CARTEL REGULATION IN DEVELOPING COUNTRIES: A COMPARATIVE ANALYSIS OF COMPETITION REGIMES IN MALAWI AND SOUTH AFRICA

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1. INTRODUCTION

Cartels have been described as the 'supreme evil of antitrust'[2]and they are considered the most egregious violations of competition law.[3] A cartel is an association of independent manufacturers or suppliers which aims at maintaining high prices and restricting competition.[4] These objects are achieved through agreements to fix prices, to limit production to a certain amount or quality, or to share markets or customers between the participants in the cartel.[5] Cartels pose a serious threat to the very objectives of competition law as they interfere with the competitive process. Instead of engaging in fair competition and basing prices on market forces, cartelists depend on agreements with one another. The incentive to minimise costs of production or innovate is reduced. Consumers are harmed as prices are raised to levels not in tandem with market forces and supply may be restricted, thereby making goods either scarce and unnecessarily expensive, or completely unavailable for certain consumers.[6] In light of the serious effects of cartels on the competitive economy and consumer welfare, cartel regulation is one of the cardinal goals of every competition regulatory system. Competition authorities must ensure that they put in place robust systems for keeping cartels in check.

In Malawi, particularly, cartels thrive as there is insufficient deterrence of such conduct. Cartels have infested key industries such as medical drugs, fertiliser, steel, tea, oil and cement. In the medical drugs and fertiliser markets, particularly, local enterprises have been conniving and setting prices higher than warranted by the market forces and prevailing international economic conditions. Bid rigging also runs rife in the said industries. Powerful

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[2] *Verizon Communications v law Offices of Curtis V Trinko* 540 US 398, p 408 (2004)
[3] OECD Council, Recommendation of the Council concerning Effective Action against Hard Core Cartels, OECD Legal Instruments, Preamble, 2019.
[4] Sashalee Stephanie Afrika and Sascha-Dominik Bachmann 'Cartel Regulation in three emerging BRICS Economies: Cartle and Competition Policies in South Africa, Brazil and India- A Comparative Overview' (2011) *The International Lawyer* 101
[5] European Commission, Competition Policy: Cartels, available at https://ec.europa.eu/competition-policy/cartels_en, accessed on November 15, 2021
[6] OECD op cit note 2

enterprises act like they were a single entity, interfere with the bidding process to ensure that no matter who wins the tender, certain powerful enterprises still end up supplying the products to the government, which is the main buyer of the products. The cartels fix higher prices for enterprises attempting to engage in the same business and order from them, thereby making the said enterprises anti-competitive and kicking them out of the market.[7] Because of these anti-competitive arrangements in the fertilizer industry, farmers end up paying exorbitant prices that are 100% to 150% higher than competitive international prices.[8] The same applies for the steel, tea, oil, cement and other markets. Malawi therefore needs a strong competition law regime to curb these practices and their negative effects. This paper examines the suitability of Malawi's current competition law regime for this task, in comparison with South Africa.

South Africa is a developing country, just like Malawi, and it too is characterised by (racial) marginalisation in trade industries. Both countries enacted their Competition Acts in 1998, and they share similar goals in their competition regimes. The objectives of Malawi's Competition and Fair-Trading Act No. 43 of 1998 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 the freedom of trade; to facilitate the expansion of the base of entrepreneurship and to provide for matters incidental thereto or connected therewith.'[9]

Similarly, South Africa's Competition Act No. 89 of 1998 was enacted to

> '…provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa: provide for

[7] Mulotwa Mulotwa, Time to break fertilizer, drug cartels, available at https://www.mwnation.com/time-to-break-fertiliser-drug-cartels/, accessed on 15 November 2021

[8] Simon Roberts and Thando Vilakazi 'Regulation and rivalry in transport and supply in the fertilizer industry in Malawi, Tanzania and Zambia' (2016), in S. Roberts (ed.) *Competition in Africa: insights from key industries* at 27

[9] Competition and Fair-Trading Act of Malawi, preamble

markets in which consumers have access to, and can freely select. the quality and variety of goods and services they desire: create greater capability and an environment for South Africans to compete effectively in international markets: restrain particular trade practices which undermine a competitive economy: regulate the transfer of economic ownership in keeping with the public interest: establish independent institutions to monitor economic competition: and give effect to the international law obligations of the Republic.'[10]

