BRIEFING PAPER

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Competition Policy in Malawi: *A course to development*

Challenges of sustainable development are often far steeper to address for small, developing and/or least developed countries (LDCs) than others. Each and every step that such countries take, have to be carefully assessed and endorsed, before being realised. This justifies the reason why some policies spend much longer periods 'on the table' in these countries than in others. Every new policy or strategy is critically and carefully scrutinised through the lens of socio-economic development before being passed for implementation. Malawi is a small LDC that has had a competition policy for almost a decade, now. However, the slow pace of implementation of the policy and enforcement of the law testifies the fact that it has had to constantly justify the fact that its effective implementation would help Malawi achieve socio-economic developmental objectives. There has been a fairly long 'gestation' period (of 5 years) between the adoption of the competition policy (and law) and its actual implementation in the country. A lot of valuable time has been wasted!

This paper clarifies how an effective implementation of the competition regime in Malawi can help the country achieve its developmental goals. This paper would prove to be useful in raising support and public opinion (among the relevant stakeholders) about speeding up the process of enforcement of the country's competition policy and law.

Introduction

The notion of competition in developing countries is being looked at as a separate discipline that has to be linked to their individual developmental agenda. It is true that the goal of small or medium economies are to meet the challenges of sustainable development and to ensure that any concept introduced in their economic planning methods is aligned with their ongoing developmental policies.

Issues of competition policy and law may not be anything new in the developed worlds of North America, Western Europe and Australia. However, the adoption of a competition policy poses a great deal of uncertainty for *smaller governments*, especially to embrace the ideas of competition and implement a comprehensive competition law. The big question is: 'how do smaller governments put in place an effective competition regime?' For a country like Malawi, the Competition and Fair Trading Act of 1998 seems to be an ideal legislation: though its implementation is yet to be realised.

Smaller governments embrace economic development as a top priority on their agenda. Therefore, the Malawi Government needs to assess whether any economic intervention would satisfy the country's developmental objective. The question for the Government, after almost 10 years of the Competition Act's existence is whether competition is a means to achieving economic development.

This paper is aimed to answer that question in a fashion that simplifies the perspective from one of asking whether this is a viable idea to implement the competition regime, to one of defining competition and what it involves to illustrate how in every way, it is a developmental need. Upon discovering that one cannot discuss competition without automatically solving concommitant development questions, whether in a developed or a developing economy, it is imperative to analyse why this is so to interested stakeholders, so that efforts are directed equally on other important issues. The paper starts with a definition of competition policy followed by its explanatory objectives, and then link these objectives with how they explain economic development variables especially in the context of Malawi.

Welfare Aspects of Competition Policy

There are a number of purposes to explain the need for having a competition policy in a country, be it a developed or a developing country.

First is the concept of ***total welfare***[1]. A regime that does not really worry about whether it is the consumer or the producer who has gained as separate entities; rather whether the policy in question increases the level of the sum of consumer and producer welfare. It starts with the observation of a level of the combined welfare for the two parties followed by an assessment of whether a remedy to a situation would lead to an incremental effect on the welfare of all the players in the market.

A simplistic example is where a transaction is affected by a rise in prices. In economic terms, the demand function together with a given price will indicate the levels of welfare and efficiency losses that are experienced at a given time. Total welfare regimes will then look at whether a market or structural change, including competition enforcement, would raise consumer or producer welfare, in turn reducing the efficiency loss that was incurred in the previous period. It is the policy that is mainly concerned with productivity or profitability of a market, and is usually ideal in export-geared industries.

Second is the concept of ***consumer welfare***. This is usually the primary concern of many economies with an objective of ensuring that the innocent/unknowing consumer is not lured into paying exorbitant prices for the sole greedy benefit of the producer. With many profit-making organisations aiming to impress and increase dividends of company owners, the simplest means to achieving higher profit margins is raising prices without tackling production levels, as well as engaging in exclusionary practices that block competition. This pressure on managers to increase profits is usually coupled with what is known as persuasive advertisement so that consumers would stop looking at their financial constraints and instead focus on their social standing for the procurement of certain products.

