, June, 2016), Working Party No. 3 on Co-operation and Enforcement, DAF/COMP/WP3/M(2016)1/ANN5/FINAL

¹⁰⁸ John Oxenham, “*Balancing Public Interest Merger Consideration Before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty*.” (2012), Vol. 9, *US-China Law Review*, 211

¹⁰⁹ (Article 2(1)(b) of the EC Merger Regulation; “*Horizontal Guidelines*”), OJ [2004] C 31/5, at 76-88.); COMESA Merger Guidelines, part 7.8

IV/M.50, AT&T/NCR's¹¹⁰ potential advantages from synergies were dismissed because they did not benefit consumers and were likely to harm competition.

Similarly, in **Brown Shoe Co., Inc. v. United States**¹¹¹ and **FTC v. Procter and Gamble**¹¹², the court stated that merger efficiencies were not a defence because they could negatively affect competition. Therefore, the Central Poultry and Lilongwe Dairy mergers would not have been cleared because although the dominant post-merger entities would result in production efficiencies, they would also raise competition concerns.

Additionally, in **GE/Honeywell**¹¹³, a transaction that was approved in the US was blocked in Europe because the post-merger entity's ability to charge lower prices by subsidising its operations signalled that it would harm less efficient competitors.

However, in the Canadian **Superior Propane Case**,¹¹⁴ the court authorized a potentially uncompetitive merger to monopoly because the economic benefits from its production efficiencies outweighed the anticompetitive effects. Malawi can also learn from the "balancing weights" approach expounded in the case- which provides for an objective method of merger review. As was stated in the case, in this approach:

*“the Tribunal first determines the change in consumer surplus ΔCS and the change in profit, $\Delta \pi$, that are supported by the evidence in the case. Instead of committing itself to a precise set of weights in balancing the two figures, it then calculates the weight, w , that would lead to a weighted average of the changes in surplus, $w \cdot \Delta CS + (1-w) \Delta \pi$, equal to zero. (Any greater weight on consumer surplus would lead to a negative change in this weighted average.) Then the Tribunal decides whether the appropriate weight on consumer surplus is greater than or less than this critical value, w .”*¹¹⁵

Essentially, the approach involves using econometrics to calculate the minimum weight on consumer surplus (relative to profits) that would render a merger unacceptable and then asking whether the most appropriate weight (based on the tax and redistribution system) likely exceeds

¹¹⁰ Commission decision of January 18, 1991, 30

¹¹¹ 370 U.S. 294 (1962)

¹¹² 386 U.S. 568 (1967).

¹¹³ (Commission decision of July 3, 2001, case COMP/M.2220, at 350 et seq.).

¹¹⁴ Commissioner of Competition v. Superior Propane Inc. [2000] C.C.T.D. No.15,7 C.P.R. (4th)3

¹¹⁵ Ibid, at p478

this number. Merger reviewers can then strive to ensure an upper or lower limit on the weight attached to consumer surplus¹¹⁶.

¹¹⁶ Ross, Thomas W., and Ralph A. Winter. *The Efficiency Defense in Merger Law: Economic Foundations and Recent Canadian Developments*. ALJ, vol. 72, no. 2, American Bar Association, 2005, pp. 471–503, <http://www.jstor.org/stable/40843631>. at p488

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter considers the extent to which the research questions have been answered. The chapter further considers the implications of the study's findings on theory, law reform, practice and further research.

5.1 Findings

The study aimed to examine the effect of consumer welfare considerations in the CFTC's application of the merger authorization criteria under the CFTA. This was premised on the foundation that the CFTC has failed to adequately consider the effects of proposed mergers on consumer welfare.

This was also in recognition of the fact that the CFTA ensures consumer protection by promoting competition. This is because the CFTA provides for mergers/acquisitions which change market structure and competition, thereby affecting consumers. The study presumed that although consumer protection is one of the goals of the CFTA, it is not a priority consideration in the merger review process. Therefore, the study sought to provide an ideal framework for the protection of consumer welfare in the merger assessment under the CFTA.

Consequently, the study explored the theoretical foundations of the concept of mergers/acquisitions and its relationship with competition, consumer protection and efficiency.

The study has found that based on the theory of law and economics, only efficient mergers/acquisitions should be allowed. This entails efficiency for the merging entities and other market participants by promoting competition and consumer welfare.

The study has found that without guidance on the weight to be applied to the various merger factors, there is no objective means for attaining the balance envisaged under the merger authorization criteria. Consequently, in exercising its discretion, the CFTC tends to authorize mergers based on expected production efficiencies and public interest concerns. This is done at the

expense of the merger's potential negative effects on competition and consumer welfare, such that it may not be efficient at all.

The study has found that despite academic debates on which standard of merger authorization should be used between the consumer and total welfare standards, there is a general consensus that consumer protection is the ultimate goal of competition law. Nonetheless, others argue that competition law is not the best tool for dealing with wealth distribution between producers and consumers and total welfare is more desirable. The study has found that this is a deprecation of the relationship between competition, consumer protection and efficiency.

The study has, thus found that under such circumstances the ideal framework for protecting the consumer welfare would be achieved by having regard to both consumer and producer welfare but prioritizing consumer welfare.

The study has found that whilst the CFTA recognizes the need to ensure consumer protection, the merger authorization criteria under the CFTA does not adequately protect consumer welfare.

5.2 Implications of the Findings

5.2.1 Theory

Failure of the CFTA to set out an objective way of weighing merger factors results into mergers which result into production efficiencies or protection of failing firms at the expense of competition and consumer welfare, thereby defeating the theoretical tenets of efficiency.

5.2.2 Law Reform

Therefore, it is necessary to consider reforming the CFTA so that it accomplishes the theoretical tenets of efficiency by ensuring competition and consumer protection. This can be achieved if the merger authorization criteria are structured to fit into the ideal framework of protection of consumer welfare conjectured by this study. This entails clear and objective criteria that promote consumer welfare, competition and efficiency. As stated in the **Superior Propane Case** this can be done by using econometrics to calculate a minimum weight of consumer surplus (relative to profits) that would make a merger unacceptable. This can then be used to determine limits of the weight of consumer welfare which can be specified in the merger criteria to guide merger assessment. The criteria also have to specify objective tests for the application of efficiencies and failing firm defences as is provided for in the assessment criteria of the COMESA, EC and the

UK. This is a better safeguard for competition, consumer protection and economic development and thus in line with the goals of the CFTA.

5.3 Conclusion

Mergers and acquisitions help entities survive adverse business conditions. It is important to consider reforming the current merger authorization criteria so that it can adequately protect consumer welfare, competition and economic development.

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