Although there are differences, the two Acts pursue the central objectives of ensuring that the competitive economy is not undermined, that the welfare of consumers is protected, that production and distribution of goods is efficient, and that economic power is not concentrated in one sector of the citizenry to the detriment of others. South Africa's competition law regulatory system is considerably well developed as far as regulating anti-competitive conduct, particularly cartels, is concerned. Unfortunately, the same cannot be said of Malawi's competition law regime. It is lacking in both the legal and institutional framework and is therefore not suited to achieve the best results. This paper discusses the state of cartel regulation in Malawi and draws lessons from South Africa on possible improvements to the cartel regulation system.

2. LEGAL FRAMEWORK

Competition law in Malawi is governed by the Competition and Fair-Trading Act (CFTA). The Act does not define cartel behaviour. However, it provides for per se prohibited agreements, some of which fit the definition of cartel conduct. Section 33 of the CFTA prohibits and criminalises anti-competitive agreements between enterprises that are competitors or potential competitors in a given market. Such agreements may be formal or informal; written or unwritten. What matters is that there is an agreement or an arrangement between competitors.

Section 33 (3) of the CFTA provides that:

> For purposes of subsection (1), the following are prohibited

[10] Competition Act of South Africa, preamble

(a) colluding in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in settling uniform price in order to eliminate competition;
(b) collusive tendering and bid-rigging;
(c) market or customer allocation agreements;
(d) allocation by quota as to sales and production;
(e) collective action to enforce arrangements;
(f) concerted refusals to supply goods or services to potential purchasers;
(g) collective denials of access to an arrangement or association which is crucial to competition.

The reading of the section demonstrates a combination of per se prohibition of cartel conduct, under paragraphs (a) to (e), and conduct typically characterised as abuse of dominance under paragraphs (f) and (g). In relation to cartel behaviour, Section 33 (3) prohibits price fixing for monopolies, collusive tendering and bid-rigging, market or customer allocation agreements, allocation by quota as to sales and production and collective action to enforce arrangements. However, this conduct is not defined under the Act. In addition to this, there is paucity of case law, whether decisions by the Competition and Fair-Trading Commission (CFTC) or the Malawi judiciary, providing guidance on the definition of the conduct listed under Section 33(3). Recourse must be had to foreign jurisprudence to determine what exactly constitutes the listed conduct.

Special consideration must be made of the prohibition of price fixing under Section 33 (3) (a). The section prohibits the settling of uniform prices by competitors to eliminate competition. However, under the section, price fixing by competitors is prohibited in the 'case of monopolies.' This is an anomaly as it essentially means that if the competitors engaged in price fixing cannot be categorised as monopolies, which is usually the case, price-fixing is not prohibited per se and does not constitute an offence. Price-fixing constitutes one of the most common and serious forms of cartel conduct, yet the prohibition under Section 33 (3) (a) applies only in cases of monopolies. This gap is therefore a challenge in regulation of cartel behaviour as there is a lack of solid foundation in the law for action against price fixing arrangements.

Mention is made of price-fixing in Section 32 (2) (g) of the CFTA. Under this section, price-fixing is not characterised as conduct that is prohibited per se and is not criminalised. Section 32 (1) prohibits 'agreements, decisions and concerted practices which are likely to result in the prevention, restriction or distortion of competition to an appreciable extent in Malawi or in any substantial part of it'. Particularly, Section 32 (2)(g) directs enterprises to refrain from trade agreements that fix prices between competitors and hinder or prevent the sale or supply or purchase of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services. Thus, for a price fixing agreement to be prohibited under Section 32 (2) (g), it must be shown to hinder or restrict trade. This prohibition is subject to a further proviso. Section 32 (2) provides that the conduct listed thereunder, including price-fixing, is prohibited if it limits access to markets, unduly restrains competition, or has or is likely to have adverse effects on trade or the economy in general. Essentially, under the CFTA, if price-fixing has not been committed by monopolies, it is subject to the rule of reason and is not criminalised. Under the rule of reason analysis, it must be shown, firstly, that the agreement hinders or prevents the sale or supply of goods and services or restricts the conditions of sale or supply, and, secondly, that the conduct has or is likely to have adverse effects on trade or the economy. This creates a high standard of proof in order to make out a case of price fixing than would have been the case if it were subject to a per se prohibition. Adopting such an approach for price-fixing, which is serious cartel conduct, lays a weak foundation for cartel regulation and makes it easy for cartelists in Malawi to be exonerated from liability for such anti-competitive behaviour.

