IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

CASE No. 2014/ CCPT/015/ CON

BETWEEN:

AIRTEL NETWORKS ZAMBIA PLC — APPELLANT

AND

THE COMPETITION AND CONSUMER PROTECTION COMMISSION — RESPONDENT

AND

IN THE COMPETITION AND CONSUMER PROTECTION TRIBUNAL
HOLDEN AT LUSAKA

BETWEEN:

MACNICIOUS MWIMBA — APPELLANT

AND

AIRTEL NETWORKS ZAMBIA PLC — 1ST RESPONDENT

COMPETITION AND CONSUMER PROTECTION COMMISSION — 2ND RESPONDENT

QUORUM: Mr. Willie A. Mubanga, SC (Chairperson), Mrs. Miyoba B. Muzumbwe-Katongo (Vice Chairperson), Mr. Chance Kabaghe (Member), Mr. Rocky Sombe (Member) and Mrs. Eness C. Chiyenge (Member)

For Airtel Networks Zambia Plc:

Mrs. O. Chirwa – Messrs. Ranchhold, Chungu Advocates

For Mr. Macnicious Mwiimba – In Person

For Competition and Consumer Protection Commission:

Mrs. M. M. Mulenga – Manager, Legal & Corporate Affairs (In-House legal counsel), Mrs. M. Mtonga – Legal Officer (In-House legal counsel)

JUDGMENT

Legislation referred to:

1. Competition and Consumer Protection Act No. 24 of 2010, sections 2, 3, 5, 45, 46, 47 and 54
2. Information and Communication Technologies Act No. 15 of 2009, sections 8, 47, 68 and 69
3. Australian Consumer Law, sections 18 (1), 29 (1) (a) and 33
4. (Australia) Trade Practices Act 1974, section 52 (1)

Cases referred to:

5. Director of Public Prosecutions v. Ngandu and Others (1975) Z.R. 253 (S.C.)
6. Mica Zambia Limited v. Competition and Consumer Protection Commission 2014/CCPT/010/CON
7. Parkdale Custom Built Furniture Pty. Ltd. V. Puxu Pty. Ltd. (1982) 149 Clr 191
8. Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited [2014] FCA 634
9. Keehn v. Medical Benefits Fund of Australia Ltd (1977) 14 ALR 77
10. Director General of Fair Trading v First National Bank [2002] 1 AC 482; [2001] UKHL 52
11. African Life Assurance Limited v. Competition and Consumer Protection Commission, (Re Martin Ilunga)
12. Spar Zambia Limited v. Danny Kaluba and the CCPC 2016/CCPT/009/CON

Other works referred to:

13. Gleeson, CJ.: M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" Address to Victoria Law Foundation, Melbourne, 31 July, 2008
14. Information and Communication Technologies Act (Consumer Protection Guidelines)
15. Information and Communication Technologies Act (Code of Conduct for ICT Service Providers)
16. Competition and Consumer Protection Act (Guidelines for Issuance of Fines)

Background

The background to this judgment is that on 13th September 2013, Mr. Macnicious Mwimba (whom we shall refer to as "the Complainant") lodged a complaint against Airtel Networks Zambia Plc (which we shall refer to as "Airtel"), which company was the respondent in the proceedings before the Competition and Consumer Protection Commission (which we shall refer to as "the Commission"). The complaint was that Airtel deceived internet users (including the Complainant as an internet user) by providing an internet service called "unlimited daily/monthly plan" which, according to him, was in actual fact limited.

The Commission investigated the complaint and through its Board of Commissioners, on 20th June, 2014, determined the complaint and reached the verdict that Airtel had violated section 46 (1) as read with section 45 (a) and section 47 (a) (v) of the Competition and Consumer Protection Act, No. 24 of 2010 (which we shall refer to as "the Act"). The Commission did not impose a fine but instead issued a warning to Airtel.

Airtel appealed against the Commission's verdict by Notice of Appeal filed on 13th August 2014. According to its Notice of Appeal, Airtel appealed against the whole of the Commission's determination which decided that, *"The facts and evidence showed that the Appellant was in violation of Section 46 (1) of the Act as read with Section 45 (a) and Section 47 (a) (v) of the Act"*. The grounds of appeal are as follows:

1. That the (Commission) erred in law and in fact in finding that (Airtel) was in violation of section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v) of the Act.
2. The (Commission) erred in law and in fact when it directed that (Airtel) be warned for breaching section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v) of the Act.

Airtel sought the following relief:

1. That the decision/directive of the (Commission) dated 20th June 2014 be set aside.
2. That costs be awarded to (Airtel)
3. Any other relief that the Tribunal may deem fit.

Meanwhile, the Complainant had also earlier appealed against both the Commission and Airtel by Notice of Appeal filed on 24th July 2014. According to the Notice, the Complainant appealed against the whole decision or the part or parts of the decision which decided that, "Based on the findings of the CCPC Board, case number CCPC/CON/084 between the Appellant and Airtel Networks Zambia (respondent) be warned. His grounds of appeal are as follows:

1. That the (Commission's) Board clearly noted that (Airtel) is a perpetual violator of the part or all of section 45, 46 and 47 of the Competition and Consumer Protection Act of 2010; failure to impose punitive sanctions on (Airtel) will not deter (Airtel) from committing the offence again, as it will not be in the conscience of (Airtel) that violation of the CCPC Act costs.
2. Further the Board failed to consider that the Complainant suffered damages, financial loss and time loss when he was misled and lost out on business for which he should have been compensated.
3. The Complainant suffered inconvenience and the Board should have ordered (Airtel) to compensate him.
4. (Airtel) who has largest customer base in both mobile internet service provision and mobile communication subscribers misled not only the Complainant but also masses of its customers who subscribed to their service and made millions of

Kwacha. As such the Board's decision to simply warn the offender clearly demonstrated failure to demonstrate actual protection of consumers.