Governments and regulatory authorities would more often be concerned with this kind of behaviour or even just the suspicion of it. More specifically, authorities would want to put in place measures that make the cost operations (which are usually the scapegoat of many sellers when cautioned about high prices) to be more transparent so that prices reflect costs of production. It provides an opportunity for government to ensure protection of the consumer by dealing with certain conducts of producers that reduce competition. This is the emerging concern of developing countries as a good number of their more important markets (sectors) are characterised by large multinational corporations (MNG) with economies of scale possibly having little justification of their pricing criteria.

The third regime of welfare is ***producer welfare***, which can be considered as concomitant to the protection of small firms. It is one where efforts are concentrated on protecting smaller producers from larger producers. There are several ways in which large producers would also want to sustain their dominance (in terms of size and/or influence) in markets with free entry. Smaller producers/sellers would rarely pose a threat for competition to their position in the market. Hence, larger producers are able to engage in practices that attract clients to themselves to the detriment of small firms by embarking on cost-intensive activities like rigorous advertising, research and development, predatory pricing and price discrimination. Smaller firms also collectively play most of the roles that large firms do. They could easily satisfy employment needs of an economy, provision of variety, or even offering easy accessibility for consumers to certain goods and services. Their protection is thus needed to preserve these important social roles they often play in the economy.

The problem, however, of protecting small firms superficially for the sake of promoting their roles in society is that certain inefficient firms might get protection in the process. It is likely that some small firms would not have attained 'economies of scale' and their existence in a market could be at the cost of consumers. Plus, the economic cost to society is heavily compromised where larger firms with 'economies of scale' could probably do better.

This is not to say that protection of larger firms is not necessary at all. Unlike smaller firms, larger firms are more likely to have a better labour employment level, proper infrastructure and make better use of other facilities, including resources. The second point to note about large firms is that their size does not necessarily imply their abuse of market power. In some instances (monopolistic market – a large firm occupying a significant share of the market, characterised also by the presence of several small firms), it might still be possible for an efficient monopoly to price fairly and still provide a better variety of products than many small firms together. So, the benefits that an economy would gain from the presence of big firms may be a case for governments/regulatory authorities to consider with utmost care.

Additionally, it would be important to understand that certain exclusionary practices can both exclude smaller competitors and harm consumer, and sometimes total welfare. The channel through which larger firms are sometimes protected is by allowing them to price higher than the lower competitive price, subsidising some of their costs, or allowing them certain privileges that other suppliers are not normally entitled to.

The beauty of these notions and their applicability is that they are situation-based. It is really the objective of a particular economic setting that determines whether it is total consumer or producer welfare that is embraced. Whereas many developing countries may have similar conditions to which they are subjected and development at the core of their agenda, their policies may carry differing ambitions and targets, and even ideologies, which will always make them different as they undertake decisions for shaping national competition regimes.

Balancing Welfare & Economic Development

Governments always attempt to first analyse how certain policies would advance their level of economic wellbeing to a progressional pattern for sustainable development before introducing such policies. The idea is to carefully examine any economic system that would have an attribute of an advanced economy but could be a bit too sophisticated in their current context.

So, the focus of their attention would be to check whether any policy or law to do with economic variables would help the nation move progressively in the labour market, on the international scene, in technological development towards the rate of economic development, production efficiency, and even in lowering prices. We therefore, note that while the policies would have an economic function there are still some strong traits of social roles that they would need to play.

This paper attempts to ascertain how competition policy would relate to these factors without openly starting to address them. One point to emphasise is that a demonstration of this fact would be best described by use of sample cases that have been analysed before (see Box 1). It will be nice at this time to draw our attention back to our earlier understanding of competition policy of protecting both consumers and both potentially efficient and efficient producers, while ensuring that the market works as a self-regulated mechanism.

Box 1: MTL Acquisition of Shareholding in TNM Focuses on Developmental Aspects of Competition

The Malawi Competition and Fair Trading Commission's (MCFTC's) case for Malawi Telecommunications Limited's (MTL) proposed acquisition of 60 percent shareholding in Telekom Networks Malawi Limited (TNM) is a good Malawian example of a case that focuses on the aspects of development that competition policy aims to address. It also shows us the ambiguities of meeting all the development needs as purported by the competition policy. A brief background is that TNM was initially owned by Telekom Malaysia (with 60 percent shareholding) and MTL (with 40 percent initial holding). The MTL acquisition of the remaining 60 percent means that MTL would have 100 percent control of the company assets and operations.

