



## PRESS RELEASE

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### ENTERING INTO FORCE OF THE NEW COMPETITION AND FAIR TRADING ACT

You will recall that the Competition and Fair Trading Commission (CFTC) has been reviewing the Competition and Fair Trading Act (CFTA) of 1998 in order to fill the existing gaps and enhance its effective enforcement. The CFTC is pleased to announce that the process of repealing the CFTA of 1998 was completed and it has been replaced with a new legislation, the Competition and Fair Trading Act of 2024.

The new legislation was passed by Parliament on 5<sup>th</sup> April, 2024, and was assented to by the **State President, His Excellency, Dr Lazarus Chakwera** on 19<sup>th</sup> May 2024. In accordance to Section 1 of CFTA of 2024, The new Act shall come into force on a date to be appointed by the Minister, by notice published in the Gazette. The Competition and Fair Trading Act of 2024, therefore, comes into force today, 1<sup>st</sup> July, 2024, following the gazetting of the notice, signed by the Minister of Trade and Industry, Hon. Sosten Gwengwe, MP, which appoints this date.

CFTC is extremely pleased with this development as it signals an end to some of the enforcement challenges the institution was facing with regard to the enforcement of the old Act due to the gaps in some of the key provisions in the law. In addition, the CFTA needed to be aligned with the recent developments in the enforcement of competition

and consumer protection law, reflective of the current market dynamics in the economy. Furthermore, the CFTA required to be aligned with international best practices in the enforcement of competition and consumer protection.

In order to address these gaps, there are several changes that have been made to the CFTA of 2024. Below is a highlight of some of the key changes:

### **i. Competition Regulation**

The major change that has been brought in is on Suspensory Merger Notification. The 1998 CFTA provided for voluntary notification of mergers and acquisitions; which meant that mergers having potential harm to competition process and consumer welfare could be effected without seeking authorisation from the CFTC. The new CFTA has made notification of mergers and acquisitions mandatory, based on determined thresholds.

The new Act has also expanded on the provisions on anticompetitive business practices, to make it very encompassing but also effective to regulate and enforce. These areas include: restrictive business practices; collusive conducts (cartels); abuse of market power; but also mergers and acquisitions.

### **ii. Consumer Protection**

The CFTA of 1998 narrowly defined the term “Consumer”. The definition under the old Act left out some stakeholders that are equally affected by unfair trading practices, which include: consumers of technology, consumers of digital products, beneficiary consumers, but also other users of goods or services for purposes of production of other goods or services. For this reason, various vulnerable groups that did not fall within that narrow definition were not effectively protected from unfair trading practices

The CFTA of 2024 has also brought in several types of unfair trading practices that were not included in the CFTA of 1998. Among others, these include the following:

- failure to give warranty or guarantee on goods for long term use;
- improper or insufficient labelling of products;
- failure to disclose material information about the products supplied;
- engaging in excessive or exploitative pricing of the products.
- imposition and implementation of unfair terms in consumer contracts.

### **iii. Abuse of Buyer Power**

The CFTC of 1998 focused on abuse of supplier (seller) power and not the abuse that may arise from powerful or dominant buyers. This made it difficult to deal with malpractices by buyers, including those involved in buying farm produce from farmers.

The CFTA of 2024 has included various provisions to redress malpractices resulting from abuse of buyer power. The Act has expressly prohibited the powerful and dominant companies that purchase agriculture produce from the farmers not to engage in any anticompetitive and exploitative conducts. For example, the Act prohibits, among others, the following conducts:

- delays in payment of suppliers, without justifiable reason, in breach of agreed terms of payment;
- unilateral termination or threats of termination of a commercial relationship, without notice or on an unreasonably short notice period, and without an objectively justifiable reason;
- refusal to receive or return any goods or part thereof without justifiable reason, in breach of the agreed contractual terms;
- transfer of commercial risks meant to be borne by the buyer to the suppliers;
- demands for preferential terms unfavourable to the suppliers;
- demanding limitations on supplies to other buyers;

- reducing prices by a small, but significant, amount where there is difficulty in substitutability of alternative buyers or reducing prices below competitive levels; or
- bidding up prices of inputs by a buyer enterprise with the aim of excluding competitors from the market.

#### **iv. Penalties for Violations**

Under the CFTA of 1998, when the Commission found a business enterprise in breach, it had been imposing fines, which were provided for under Section 51. However, in 2023, in the matter of **CFTC v Airtel Malawi Plc**, the Court ruled that the said provision does not empower the CFTC to impose fines, on the grounds that the violations were designated as being criminal in nature. Specifically, under section 51 of the CFTA of 1998, the provision for imposing the fines was combined with sanctioning of an imprisonment sentence of up to 5 years. The ruling in the **CFTC v Airtel Malawi Plc** case, thus weakened the regulatory mandate of the CFTC. In addition, the 1998 CFTA did not provide for aggravating and mitigation factors for the Commission to consider in coming up with fines and/or orders.

The CFTA of 2024 gives express powers to the CFTC to issue Administrative Orders, which include imposing fines on errant enterprises. Under the new Act, the fines to be imposed will be (i) up to 5% of annual turnover if it is an individual; or (ii) up to 10% of annual turnover if it is a company. The determination of the fines will depend on the applicable aggravating and mitigating factors. There are also various Orders that the CFTC can impose which are meant to redress the malpractices. These include orders to: give refunds, return or exchange defective products, withdraw false advertisements, supply the advertised/promised goods and services, and cancel unfair and exploitative contracts.

## **v. Suitability and Independence of Commissioners for the CFTC**

As adjudicators of cases, the Commissioners of the CFTC are required to be sufficiently scrutinized for their qualification and suitability for their functions, but also guarantee utmost independence. Under the provisions of the CFTA of 1998, the Commissioners were not thoroughly subjected to scrutiny of Parliament once appointed, to determine their qualification and suitability for their office. Similarly, the Commissioners independence as adjudicators was not guaranteed under the old law. The CFTA of 2024 has provided that, as a way of ascertaining the Commissioners' suitability and ensuring independence, their appointment and removal from office will be subjected to the scrutiny of the Public Appointments Committee of Parliament.

In view of the foregoing, the CFTC would like to call upon business enterprises, consumers and the general public to take notice of the new legislation, and particularly take consideration of the provisions that have been brought into the CFTA of 2024. Furthermore, the CFTC would like to advise the business enterprises to adopt voluntary compliance with competition and fair trading laws at all times, so as not to be found in breach of the law.

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