The Complainant sought the following relief:

1. The Tribunal reviews the decision of the Commission not to award the Complainant damages for the financial loss, time loss and business loss.
2. The Complainant be compensated to being misled into subscribing to the service which had limitation without the appellant transparently providing information about the existence of the limitation.
3. The Complainant be given any relief that the tribunal will deem fit.

The two appeals, having arisen from the same proceedings, were consolidated by the Secretariat pursuant to Rule 12 of the Competition and Consumer Protection (Tribunal) Rules, 2012.

Following our ruling delivered on 29th April 2015 on a preliminary issue in which we ruled that the Complainant had a right to appeal the decision of the Commission, counsel for Airtel, Mrs. Ranchhold, raised a preliminary issue on a point of law. The point of law was whether the Complainant was entitled to seek the relief of damages or compensation he was seeking from the Tribunal. On 14th July 2015, we delivered our Ruling in which we determined that the Commission and the Tribunal have no jurisdiction to award damages or compensation sought by the Complainant for what he alleged to have suffered. We also determined that our decision meant that the Complainant's second and third grounds of appeal fell away and that only the first and fourth grounds of appeal remained to be determined. We ordered that costs were in the appeal. More interlocutory applications followed, resulting in the appeal proceedings being protracted.

Initially, Airtel filed heads of Argument on 15th December 2014 as well as "final" submissions on 26th February 2015. The Commission also filed submissions on 25th February 2015. The consolidated appeal itself was heard starting 17th January 2017 and ending 20th June 2017.

At our sitting on 20th June 2017, we directed the parties to file their respective final written submissions, the last being 15th August 2017. We note, however, that the Complainant's final submissions were filed on 4th August 2017 and the Commission and Airtel filed theirs on 22nd August 2017 and 17th November 2017, respectively. We would have delivered the judgment well before the end of 2017, but due to some logistical problems this could not be achieved. We mention these matters because this appeal has taken very long indeed, which is regrettable.

The case and the hearing

At the hearing of the consolidated appeals, the Complainant called two witnesses - the first one was from the Commission and the second one from the Information and Communication Technology Authority (ZICTA). Both were called by way of summons issued by the Tribunal upon the Complainant's application pursuant to section 71 (2) of the Competition and Consumer Protection Act. After indicating that it would call not more than two witnesses, Airtel opted not to call any witness. The Commission also did not call any witness.

It is not in dispute that the Complainant subscribed to the internet product in issue and that Airtel publicly advertised the product in the print and electronic media accessible to the public and internet users. It was advertised as follows:

> "Enjoy unlimited 3.75 G internet connectivity, your way! Now really enjoy living in the digital age.
>
> | *Data package* | *Validity Period* | *Fair usage quota* | *Charge (K)* |
> |---|---|---|---|
> | Daily Plan | 24 hours | 500MB | 15,000 |
> | Weekly Plan | 7 days | 4GB | 75,000 |
> | Monthly Plan | 30 days | 6GB | 300,000 |
> | SMB Plan | 90 days | 20GB | 800,000 |
>
> Call 575 for more details
>
> be super.be Zambitious
>
> once allotted volume has been exhausted, customers will continue enjoying the service but at slower speeds of 128kbps download and 64kbps upload"

The Complainant reproduced the public advertisement as an attachment to his Notice of Appeal (see image dated 10 Jan) and it was referred to by counsel for Airtel, Mrs Chirwa, at the hearing of the appeal. Counsel requested to file another copy of the advertisement, which she said would show the date of publication clearly. We granted the request, but the said copy was not filed. However, since there was no dispute as to the content of the advertisement as outlined above, and neither was any issue raised in relation to the date of the publication, we did not consider production of the copy by Airtel necessary. We took it that it was accepted by all the parties concerned that this was the public advertisement in question.

The Complainant in his email letter of complaint to the Commission dated 13th September 2013, made allegations against Airtel as follows:

> *"I wish to complain against utter deception of internet users by Airtel. This company provides a service called unlimited daily plan, which is an internet service. They have deceived me as their customer that the service is unlimited when one subscribes to it whether daily or monthly and yet the service has a limit of the size of uploads and downloads that one can do per subscription. Nevertheless, the connectivity will still be their (sic) after one has reached the limit.*
>
> *My borne (sic) of contention is the deception that the service is UNLIMITED DAILY PLAN and yet the service has limitation on the uploads and downloads."* **(See page 3 of the Record of Proceedings)** (Italics ours)

The Complainant attached to his said letter of complainant to the Commission copies of communications with Airtel on its facebook concerning the internet service product in dispute, as seen at pages 5 and 6 of the Record of Proceedings. Airtel has not disputed these communications and in fact, at the hearing of the appeal, counsel for Airtel, Mrs. Chirwa, referred the first witness, an investigator at the Commission, Mr. Chester Njobvu to Airtel's response at page 6. At page 5, the facebook communications from Airtel to the Complainant include the following:

> *"Successfully subscribed to Unlimited Daily Plan, valid until 09-09-2013. Thank you for using Airtel internet services.*
>
> *Time: 9/8/2013 2:24:25 PM"*
>
> *"You have reached your usage limit. For 3.75G speeds, kindly subscribe to a bundle of your choice. If not, you will be subjected to slower speeds.*
>
> *Time: 9/8/2013 8:29:56 PM"*
>
> (Italics ours)

According to page 6 of the Record of Proceedings, the Complainant queried Airtel on its facebook with respect to its above stated message as follows:

> *"My query was therefore as follows:*
>
> 1. *To seek your definition of unlimited Daily Plan*
> 2. *How come the unlimited Daily Plan has a usage limit*
>
> *The two messages contradict each other and would be interpreted as deception by us your customers. Would you shared (sic) more light?*

The above was my query."