The same point was raised by the MCFTC to assess whether the acquisition was development-friendly and to assess if it was to be allowed or not. The case would be standard for Vertical Restraints (VRs), as TNM might have preferential treatment from its mother company (MTL) over Celtel Malawi Limited, its only competitor in Malawi. The VRs come in because of the initial arrangements that both companies had with MTL to use MTL's Microwave Backbone Links (MBLs), which were to connect their networks to consumers across the country.

After some research, it was discovered that Celtel had purchased its own MBL system towards the end of 2005 and no longer relied on MTL for its transmissions. Although this nullifies the VR fears to an extent, the truth of it was that there was still a problem of access across the networks regarding MTL/TNM customers calling Celtel customers, and *vice versa*[2]. In the longer run, a review would have to be done to check if the level of competition would have altered. Regardless of this realisation, it was found that the acquisition fully complied with the policy's aspect of protecting other producers, as VRs are usually executed to promote exclusivity in terms of dealings between upstream and downstream firms in the case of suppliers in a market. It was also established that the process would positively affect the industrial setup because there was no evidence of reduced competition in the mobile network industry. A further advantage included no earnings by Telekom Malaysia to be expatriated any more as now ownership would be fully Malawian, in turn improving the balance of payments position of the country's trade book.

The reality of having a fully local mobile network company (TNM) competing with Celtel (a multinational) would also bring in the hope of greater investments on Research and Development (R&D)[3]. The need for technological advancement would be attained. The acquisition was likely to help TNM to expand its network to areas that were not reachable by Celtel, but enjoying MTL presence. This expansion is to improve the move towards economies of scale for TNM, whose market share remains at 43 percent. The efficiency aspect of the process is also likely to be attained. These factors are all incorporated in the consumer protection argument of competition policy.

This is how, in trying to reach the goals of competition policy, the application of competition law by the MCFTC will help to address other developmental needs of a developing country, like Malawi. Interestingly, it is a challenge for the MCFTC to assess whether the captioned acquisition would help in the areas of employment, because employment would only change depending on expansion and advancement in mechanisation levels of operations, and prices, as the industry is a duopoly which is very easily prone to collusive practices as price fixing.

The Malawi Competition and Fair Trading Act of 1998 has two main objectives: to prevent abuse by dominant undertakings in given markets of their dominance to reap excessive benefits to the disadvantage of the consumer; and to protect producers from unfair or restrictive trade practices (RTPs) by certain counterparts in the same market to reduce the level of competition.

The desire to meet socio-economic obligations, on the part of government, has overtaken its mainstream activities. The state would make the laws governing certain practices and then would fail to implement or enforce them (the laws) due to an overload of activities or the need for some political independence of these particular tasks to enhance professionalism in their implementation. The introduction of independent bodies funded by the government budget and other sources is undertaken. The Competition Commission is one such body, whose primary interest is in taking care of the competition law. It is this Commission that is responsible for the investigation and enforcement of competition law with regard to socio-economic benefits that would accrue to the country.

It is hoped that this clarification helps to put to rest the attempts of civil society in Malawi and Government arms that control funding of the Commission's activities in finding out whether or not development would be achieved. In other words, it is necessary for these stakeholders to understand that the Commission's activities are already developmental in nature and that it would even help accelerate the level of development effort in a country. The advantage of having this Commission is also that it is a professional body that re-organises industries in the country. This makes it easier for the Government to observe a clear statistical advantage in its efforts to obtain revenues from organised business industries.

A case that poses a challenge in the fulfillment of these developmental needs for a small open economy as Malawi is one where approval by the Competition Commission would only be done under a number of conditions and deadlines. The failure to meet these obligations by the undertakings is tackled by the rule of law, fines and charges that accrue to the Government.

Other Developmental Objectives of Competition

The points raised below reiterate the need for having and implementing a competition regime in a country, which shows how the policy is instrumental in achieving economic development objectives.

Promotion of Market Integration

In some cases, a regional policy prohibits discrimination of prices across borders by suppliers. However, policy may work in the best interest of more stakeholders than just consumers if this conduct were allowed. The technical promoter of such behaviour is an assessment by a seller of different market conditions existing in different countries so that one could discriminate prices by charging more in an environment where people are better off and have a higher willingness to pay for the product being supplied. Less could be charged in the market where the situation is in the contrary.