Provision has also been made for enterprises to make an application to the CFTC for authorisation of an agreement if the enterprises believe the agreement would not hinder or prevent the sale or supply or purchase of goods or services between persons, and would not limit or restrict the terms and conditions of sale or purchase between persons engaged in the sale of purchased goods or services.[11] This further demonstrates the level of lenience Malawi's competition regime has towards price fixing agreements, in that there is room for participants in such agreements to attempt to justify them before the CFTC, and there is room for the CFTC to authorise the said agreements.

[11] Competition and Fair-Trading Regulations, Regulation 7

Malawi's lenient approach towards cartel behaviour, particularly price fixing, stands in stark contrast with that of South Africa. Section 4 (1) (b) of the South African Competition Act (CA) 1998 prohibits agreements or concerted practices between firms, or decisions by an association of firms, involving the fixing of a purchase price, selling price or other trading condition; market division through allocation of customers, suppliers, territories or specific types of goods or services; or collusive tendering. All these types of anti-competitive behaviour are prohibited per se. This demonstrates recognition of the 'naked' nature of cartels- that they restrict competition without any countervailing benefits such as technological, efficiency or other pro-competitive gains.[12] This is differentiated from other anticompetitive horizontal agreements or concerted practices that "have the effect of substantially preventing or lessening competition in a market,", provided for in Section 4 (1) (a) of the South African Competition Act. These agreements or concerted practices, are permissible if a party to the agreement, concerted practice. or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

According to South African law, whenever enterprises engage in cartel behaviour, competition will be harmed and there is absolutely no room for justification.[13]Because of this notion, the approach is to nip cartels in the bud. As such, even if an agreement is not implemented, the mere fact that a firm reached an understanding with another firm to engage in cartel behaviour or passively participated in meetings of a cartel without publicly distancing itself, is sufficient basis for a finding of violation of Article 4 (1) (b) of the CA.[14]Such is the seriousness with which cartels are regarded in South Africa. The possibility of a rule of reason analysis, or authorisation to engage in what would otherwise constitute cartel behaviour, is unthinkable.

Malawi would do well to draw a lesson from South Africa's per se prohibition of all cartel conduct, including price fixing. The justification behind per se prohibition of price fixing only when it pertains to monopolies is difficult to appreciate. Cartels offer no benefits to the competitive process. On the contrary, they shield enterprises from the market forces

[12] Isabel Goodman, Patrick Smith, Luke Kelly et al *Principles of Competition Law in South Africa.* (2017) at 4.2
[13] *Johan Venter v Law Society of the Cape of Good Hope and Others* [2013] ZACT 103 (14 October 2013) at para 73.
[14] *MacNeil Agencies (Pty) Ltd v Competition Commission* (121/CAC/Jul12) [2013] ZACAC 3 (18 November 2013) at 63.

and create an artificial environment in which producers or suppliers are under no obligation to reduce production costs or be innovative. Consumers do not stand to benefit in any way from price fixing. There must be no room for justification of such conduct and Sections 32 and 33 of the CFTA need to be amended to rectify this anomaly so that all kinds of cartel behaviour are prohibited per se.

3. ENFORCEMENT

3.1.Investigation and Adjudication

The CFTC is the body authorised to regulate all competition issues, including cartel conduct, in Malawi. Established under Section 4 of the CTFA, the Commission's function is to regulate, monitor, control and prevent behaviour or acts which are likely to adversely affect competition and fair trading in Malawi.[15] The geographical scope of the CFTC's authority and, incidentally, application of the CFTA, is wide. It goes beyond economic activities taking place in Malawi and extends to those outside Malawi, as long as the said activities affect or are likely to affect competition in Malawi in an adverse way. Its wide scope is a strength as cross-border jurisdiction is highly significant and useful in a globalised world where cartel activities and their effects may span over a number of countries, with developing countries such as Malawi bearing the brunt of the deleterious effects of cross-border cartels on trade.[16]