(Italics ours)

Airtel's response at the same page was:

"Please note that it is called unlimited in that you do not loose (sic) the connection despite the speeds being slower after you reach your threshold."

Airtel again stated:

"What is unlimited is the connection even after the threshold is reached."

(Italics ours)

Suffice it to state that the Complainant expressed dissatisfaction with Airtel's explanation and alleged that the latter's description of the service as "unlimited" was incorrect and a deception.

In its Notice of Investigation and accompanying letter to Airtel, dated 11th December 2013, the Commission outlined the Complainant's allegations and requested for Airtel's response. The gist of Airtel's response was that:

1. The "Unlimited Plan" service complained of had been approved by ZICTA with the capping as observed by the customer.
2. The customer did not take time to understand the product construct which explained how the unlimited data plan operated.
3. The attached letter (copy) of application to ZICTA spelt out the mechanics.
4. In no way did they deceive their customers as product information was at the time and remained readily available to customers upon request.

Airtel attached to that letter copy of their application letter to ZICTA. However, they did not produce the approval letter from ZICTA. **(See letter at pages 12 - 14 of the Record of Proceedings)**

In the Commission investigator's (first witness') note at page 15 of the Record of Proceedings, the investigator recorded that he had on several occasions communicated with Airtel requesting for the authorization granted by ZICTA, but was informed that they were looking for the letter and would send it to the Commission once found. Airtel did not send the letter; neither did ZICTA whom the officer later contacted. That ZICTA had informed him that it appeared that the letter had been removed from the file; that it appeared that Consumer Department had also received a case which required a review of the same document and that it would be availed once it was located. At the hearing of

the appeal, ZICTA produced a copy of a letter, dated 20th April 2012, which is the first document in Section 1 of the Bundle titled "Macnicious Mwimba Airtel Complaint Ref: ZICTA/CP/15/MM/1/1/14" filed on 30th March 2017. The Bundle was filed pursuant to Summons issued to ZICTA by the Tribunal upon application by the Complainant. Documents in this Bundle were referred to by the second witness, the Director Consumer Affairs and Protection from ZICTA, Mr. Mofya Chisala, and counsel for Airtel at the hearing of the appeal. We intend to make reference to the same now and later as we find necessary.

Airtel's application letter to ZICTA is at page 14 of the Record of Proceedings and it read (italics ours):

> *"(Logo)*
>
> *18th April 2012*
>
> *Mrs. Margaret K. Chalwe-Mudenda*
> *Director General*
> *Zambia ICT Authority*
> *P.O. Box 38871*
> *LUSAKA*
>
> *Dear Madam,*
>
> ***UNLIMITED DATA BUNDLES***
>
> *Reference is made to the above.*
>
> *Please find herein an application for your consideration to implement the unlimited Data Bundles:*

Data package	*Validity Period*	*Fair usage quota*	*Charge (K)*
Daily Plan	*24 hours*	*500MB*	*15,000*
Weekly Plan	*7 days*	*4GB*	*75,000*
Monthly Plan	*30 days*	*6GB*	*300,000*
SMB Plan	*90 days*	*20GB*	*800,000*

> *This is in response to customer demand for a package that will allow them unlimited usage. Under this plan, the consumer must consume the entire package during the validity period failing which the bundle will expire. At the end of the validity period or by upon reaching the usage limit, whichever is earlier, the Advice Of Change (AOC) page will appear notifying the customer that they need either to re-subscribe or to enroll on another plan or go to PAYG plan which is K1,100.00 per Megabyte.*
>
> *Kindly note that this plan will be available to any customer and that the intention is to retain the tariff plan as permanent.*

Also note that apart from fair usage quota, there are no special conditions attached. The fair usage quota has been employed to forestall abuse of the product which may lead to product being overrun and unsustainable.

Further, be advised that the plan will be launched as soon as approval is granted.

I thank you in advance for your positive response.

Yours faithfully,
Airtel

Favaz King
Managing Director"

ZICTA's letter in response, which was not available to the Commission during the investigation and the decision-making process, read as follows (see the first document in ZICTA's Bundle filed on 30th March 2017):

"ZICTA/MC&L/MMC/ckm

April 20, 2012

The Managing Director
Airtel Zambia
P.O. Box 320001
LUSAKA

Dear Sir,

RE: AIRTEL – NEW DATA BUNDLES FOR CAPPED INTERNET

I refer to your application letter of 16th April 2012 regarding the above subject matter.

The Authority would like to acknowledge receipt of Airtel Zambia's application for introduction of new data bundles for your proposed capped internet services targeted at high bandwidth internet users. The Authority notes that Airtel Zambia has reduced the tariffs for the new data bundle therefore making them easily affordable by the targeted customers.

Upon review of an application, the Authority is satisfied with the terms and conditions in the offing and hereby in accordance with section 47 of the ICT Act grants approval to Airtel Zambia to introduce the new capped data bundles as highlighted in the table below, on the Zambian market.