It is to be noted in case of a competition policy, which allows for such price discrimination that consumers are better off, in both markets although their valuations of the product may be expressed by different willingness to pay. The producer is better off if his total profit is higher through this distinguishing of market prices than it would be if he was charging a similar price.

The scenario just described is advantageous in that, not only are people better off by paying tolerable prices, but also that those with the lower willingness to pay due to less financial means have access to the products. In this way, producers are encouraged to produce more and governments' encouragement is limited to regulate these practices to avoid any abusive tendencies by the sellers in the interest of consumers.

Inflation Reduction

It has, through our discussion of competition and its benefits, been very clear that competition is beneficial in reducing prices and enhancing efficiency through 'the survival of the fittest sellers'. Efficient firms are likely to compete better and get through tough price wars with other firms in the same market. If the firms concerned are in key strategic sectors, like in transport sectors of landlocked countries as Malawi, one can hope that the effects of competition in the sector would trickle down to various other sectors like energy, agriculture etc.

All of Malawi's petroleum products are hauled by articulated trucks (produced in the private sector) which travel long distances to the nearest sea ports. Low transport charges due to competition would lead to the reduction in pump price of fuel at the local petrol station.

Key sector regulation becomes a functional instrument to the reduction of inflation in the country and promotion of efficient firms remaining in the market.

Structural Remedies

Among the duties of a competition commission are to analyse mergers and approve them if they do not negatively affect market structure and also to provide remedies in markets where the structural outline is not in accordance with desired standards. Mergers have various effects in the market and the economy as a whole. And, in a developing country case, the same variables set out by the state will be exposed to check whether approval will be positively satisfied. MCFTA (1998) does highlight the need for market activity (i.e. mergers, takeovers, etc.) to have a development orientation, as well as setting out the development variables that the economy is to use as parameters of success. The same is true with remedies of market structure that are there to guide conduct towards a more competitive path. These structural remedies are usually drawn from suspicion of certain market structures to develop conduct into monopolistic behaviour if left unchecked.

The competition authority will then have to investigate the market to establish the truth about such suspicion and then pass a remedy if one is required. However, the objectives of the authority are always in line with making certain that the development needs in the economy are realised. It is the aim of this section of the paper to highlight the importance of the Commission's flexibility in deciding on these matters.

The most important of all these questions on remedies and approval methods, which is the reason for the need of the authority's independence from political influence, is how to decide if the approval or remedy is development-oriented. After an assessment of the market and economic effect of the merger or remedy, the development variables should be checked independently and an overall deduction of economic improvement status be made. The reason for this is that one cannot expect there to be a positive movement in the variables with every merger or remedy case that will be analysed. On the other hand, certain variables will definitely be affected negatively, neutrally and positively. It is, however, possible that certain of these may also feature a positive movement in all of the variables.

Looking at the more interesting case of a non-completely positive movement in development variables, the authority should be able to still come up with a position on whether the resultant decision is considerate of the areas of need according to the industry being primarily affected, with regards to the development variables. The MTL/TNM-Celtel example would also be useful in explaining this point. Remember that it is ambiguous that employment would improve at all in the market, and yet there is a clear indication of significant positive change in the balance of payments. It suffices that the merger be approved in this sense without a change in employment while knowing well that the country still stands to benefit in its trade books.

In other words, the authority should have the ability to assess by considering movements in the key development variables as a direct result of a change in the market structure, which areas benefit the economy more in the presence of unchanging or even decreased values in certain areas. Even more, the Commission is to see to it that the approval of certain mergers and acquisitions (M&As) should reflect efficiency on the supply side of Malawi's markets. It is up to the Commission, as it has been given autonomy from Government, to reach a reasonable balance by using a cost-benefit analysis approach to situations where some development variables may have been affected differently by a single market action.

Role of Civil Society

The Consumers' Association of Malawi (CAMA) was established to assist Malawi in protecting consumer rights in the absence of a consumer protection law. The CAMA is currently working on a number of programmes including: civic education on consumer rights; women consumer rights awareness campaign; civic education on counterfeit markets; consumer club awareness on consumption of iodised salt (with UNICEF); and collection of pricing data since 2001.