The CFTC has power to conduct investigations, whether on its own motion or upon being so requested by any person, into business activities to establish whether they constitute anti-competitive behaviour and the extent of such conduct. Section 8 (2) (c) gives the CFTC power to take any action it considers necessary or expedient to prevent or redress the creation of a merger or the abuse of a dominant position by an enterprise. Oddly, although the provision gives the CFTC power to take action against anti-competitive conduct and mentions specific categories, no mention is made of cartel behaviour. This notwithstanding, the CFTC has authority to regulate

[15] Competition and Fair-Trading Act of Malawi, Section 8
[16] Jonathan Klaaren and Fungai Sibanda, "Competition policy for the Tripartite Free Trade Area" in Jonathan Klaaren, Simon Roberts and Imraan Valodia (ed) *Competition and Regulation for Inclusive Growth in Southern Africa* (2019) at 69

cartels, emanating from its general function of regulating, monitoring, controlling and preventing conduct likely to adversely affect competition and fair trading in Malawi.
Pursuant to its investigative powers, the CFTC may look into a matter either on its own motion or upon receiving a request by any person. This involves conducting oral hearings at which the person who may be affected by a decision and/or the person who has made a written request for a hearing is heard. During such investigations, the CFTC may call for and examine witnesses and documents, and may request for particular information necessary for it to make a determination on the nature of conduct, and may administer oaths or require that documents be verified by affidavit. The Commission determines its own procedure.

The CFTC's mandate to issue orders upon conducting investigations has been expressly provided for only in respect of mergers, 39 and 40. In relation to all other matters, including cartels, no express provision of the Commission's power to issue decisions, and the enforceability of those decisions, has been made. For mergers, the CFTC is to issue decisions within 45 days, subject to the fulfilment of certain conditions by the applicant. No similar provision exists for determinations on anti-competitive behaviour, and cartels in particular.

The adjudicative authority of the CFTC is, however, envisaged under Section 8 (2) (i), which provides for the general powers of the CFTC to take all actions necessary for enforcement of competition laws, and Section 40, which provides for the enforcement of decisions of the Commission in general, without making specific reference to mergers. In practice, the CFTC has been determining various complaints and issuing decisions, not just with respect to mergers. Examples include the CFTC's order that the Lilongwe City Council had exercised its regulatory powers in a discriminatory manner in the issuance of permits for the erection of billboards,[17] and an order of a fine against Airtel Malawi Plc for engaging in unconscionable conduct prohibited under the Act.[18] This demonstrates that the CFTC does have adjudicative power over all matters relevant to

[17] *Alliance Media v Competition and Fair-Trading Commission*, Miscellaneous Civil Cause No. 53 of 2016
[18] *Airtel Malawi Plc v Competition and Fair-Trading Commission*, Commercial Cause No. 404 of 2021

competition, including cartels. However, there is need for an express provision for the power of the Commission to issue such order to be incorporated into the Act.

According to Section 40 of the CFTA, the Commission or any person in whose favour an order of the CFTC has been made may lodge a copy of the order, certified by the Commission or its agent, with the Registrar of the High Court. The Registrar is then required to record the decision as a judgment of the High Court. Upon being recorded, the order has the effect of a civil judgment of the High Court. According to Section 48, any person aggrieved with a decision of the CFTC may lodge an appeal to a judge in chambers within 15 days of the date of the CFTC's finding. The judge has authority to confirm, modify or reverse the findings of the CFTC, or to order that the CFTC reconsider its decision. As the decision of the CFTC has the force of a civil judgment of the High Court, appeals from such decisions lie with the Supreme Court of Appeal.[19] There is no specialised competition court or tribunal. Decisions on competition matters are made at two levels: the CFTC, whose decisions have the force of civil judgments of the High Court, followed by the Supreme Court of Appeal.