Data package	*Validity Period*	*Fair usage quota*	*Charge (K)*
Daily Plan	*24 hours*	*500MB*	*15,000*
Weekly Plan	*7 days*	*4GB*	*75,000*

Monthly Plan	*30 days*	*6GB*	*300,000*
SMB Plan	*90 days*	*20GB*	*800,000*

However, in order to avoid confusion amongst customers in view of the current volume based data bundles of 4GB and 6GB respectively, Airtel Zambia is hereby advised to clearly differentiate the two types of data bundles and also refrain from the use of the term "unlimited" in its advertising.

Yours faithfully,
ZAMBIA INFORMATION AND COMMUNICATION TECHNOLOGY AUTHORITY

Clementina Simwanza (Mrs)
ACTING DIRECTOR GENERAL
CC: Acting Director – Markets, Competition and Licensing
CC: Acting Head – Information and Consumer Protection"

(Italics ours)

Key findings reflected in the Commission's Board's decision dated 20th June 2014 were as follows:

1. Airtel was running an internet product called unlimited data plan for internet users.
2. Airtel had requested for permission from the sector regulator and had explained the characteristics and nature of the service.
3. There were several cases involving Airtel reported to the Commission and that specifically in two of these the Commission had concluded that Airtel violated section 46 (1) as read with section 45 (b) of the Act.
4. By calling the tariff "Unlimited Data Plan", Airtel misled the Complainant as he believed that he would continue to use the internet service despite having exhausted his fair usage quota. The Complainant immediately lost connectivity when they reached their fair usage quota. Therefore Airtel did mislead the Complainant into believing that the internet service purchased had unlimited data when it did not.
5. The data was limited as the user could not continue browsing the internet even after the user had reached their usage quota. The service required that a user re-subscribes to another plan in order to continue using the internet service. By calling the plan unlimited when in fact the data was limited, is a false representation of the product by Airtel.

Having found as aforesaid, the Commission's Board arrived at its verdict and warned Airtel, as we have outlined at the outset.

(See pages 41 – 44 of the Record of Proceedings)

1st Witness' evidence

In his evidence in chief, the first witness, Mr. Chester Njobvu, testified that he was an investigator at the Commission. The gist of the evidence he gave was a repeat of the complaint made by the Complainant to the Commission and the response given by Airtel, which we have already outlined above.

The witness testified that the officer he dealt with at ZICTA informed him that the letter by which ZICTA granted Airtel the licence to run the internet service product in issue had been removed from the file. Further, that Airtel informed him that they could not find the letter from ZICTA granting the licence.

In cross-examination by counsel for Airtel, Mrs. Chirwa, the witness was referred to and read paragraph three of Airtel's application letter to ZICTA (at page 14 of the Record of Proceedings), specifically the portion which read:

> *"Under this plan, the consumer must consume the entire package during the validity period failing which the bundle will expire. At the end of the validity period or by upon reaching the usage limit, whichever is earlier, the Advice Of Change (AOC) page will appear notifying the customer that they need either to re-subscribe or to enroll on another plan or go to PAYG plan which is K1,100.00 per Megabyte."* (Italics ours)

The witness confirmed that the text meant that a customer who purchased this unlimited data package had to consume the package during the validity period.

Counsel further referred the witness to page 6 of the Record of Proceedings and he read the response from Airtel to the Complainant, which stated, *""What is unlimited is the connection even after the threshold is reached."* Counsel further asked the witness to confirm that according to what was communicated to the Complainant it was the connection and not the data usage, which the witness confirmed.

Counsel also referred the witness to page 28 paragraph three of Airtel's response to the Commission's preliminary report, which read in part, *"Airtel submits that in no way was the product misleading to the customer as there was full disclosure of how the product worked. The said disclosure was by way of Terms and Conditions of the product which were published in the newspapers of national circulation and generally made available on our website, the Call Centre self-service portal and through fliers in compliance to section 47 of the ICT Act No. 15 of 2009."*(Italics ours)

The witness was asked whether in his investigation he visited the Airtel website to read the terms and conditions of the product in issue or to call the customer concerning the same, to which he responded in the negative and that his main concern had been to confirm ZICTA's authorization.

When we sought a clarification from the witness, he said the interpretation they gave to the advertised internet service product was that even if the data package was finished a customer would still browse but at a lower speed.

In re-examination by the Complainant, the witness stated that Airtel's application letter meant unlimited data bundles and not connectivity. He also referred the witness to the first sentence in the third paragraph from the last, of the same letter, which read, *"Also note that apart from fair usage quota, there are no special conditions attached."* As to whether or not there was any way that the sentence pointed to availability of any special conditions that attached to the product, the witness said there was not. He further said his understanding was that the product offered had unlimited data usage.

2nd Witness' evidence

In his evidence in chief, the second witness, Mr. Mofya Chisala, testified that he was ZICTA's Director of Consumer Affairs and Protection. That his responsibilities were, but not limited to, ensuring that consumers in the ICT sector were protected from unfair treatment, abuse and being taken advantage of by service providers and vendors of products. Also ensuring that service providers adhered to the law.

The witness went on to say that his department sat on the department concerned with licensing and promotions to provide inputs on perspectives aimed at ensuring that consumers were not disadvantaged. He testified that among the qualifications he had were a Master's degree in Business administration, Bachelor of Science in Computing as well as a Certified Chief Information Officer, which he said was the highest qualification in IT.