Since the enactment of the Consumer Protection Bill in 2003, the CAMA has operated under this Act as an implementer of programmes. However, the Act provides for the establishment of a quasi-government enforcement body called the Consumer Council, which has not yet been formed. Effectiveness of the CAMA has also been affected by the lack of adequate funding for it to operate across Malawi. Since inception, CAMA has operated only in the City of Blantyre.

CAMA needs to expand to the rest of the country for a fuller effect to be felt. Nevertheless, a better contingent of resources is to back up this scale of activities if any concrete results are to be realised. With few donors coming to the organisation's rescue every now and then, CAMA survives on networking with other non-governmental organisations (NGOs) and institutions, such as Malawi Economic Justice Network (MEJN), National Initiative for Civic Education (NICE), etc.

As part of an integrated system on market dynamics, organisations like CAMA complement the efforts in implementing a competition policy in Malawi, through the making of consumer decisions a possession of the demander of goods and services. Whereas MCFTC is the custodian of the MCFTA, CAMA becomes a major player in the enforcement of the Consumer Protection Act (2003) – although the true custodian (Consumer Council) is the yet to become operational.

Conclusion

It is thus important that discourses on competition matters should concentrate on educating stakeholders, in places where capacity on competition economics and law is low, about how the idea is already a development facilitator than attempting to find out whether it is going to be idealistic for a country to adopt a competition policy. Using a history of market interventions in Malawi, we realise that the objectives of competition policy outlined above have already been attempted before. What was remaining to happen is that there should be an independent enforcing body that could competently handle the issues. The fact that Malawi fully embraced liberalisation of markets as propounded by the International Monetary Fund (IMF) and the World Bank in the late 1980s to early 1990s, leaving all activities to market forces would be a wise but limited ideology. It would be limited in the light of well known market failures in achieving societal goals.

Organisations, such as the Malawi Bureau of Standards, the Copyright Society of Malawi, the Road Traffic Directorate and the Consumers' Association of Malawi, to mention a few, have been established strategically to enforce standards of the state in different sectors so that issues of competition and consumers concern are considered seriously. This is regardless the fact that there may not have been any foresight by the Government that these bodies would someday be beneficial in establishing a monitoring network for bodies, such as the MCFTC.

Competition policy is thus a tool for achieving economic development and ensuring that without direct intervention of government in the free market, both producers and consumers benefit each others existence.

Endnotes

1 The idea of societal total welfare is unattainable and hence in welfare economics a second best situation is usually accepted. Such a situation is decribed as 'Pareto Optimality'.

2 During peak periods, TNM and MTL would easily increase their traffic capacity without the lines that connect either of them to Celtel, making it easier for TNM and MTL customers to communicate either within network (TNM-TNM or MTL-MTL) or across networks (TNM to MTL or MTL-TNM). Eventually, TNM and MTL have an advantage of retaining and attracting more customers.

3 It is common in the service industry for companies to compete in providing the best and latest service to customers as well as establishing equipment that would enhance product variety.

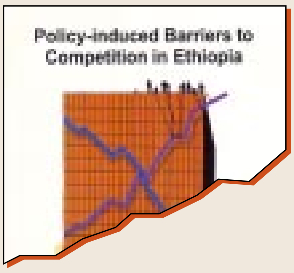
Also Read

Taking the Right Steps: *Competition Administration in Eastern & Southern Africa*

This Briefing Paper summarises the research findings of the 7Up3 project on the state of competition in Eastern and Southern Africa (ESA), and has been developed to help the project countries take the right steps forward in implementing their competition regimes.
http://www.cuts-ccier.org/7up3/pdf/BriefingPaper01-2008.pdf

Minibus Operators and Passenger Welfare in Malawi

This Briefing Paper highlights the possibilities for the competition agency to address the situation, by the effective implementation of the country's competition Act, thereby relieving poor passengers/consumers of their heavy (transportation) cost burdens.
http://www.cuts-ccier.org/7up3/pdf/BriefingPaper02-2008.pdf



Policy-induced Barriers to Competition in Ethiopia

This paper attempts to portray the competition regime in Ethiopia. It shows that irrespective of a decade and a half of market reform measures, economic restructuring still remains partial. Specifically, it shows that many important regulatory provisions, including the competition law, are deliberately designed such that it could be easily manipulated. *http://www.cuts-ccier.org/7up3/pdf/Monograph01-2008.pdf*

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