It is apparent that the adjudicative jurisdiction of the CFTC is civil in nature. However, those involved in cartels are liable for both civil damages and criminal sanctions.[20] The CFTC has been imposing fines for anticompetitive and unfair conduct. In the case of *Airtel Malawi v Competition and Fair-Trading Commission*, the power of the CFTC to impose out and out fines, which are meant to punish the perpetrator and not to compensate the victims, was questioned. This challenge was based on the fact that there is no provision for criminal jurisdiction of the CFTC and its decisions have the force of civil and not criminal judgments of the High Court. The fairness of imposition of criminal sanctions such as fines without conducting a criminal trial prior to the imposition of the fine was questioned. These issues are still before the High Court and are yet to be resolved. There remains, therefore, a need for legislative clarity on the existence, nature and extent of the CFTC's criminal jurisdiction and authority to impose fines.

[19] Ibid at page 3

[20] CFTA, Section 33(1) and Section 51

Malawi's institutional framework for competition law enforcement can be contrasted with that of South Africa. Although South Africa has a Competition Commission just like Malawi, it also has a specialised competition law court system, comprised of the Competition Tribunal and the Competition Appeal Court. Just like Malawi's CFTC, South Africa's Competition Commission is an independent body with the mandate of investigating and prosecuting prohibited conduct, and regulating mergers.[21] The Commission initiates complaints into anti-competitive behaviour by commencing investigations if it has reason to believe the conduct constitutes anti-competitive behaviour. This may be on the Commission's own motion or upon receiving information or a complaint from any person regarding a prohibited practice.[22] A complaint is initiated by commencing investigations into the conduct. In the exercise of its investigative powers, the Commission has power to summon witnesses, to enter and search premises, and to require witnesses to produce information and documents relevant to the investigation process.[23] These powers are similar to those of Malawi's CFTC.

If, after conducting investigations, the Commission is of the view that a prohibited practice has been established, it may refer the matter to the tribunal, which has power to adjudicate over the matter and impose a penalty. Alternatively, the Commission can agree on settlement terms with the party guilty of prohibited conduct and sign a consent order, which is then referred to the tribunal for review and approval.[24] If the Commission establishes from its investigations that there was no anti-competitive conduct, it can elect not to refer the matter to the tribunal and give notice of non-referral. A person whose complaint to the Commission resulted in a non-referral may refer the complaint directly to the tribunal through a private complaint referral.[25]

The tribunal does not have original jurisdiction but acts upon matters referred to it by the Commission or through private complaint referrals. Private complaint

[21] SA Competition Act 1998, Section 19, 20 and 21
[22] Ibid, Section 49 (B) (1) and (2)
[23] Ibid, Section 46 to 49
[24] Ibid, Section 49 D
[25] Ibid, Section 51

referrals can be made either upon receipt of a notice of non-referral by the Commission, as discussed above, or if the Commission takes more than a year to refer the complaint, unless otherwise agreed between the complainant and the Commission.[26] The tribunal adjudicates over the matters referred to it and has power to make orders, including administrative penalties, against only the parties before it.[27]A party aggrieved by a decision of the tribunal may lodge an appeal against that decision with the Competition Appeal Court, which has power to review and hear appeals against decisions of the Tribunal.[28] These institutions: the Competition Commission, the Competition Tribunal and the Competition Appeal Court, constitute the institutional framework responsible for enforcement of competition law in South Africa.

In 2016, the National Prosecuting Authority (NPA) was added to the enforcement framework for competition law in South Africa through the introduction of criminal liability for cartel conduct by virtue of the incorporation of Section 73 A into the Competition Act. The Section states that a director of a firm or a person in a firm's managerial power or purporting to have such managerial power commits an offence if she/he causes the firm to engage in cartel conduct or knowingly acquiesces to the firm engaging in such conduct. According to Section 179 (2) of the Constitution of the Republic of South Africa, the NPA has sole authority to conduct criminal proceedings on behalf of the state. It is therefore the body responsible for prosecution for cartel conduct. The interplay in roles between the Commission and the NPA in prosecuting cartel crimes is yet to be provided for and this is a current gap in cartel regulation in South Africa. Criminalisation of cartel conduct also has a bearing on the operation of the corporate leniency program, discussed below.