The witness also testified that ZICTA had issued consumer guidelines in line with its mandate under sections 68 and 69 of the Information and Communication Technologies Act, placing obligations on service providers in order to protect consumers. He further testified that there was an MoU between ZICTA and the Commission, pursuant to section 8 of that Act, by which the two institutions would consult when necessary. Further, that ZICTA referred issues related to competition to the Commission. That ZICTA provided advice to operators in the ICT sector to adhere to both the Information and Communication Technologies Act and the Competition and Consumer Protection Act.

The witness testified that ZICTA did give authority to Airtel to run the product in issue and Airtel was expected to honour what it had promised based on the terms and conditions. That in the application, Airtel had used the term "unlimited data plans" and this was defined in accordance with their promotions, to mean that customers were expected to consume the entire package during the validity period failing which the bundle would expire. Further, that at the end of the validity period or upon reaching the usage limit, whichever was earlier, the consumer would receive a notification on the screen of their phone advising the customer to either re-subscribe or enrol on another plan.

The witness went on to testify that ZICTA did not control the language a service provider used to describe their product and that their interest was to pay attention to terms and conditions set by service providers. That in this case, they were made to believe that the unlimited data plan meant that consumption of this product was to be within the validity period and that the internet that was being offered must not be slowed or reduced within that stipulated period or meaning that the service provider had no right to reduce the internet speed. That they were not aware that this was not the case until they received a complaint from the Complainant and they discovered that a number of consumers had expressed concern on the definition of the words "unlimited data plan" and what it meant. That ZICTA further gave a directive to Airtel to desist from referring to the internet provision with a volume limitation as "unlimited".

The witness went further to testify that ZICTA did a benchmarking exercise where they looked at the practice of other regulators in the ICT sector in Europe. That they discovered that the practice there was provision of time bound internet service as opposed to volume base; that is the service provider would give unlimited internet service within the stipulated time frame. That by attaching volume to data usage, "unlimited" was wrongly used by Airtel; this usage did not amount to the unlimited offer of internet service. The witness affirmatively explained that if a customer bought 500 MB valid for 24 hours, if he used the 500 MB then he or she reached the limit and technically he or she would stop using the internet connectivity. That, even with the 24 hours subscription period, one would still encounter the limit even within 2 minutes based on the volume.

The witness testified that in 2012 to 2013, among the telecommunications service providers, Airtel had the largest customer base, in terms of mobile communication, data and internet provision, followed by MTN and ZAMTEL.

The witness, after filing the bundle of documents (with our permission), continued to testify. He was referred to Article 1.1 of section 3 of the said ZICTA's Bundle, Consumer Protection Guidelines, at page 4 and he read, "*A licensee shall provide consumers with a clear,*

accurate and understandable description of available services, tariffs, terms and conditions for each service and publish the information within such period as may be determined by the Authority. Such information shall be in a language and terms which the consumer understands." (Italics ours)

He said that in its mandate ZICTA did not have the right to prescribe how the service providers described their products and in response to the question of Airtel's terms and conditions, the witness referred to the application letter by Airtel, of 18th April 2012 and ZICTA's letter of approval dated 20th April 2012, appearing in section 1 of the Bundle of Documents titled "Macnicious Mwimba Airtel Complaint Ref: ZICTA/CP/15/MM/1/1/14" filed on 30th March 2017. He said ZICTA's response contained advice to Airtel to refrain from using the term "unlimited" when advertising the product.

The witness testified that in reference to the consumer protection guideline he had just read out, ZICTA had noted that the product description in Airtel's application letter was technically accurate but also noted, in view of ZICTA's mandate and its Consumer Protection Guidelines, that it appeared that the description would not be clear and understandable to the consumers hence ZICTA's advice to Airtel to refrain from using the term "unlimited" in their advertising. That, they (ZICTA) could not say the description would not be clear; that was their perception.

The witness answered in the affirmative that ZICTA was empowered by law to apply sanction on service providers found flouting the law, including guidelines. He testified that in line with complaint resolution procedures of ZICTA the first thing they did was to allow for possible dispute resolution between the service provider and the Complainant. Further, that when a solution was not found, the Complainant came to ZICTA, which in turn wrote to Airtel, who denied that there was a problem. The witness referred to correspondence in section 2 of ZICTA's Bundle.

The witness further said that Airtel disregarded ZICTA's advice by going ahead to advertise the product as unlimited. The witness further testified that when Airtel later requested for revision of the service, on 14th August 2013, ZICTA rejected revision of their unlimited new data plans.

The witness testified that there was a letter in section 2 of the ZICTA Bundle dated 15th January 2014 in which ZICTA brought the Complainant's allegations to the attention of Airtel and the latter responded denying the same, which letter was in the same Bundle just before ZICTA's letter. By then he had taken over in the position he was currently serving at ZICTA. That following this exchange, ZICTA conducted its own investigations. That ZICTA attempted to mediate between the "warring" parties and, in

the process, involved the Commission. That at the time there was hope that the two would resolve the conflict.

He further testified that about the said time, Airtel made the application to revise the product in issue on 14th August 2013, which ZICTA rejected.

The witness was questioned by the Complaint concerning the period between the date of the letter of ZICTA's approval dated 20th April 2012 and the letter from Airtel requesting for revision of the product dated 14th August 2013, which was responded to by letter dated 15th August 2013, and the implication that all this period Airtel was running the product on promotion, which was supposed to run for only 90 days according to his earlier evidence. The witness responded that it did not necessarily mean that during all that period Airtel was running the product. That service providers were in the habit of applying for products on promotion and that sometimes if such a product became popular, they would convert it into a core product. In this instance, the witness said, he was not certain whether this was the status of the product because the letter (ZICTA's letter to Airtel), specifically stated that the product should be discontinued.