3.2.Corporate leniency

Corporate leniency is an investigative tool employed by competition regulators, including the South African Competition Commission, in cartel regulation. Corporate leniency is aimed at detecting, stopping and preventing cartel behaviour, which is typically secretive, conducted through conspiracies among groups of firms

[26] Ibid, Section 50 and 51
[27]*Premier Foods (Pty Ltd v Manoim NO and Others* 2016 (1) SA 445 (SCA)
[28] SA Competition Act, Sections 36 and 37

and extremely difficult to detect or prove[29].South Africa's Corporate leniency policy (CLP) recognises that detection or proof of a cartel usually requires the help of a member of such a cartel. To make such detection and proof easier, the policy creates an incentive for a firm, whether a natural person, a partnership, a trust or a body corporate, that is a member of a cartel, to provide information about the said cartel to the Commission. This incentive is created by granting immunity from prosecution to the first firm in a cartel that confesses its membership in a cartel and provides information leading to the institution of proceedings against the cartel. This means the Commission will not refer a firm that has successfully made an application under the policy to the tribunal for adjudication relating to the firm's involvement in the cartel and the Commission will not propose to have fines imposed on the firm.[30]

In order to qualify for such immunity, the firm must be the first member of a cartel to alert the Commission about cartel conduct which the Commission is not aware of, or which it is aware of but does not have sufficient information relating to it, or has not yet initiated investigations with respect to it. It may also relate to investigations that have already been commenced but of which the Commission has insufficient evidence to prosecute the cartel members.[31] The person making an application under the CLP must be authorised to act on behalf of the firm. If the report is made by an employee or a person not authorised to act on behalf of the firm, it will constitute whistleblowing and will not qualify for immunity under CLP.

To qualify for immunity, the applicant must be the first firm to provide the Commission with information sufficient to institute proceedings, must provide truthful and complete disclosure of all evidence information and documents under its control relating to the cartel without misrepresenting material facts, must not conceal, destroy or falsify any evidence or documents pertaining to the cartel and they must fully cooperate with the Commission until its investigations and subsequent proceedings before the Competition Tribunal and the Competition Appeal Court are finalised. The applicant is also required to immediately stop

[29] Competition Commission of South Africa, Corporate Leniency Policy, para 2.4 and 2.5.
[30] Ibid para 3.3.
[31] Ibid para 5.5

participating in the cartel activity, to keep the dealings with the Commission confidential and not alert other participants in the cartel or third parties that it has applied for immunity.[32]Only when such conditions have been met will immunity be granted.

It is important to note, however, that immunity of a firm under CLP does not protect the applicant from criminal or civil liability resulting from participation in a cartel.[33]This may be a disincentive to individuals against confessing their involvement in cartel conduct under the CLP. This problem is even more pronounced since the introduction of criminal sanctions for involvement in a cartel in 2016 under Section 73A (1) to (3) of the Competition Act, which provides for criminal liability of a director of firm or a person with or purporting to have management authority of a firm if the person caused the firm to engage in cartel conduct or knowingly acquiesced in the firm engaging in cartel conduct. A person may be prosecuted under this provision if the firm acknowledged involvement in cartel conduct through a consent order with the Commission, or the Competition Tribunal or Appeal Court made a finding that the person was involved in such conduct.[34] This provision may discourage participants in a cartel from confessing their involvement for fear of being prosecuted.

CLP is safeguarded under Section 73 (4) only to a very limited extent. Section 73A (4)(a) precludes the Commission from seeking or requesting the prosecution of a person who is subject to leniency under the CLP. Further, Section 73A (4) (b) gives the Commission discretion to make submissions to the NPA supporting leniency for a person prosecuted of an offence if the Commission is satisfied that the person deserves such leniency. However, the fact that the Commission cannot make recommendations for prosecution of a person subject to leniency does not necessarily mean such a person will not be prosecuted as the ultimate decision lies with the NPA, which does not have to be moved by the Commission to institute criminal proceedings against the person. Furthermore, although the Commission may make recommendations to the NPA not to prosecute certain persons on the

[32] Ibid para 10
[33] CLP, para 5.9
[34] SA Competition Act, Section 73 (3) (a) and (b)

basis of CLP, these remain simply recommendations. The NPA is not bound to follow them and may elect to proceed with the prosecution despite a contrary recommendation from the Commission. The danger of a person being held criminally liable on the basis of information they provided under the CLP, therefore, remains and is a disincentive to those who may wish to provide information about cartels of which they are a part. As CLP and criminalisation of cartel conduct are both formidable weapons in regulation of cartels, there is a need to bring them into harmony so that one does not jeopardise the other.