The witness repeatedly testified to the effect that ZICTA was concerned with confusion that use of the term "unlimited data plans" was creating as far as consumers were concerned and that there were a lot of consumer complaints in this respect, which were likely to continue, thereby resulting in ZICTA "fire – fighting" with the service providers. Hence the decision not to have this product on the market. Further, that in light of the emerging trend that data bundle product by service providers was becoming a normal service on the market, there was need to learn how other ICT markets conducted themselves. That it was in this wider context that ZICTA conducted the benchmarking with practices in ICT markets in some European countries, which he had earlier referred to.

In cross-examination by counsel for Airtel, the witness said that in the Code of Conduct for the ICT Service Providers (in the ZICTA bundle of documents), provision of information by the service provider was explicit and that a consumer had an obligation to solicit for information relating to a service being consumed or intended to be consumed. Further, that a consumer was expected to be assertive when making decisions to purchase and use communication goods and services. Further, that ZICTA ensured that terms and conditions of all services offered to the public are readily available to the public in print and electronic forms and that information was available at retail outlets.

The witness testified that on 20th April 2012 he was not the Acting Director - Marketing, Competition and Licensing. On the question as to how he could be certain that the letter giving Airtel advice (to refrain from using the word "unlimited" in its advertising) was

received by Airtel, the witness responded that by law, service providers would not run a product without ZICTA's approval and that procedurally, all applications processed by ZICTA were responded to and delivered and they never had a situation where a service provider would then write a letter confirming commencement of a promotion.

As to the question whether if ZICTA had received several complaints, the same were communicated to Airtel before the letter informing of the complaint by the Complainant, the witness said ZICTA had a tradition whereby before a complaint escalated to that level, it was dealt with by contact persons in ZICTA and the service provider concerned and that in this case the contact person in ZICTA was Gloria Kabonga. That this working relationship was there so that they did not constantly have to write letters. Further, that if need be complaints relating to the product in issue could be made available because ZICTA did have a number of complaints relating to the product. That in the ZICTA bundle of documents filed on 30th March 2017, complaints relating to other complaints were not there.

In response to the question what would happen if a service provider made an application to implement a package and a response was not received from ZICTA within fourteen days, the witness said ZICTA had mechanisms including a service charter on its response time; therefore, service providers had recourse if ZICTA did not respond within the stipulated time without giving reasons before or after. He further said, in response to a question, that a service provider could not implement the package if they did not receive a response to their application.

In response to a question whether when the witness became the Director Consumer Affairs and Protection in 2013 he followed up with Airtel on ZICTA's advice in its letter of 20th April 2012 restraining it from using the word "unlimited", in view of his testimony that there were several complaints from consumers other than that from the Complainant in the present case, the witness answered in the affirmative but that the correspondence was not before the Tribunal.

Upon being referred to Airtel's letter to ZICTA dated 29th November 2013, paragraphs 2 and 3 in section 2 of the ZICTA bundle of documents, as to the reasons for Airtel's withdrawal of the unlimited data plan, the witness said when ZICTA received letters like that they did not just look at the reason given by service provider. He said that he did not know whether Airtel was withdrawing the data plan because it could not be sustained from the revenue the product was generating, as alleged by Airtel.

The witness further said the meetings ZICTA held with the Complainant and representatives of Airtel and the Commission did not result in resolution of the complaint and the Complainant opted to pursue his complaint with the Commission.

Analysis and conclusions

We have given serious consideration to the consolidated appeals and taken into account the evidence on record and that which was orally given at the hearing as well as the heads of argument and submissions filed by the three parties, respectively.

First and foremost, we address the legal context of the subject matter of the appeal, including the jurisdictions of ZICTA and the Commission. In this respect, we take into consideration the fact that the complaint originated from transactions governed primarily by the Information and Communication Technologies Act, No. 15 of 2009.

We note that ZICTA has power under the Information and Communication Technologies Act, in particular Part VII, to deal with complaints from consumers of information communication technologies against service providers. Section 68 (4) provides that, "The *Authority may resolve any complaints from consumers in relation to matters of service provision and consumer protection including the quality of service or the failure by a licensee to comply with consumer protection guidelines issued by the Authority under this Act."*(Italics ours)

Section 8 of the said Act enjoins ZICTA to consult the Commission on any matter relating to competition in the sector.

We also note that section 3 (1) of the Competition and Consumer Protection Act provides that, *"Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within, Zambia."* Furthermore, according to section 5 of the Act, the Commission has among its functions the following (quoting only relevant parts):

> *"(a) …;*
>
> *(b) review the trading practices pursued by enterprises doing business in Zambia;*
>
> *(c) …;*
>
> *(d) investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary;*
>
> *(e) …;*
>
> *(f) act as a primary advocate for competition and effective consumer protection in Zambia;*
>
> *(g) …;*
>
> *(h) …;*
>
> *(i) …;*
>
> *(j) …;*

(k)…; and

(l) do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act." (Italics ours)

In addition, section 43 of the Act provides that, *"The Commission shall, for the purpose of coordinating and harmonising matters relating to competition in other sectors of the economy, enter into a memorandum of understanding with any regulator in that sector, in the prescribed manner and form."*(Italics ours)

The Act in Part VII further provides for consumer protection and thereunder section 54 gives power to persons to lodge to the Commission complaints with respect to consumer protection in the following terms:

"54. Any person who alleges that a person or an enterprise –

(a) is practicing any unfair trading;

(b) has made a false or misleading representation in respect of any goods, services or facilities;

(c) has displayed a disclaimer at any trading premises contrary to the provisions of this Act;

(d) has supplied defective or unsuitable goods or provided unsuitable services to that person;

(e) is selling goods that do not conform with the mandatory safety standards for the class of goods;

(f) has concluded or is enforcing an unfair contract or term of contract to the detriment of that person; or

(g) has contravened any other provision of this Act relating to consumer protection or has failed to comply with a requirement under this Act, to the detriment if that person;

may lodge a complaint with the Commission in the prescribed manner and form."