Despite the challenge posed to the operation CLP by criminalisation of cartel conduct, corporate leniency remains an effective tool in cartel enforcement. Leniency programs help with detection and cessation of cartels as they encourage participants to attempt to be the first to report the cartel. The incentive makes it likely that a participant in a cartel will report its existence, thereby making cartel membership less attractive to would be members, who have reason to fear being caught. Leniency programs also help in getting first-hand information about the nature and extent of the cartel conduct, making it easier for the enforcement authority to determine the appropriate penalty to impose on the conduct, which in turn helps make the enforcement sufficiently deterrent.[35] Unfortunately, there is no corporate leniency policy under the Malawian competition regime. Because of its instrumentality in fighting cartels, corporate leniency is an aspect of cartel regulation that Malawi should consider adopting from its South African counterpart, subject, of course, to proper checks to ensure its efficient harmonisation with the criminalisation of cartel conduct and other regulatory tools.

3.3.Sanctions and Remedies

In terms of penalties and remedies, Malawi's CFTA provides for both civil and criminal sanctions for violation of the provisions of the CFTA. Civil remedies are provided for under Section 52, on whose basis any person who suffers loss, injury or harm as a result of an agreement, arrangement, undertaking, act or omission

[35] Barnabas Andiva and Edith Masereti 'Cartel enforcement: Adoption of a leniency programme in Kenya' in Jonathan Klaaren, Simon Roberts and Imraan Valodia (ed) *Competition and Regulation for Inclusive Growth in Southern Africa* (2019) (321-339) at 323

which is prohibited under the Act can commence a civil action in the High Court to recover damages from the person responsible for the conduct. Section 33(1) on the other hand provides that it is an offence to engage in cartel behaviour prohibited under the Section. Nevertheless, the Act does not indicate who exactly in the firm bears the criminal liability. Section 51 provides that any person guilty of an offence under the Act whose penalty has not been specified elsewhere in the Act shall be liable to a fine of K500,000 or of an amount equivalent to the financial gain generated by the offence, if the amount is greater, and to imprisonment for five years. Since no other penalty has been specified for cartel behaviour, the penalty under Section 51 is applicable.

The challenge with this penalty is that it is extremely difficult to determine the exact gain occasioning from cartel conduct as it is usually kept under wraps, just like the cartel conduct itself. It requires an assessment of the amount of what the competitive price would have been if it were not for the cartel, and of the amount of affected commerce.[36] This is a daunting task. Where the CFTC is unable to determine the exact gain, the fine of K 500, 000.00 and/or sentence of five years imprisonment may be imposed. However, this penalty is manifestly low, considering the egregious nature of cartel conduct, and the fact that the pecuniary benefit for those engaged in the conduct is usually exponentially high. It stands in sharp contrast with international trends, characterised by imposition of fines based on a percentage of the firm's annual turnover, considered to reflect the gain. Some jurisdictions impose penalties of fines amounting to 10% of the firm's annual turnover and others imposes up to 3 times the estimated gain.[37] As for fixed sentences, some jurisdictions impose up to €4.8 million and/or imprisonment for 14 years,[38] which can be greatly contrasted from Malawi's K 500, 000.00 (€541.41/ R 9508.39) and 5 years imprisonment. Malawi's sentence is significantly low compared to international trends, and weighed against the seriousness of the conduct it seeks to address.

[36] OECD Report, Competition Law and Policy, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002, at 72
[37] Ibid at 73
[38] Ibid

The CA of South Africa also provides for penalties for engaging in cartel behaviour. Unlike under the Malawian act, which provides for general penalties for contravention of competition laws, the CA provides for a penalty specific to cartel conduct. Section 73A (1) of the Act, incorporated through a 2016 amendment, provides for criminal liability of a director of firm or a person with or purporting to have management authority of a firm if the person caused the firm to engage in cartel conduct or knowingly acquiesced in the firm engaging in cartel conduct. A person convicted of an offence under Section 73A (1) is liable to a fine not exceeding R500 000-00 or imprisonment for a period not exceeding 10 years, or to pay both a fine and such imprisonment. This sentence is considerably more meaningful than the one provided for under Malawi's CFTA.

The need for sufficiently deterrent penalties in cartel regulation cannot be overemphasised. Sanctions will be effective in curbing cartel conduct only if they are able to eliminate the prospects of gain from illegal activities. Penalties for involvement in a cartel must therefore exceed the gain realised from cartels, and this is often a significant amount. There is therefore a need for amendment of Malawi's competition law to separate the penalty for cartel conduct from that of general prohibited anticompetitive conduct, as the magnitude and potential gains differ. For effective cartel regulation, sanctions befitting the level of egregiousness of cartels must be imposed.

4. CONCLUSION

Cartels pose a great danger to fair competition and the welfare of consumers. In Malawi, particularly, industries such as fertilizer, cement and medical drugs are infested with cartels. Since the enactment of the Competition and Fair-Trading Act 1998, efforts have been made to through competition law legal and institutional framework to keep cartels in check. Although Malawi and South Africa's competition law regimes are the same age, and although both are developing countries, South Africa's regime is considerably more effective in certain aspects. There is a need for law reform in Malawi to ensure clear provisions defining cartel conduct, imposing befitting sanctions and establishing effective and efficient regulation systems. Perceptibly, South Africa's regulatory system cannot be said to be perfect either. However, Malawi stands to draw significant lessons from its counterpart in order to build a robust cartel regulatory framework.

BIBLIOGRAPHY

Primary Sources

Constitution

Constitution of the Republic of South Africa, 1996

Statutes and Subsidiary Legislation

Competition Act No. 89 of 1998 (South Africa)

Competition and Fair-Trading Act No. 43 of 1998 (Malawi)

Competition and Fair-Trading Regulations (Malawi)

Competition Commission of South Africa, Corporate Leniency Policy

Cases

Malawian:

Airtel Malawi Plc v Competition and Fair-Trading Commission, Commercial Cause No. 404 of 2021

Alliance Media v Competition and Fair-Trading Commission, Miscellaneous Civil Cause No. 53 of 2016

South African:

Johan Venter v Law Society of the Cape of Good Hope and Others [2013] ZACT 103 (14 October 2013)

Premier Foods (Pty Ltd v Manoim NO and Others 2016 (1) SA 445 (SCA)

MacNeil Agencies (Pty) Ltd v Competition Commission (121/CAC/Jul12) [2013] ZACAC 3 (18 November 2013)

USA:

Verizon Communications v law Offices of Curtis V Trinko 540 US 398, p 408 (2004)

Secondary Sources

Barnabas Andiva and Edith Masereti 'Cartel enforcement: Adoption of a leniency programme

in Kenya' in Jonathan Klaaren, Simon Roberts and Imraan Valodia (ed) *Competition and Regulation for Inclusive Growth in Southern Africa* (2019) (321-339), Jacana Media (Pty) Ltd, Johannesburg

European Commission, Competition Policy: Cartels, available at https://ec.europa.eu/competition-policy/cartels_en, accessed on November 15, 2021

Isabel Goodman, Patrick Smith, Luke Kelly et al, 'Principles of Competition Law in South Africa' (2016). Oxford University Press, Southern Africa

Jonathan Klaaren and Fungai Sibanda, "Competition policy for the Tripartite Free Trade Area" in Jonathan Klaaren, Simon Roberts and Imraan Valodia (ed) Competition and Regulation for Inclusive Growth in Southern Africa (2019)

Mulotwa Mulotwa, Time to break fertilizer, drug cartels, available at https://www.mwnation.com/time-to-break-fertiliser-drug-cartels/, accessed on 15 November 2021

OECD Council, Recommendation of the Council concerning Effective Action against Hard Core Cartels, OECD Legal Instruments, Preamble, 2019.

OECD Report, Competition Law and Policy, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002

Sashalee Stephanie Afrika and Sascha-Dominik Bachmann 'Cartel Regulation in three emerging BRICS Economies: Cartle and Competition Policies in South Africa, Brazil and India- A Comparative Overview' (2011) *The International Lawyer* 101

Simon Roberts and Thando Vilakazi 'Regulation and rivalry in transport and supply in the fertilizer industry in Malawi, Tanzania and Zambia' (2016), in S. Roberts (ed.) *Competition in Africa: insights from key industries*, HSRC Press, Pretoria