(Italics ours)

Therefore, the Commission's power under the Act cuts across all sectors of the economy of Zambia. Accordingly, there is no conflict between the two Acts and the Commission has power to deal with complaints on matters covered by the Competition and Consumer Protection Act arising in the ICT sector to the extent that such complaint has not been resolved by ZICTA or conclusively prosecuted as provided by the Information and Communication Technologies Act. We find as a fact on the basis of the evidence of the

two witnesses at the hearing of the appeal that the complaint subject of the consolidated appeals before us was not resolved by ZICTA.

In terms of section 41 (1) of the Interpretation and General Provisions Act, *"Where an act or omission constitutes an offence against any two or more statutory enactments or both under a statutory enactment and the Common Law or any customary law, the offender shall be liable to be prosecuted and punished under either or any of such statutory enactments or at Common Law or under customary law, but shall not be liable to be punished twice for the same offence."*(Italics ours)

Whereas there is no dispute as to the jurisdiction of the Commission in the consolidated appeals, we found it necessary to put in context the law relating to the matter, particularly in light of the interaction with provisions of the Information and Communication Technologies Act as well as guidelines and other instruments made thereunder.

In our view, the questions we need to address covering all the grounds of appeal in the consolidated appeals are two, namely:

1. **Whether the Commission's Board erred in its finding that Airtel violated section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v).**

2. **Whether the Commission's Board erred by not imposing a fine but simply warning Airtel. (This is if our conclusion on the first question is in the affirmative)**

The first question is a mixed question of fact and law while the second is a matter of interpretation or application of the law prescribing the penalty to the facts. We proceed to deal with the two questions.

1. **Whether the Commission's Board erred in its finding that Airtel violated section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v).**

As we have stated at the outset, the Complainant's case before the Commission was an allegation couched in the following terms:

> *"I wish to complain against utter deception of internet users by Airtel. This company provides a service called unlimited daily plan, which is an internet service. They have deceived me as their customer that the service is unlimited when one subscribes to it whether daily or monthly and yet the service has a limit of the size of uploads and downloads that one can do per subscription. Nevertheless, the connectivity will still be their (sic) after one has reached the limit."***(See page 3 of the Record of Proceedings)** (Italics ours)

Airtel on the other hand disputed the allegation in the proceedings before the Commission as well us in the appeal proceedings. In their response to the complaint at pages 12 to 14 of the Record of Proceedings, Airtel stated that:

1. The "Unlimited Plan" service complained of had been approved by ZICTA with the capping as observed by the customer.

2. The customer did not take time to understand the product construct which explained how the unlimited data plan operated.

3. The attached letter (copy) of application to ZICTA spelt out the mechanics.

And further, in response to the Commission's preliminary report reflecting a finding that Airtel had breached section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v), Airtel argued that, "*... in no way was the product misleading to the customer as there was full disclosure of how the product worked and that this was by way of Terms and Conditions which were published in newspapers of national circulation and generally made available on their website, the Call Centre self-service portal and through fliers in compliance to section 47 of the Information Communication Technologies Act.*"(Italics ours)

(See Airtel's response to the Commission's preliminary report at paragraph seven at page 28 of the Record of Proceedings)

We shall refer to provisions of and the Information Communication Technologies Act, guidelines and other instruments made thereunder because these are part of the background to the complaint and relate to the subject matter of the two appeals. They therefore provide external context in the interpretation of the provisions of the Competition and Consumer Protection Act in issue, without which the meaning of these provisions, even if plainly ascertained, may be misapplied to the facts and circumstances of the case at hand.

In his address to Victoria Law Foundation on 31 July 2008, Lord M. Gleeson, then Chief Justice of Australia, had the following reflections on the subject of context in interpretation of statutes:

> *"The apparent meaning of the legislative provision is only but the starting point; courts have to consider all relevant contextual material (within the statute itself and outside of it). This calls for extensive research and full knowledge of the context, which includes the statute and the subject matter or matters it covers."***(Gleeson, CJ.: M Gleeson, "The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights" Address to Victoria Law Foundation, Melbourne, 31 July, 2008)**

Our Supreme Court in the case of **Director of Public Prosecutions v. Ngandu and Others** (1975) Z.R. 253 (S.C.) said:

"…. But as this court has said (see for instance Sinkamba v Doyle [1]) ordinary meanings or dictionary meanings of words or phrases, while they may properly be used as working hypotheses or starting points, must always in the final analysis give way to the meaning which the context requires; and we use the word "context" in its widest sense as described by Viscount Simonds in Attorney-General v H.R.H. Prince Augustus [2] at page 53:

> *'. . as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'*

In short, we find that there are provisions of the Information and Communication Technologies Act on the subject matter of the consolidated appeals which are in *pari materia* with those of the Competition and Consumer Protection Act. Therefore, they ought to be interpreted in reference to each other.

Section 47 of the Information Communication Technologies Act reads:

"47. (1) Subject to the other provisions of this Act, a licensee may set and revise tariffs in relation to electronic communications services.

(2) A licensee shall, in setting any tariffs under subsection (1), ensure that the tariffs are transparent and non discriminatory, and are based on costs not greater than the cost of providing the service.

(3) A licensee shall submit to the Authority, in the prescribed manner and form, the tariffs the licensee intends to charge, including the justification, prior to the introduction of the tariffs.

(4) The Authority shall, within fourteen days of the receipt of the tariffs proposed by a licensee, approve or reject the tariffs.

(5) Where a licensee applies for the approval of tariffs under subsection (3) and the approval is not granted within fourteen days of the submission of the application, the approval shall be deemed to have been granted.

(6) ….

(7) ….

(8) ….

(9) A licensee shall, upon approval of the new tariffs by the Authority-

(a) publish the tariffs at the licensee's own expense in at least two daily newspapers of general circulation in Zambia at least seven days immediately following their introduction; and

(b) provide its electronic communications services in accordance with the public tariffs.

(10) A licensee shall not alter or vary tariffs without the prior written approval of the Authority.

(11) The Authority shall maintain a register of approved tariffs which shall be open for public inspection on such terms and conditions as the Authority may determine.

(12) The Authority may carry out reviews of the tariffs so as to ensure that the tariffs conform to the provisions of this section.

(13) ...." (Italics ours)

(As repealed and replaced by Act No. 3 of 2010)"

As for relevant provisions of ZICTA's Consumer Protection Guidelines made under the said Act (see document in section 3 of the ZICTA bundle of Documents), section 1.1 provides that, *"A licensee shall provide consumers with clear, accurate and understandable description of available services, tariffs, terms conditions for each service and publish the information within such period as may be determined by the Authority. Such information shall be in a language and terms which the consumer understands."* (Italics ours)

In the same bundle, in the Code of Conduct for ICT Service Providers, it states in section 1.0 (quoting relevant parts only):

"The licensee shall provide Consumers with information in print on their services that is complete, accurate, and up to-date and in simple, clear language ....:

1.1 TYPES OF CONSUMER RIGHTS

I. ...;

*II. **Full Disclosure** – the right to dissemination of clear, conspicuous, and complete information about rates, terms and conditions for available and proposed products and services from the service provider;*

*III. **Fair Pricing** – the right to be charged by the service provider only for those services and under the terms and conditions that have been approved or they have agreed to.*

IV. ***Choice*** *– the right, to freely and affirmatively select their Information and Communication Technology Provider and services/goods.* ***The context of making such choices should be free from undue influence, prejudice, exploitation or any other motive by the service provider that might compromise the integrity of choice.***

V. ....

VI. ....

VII. ....

VIII. ....

IX. ***Protection from anti-competitive behavior*** *– the Right to be protected from anti-competitive behavior such as unfair trade practices, including the false and misleading advertising.*

1.2 CONSUMER OBLIGATIONS

I. ....

II. ....

III. ***Awareness*** *– Solicitation for information related to the service being consumed or intended to be consumed.*

IV. ....

V. ....

VI. ***Assertiveness*** *– to be assertive and exercise due care when making decisions as they purchase and make use of communication goods and services.*

Coming back to the Competition and Consumer Protection Act, the provisions alleged to have been breached by Airtel state as follows:

"45. A trading practice is unfair if –

(a) it misleads consumers;

(b) ...; or

(c) ...;

and thereby distorts, or is likely to distort, the purchasing decisions of consumers.

46. (1) A person or an enterprise shall not practice any unfair trading.

(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.

47. A person who, or an enterprise which –

(a) falsely represents that –

(i) ...;

(ii) ...;

(iii) ...;

(iv) ...; or

(v) any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or

(b) ...

is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher." (Italics ours)

The plain meaning of the word "mislead" is to give a wrong idea or impression (Oxford English dictionaries); "calculated to lead astray or to lead into error" (Black's Law Dictionary) while the plain meaning of "distort" is pull out of shape or into wrong shape (Oxford English dictionaries). The expression "falsely represent", in the context of the subject matter of the appeals, is to make a deceitful and untrue statement for ulterior motives (Black's Law Dictionary).

The Complainant alleged that Airtel deceived its internet users and that he was deceived as Airtel's customer that the service was unlimited when one subscribed to it whether daily or monthly and yet the service had a limit of the size of uploads and downloads that one can do per subscription. Nevertheless, the connectivity would still be there after one reached the limit, he alleged.

At the expense of repetition, we observe that Airtel's public advertisement stated that, *"once allotted volume has been exhausted, customers will continue enjoying the service but at slower speeds of 128kbps download and 64kbps upload".*

At page 5 of the Record of Proceedings, communications from Airtel to the Complainant on its facebook include the following:

> *"Successfully subscribed to Unlimited Daily Plan, valid until 09-09-2013. Thank you for using Airtel internet services.*
>
> *Time: 9/8/2013 2:24:25 PM"*
>
> *"You have reached your usage limit. For 3.75G speeds, kindly subscribe to a bundle of your choice. If not, you will be subjected to slower speeds.*
>
> *Time: 9/8/2013 8:29:56 PM"*
>
> (Italics ours)

According to page 6 of the Record of Proceedings, the Complainant queried Airtel on its facebook with respect to its above stated message as follows:

> *"My query was therefore as follows:*
>
> 3. *To seek your definition of unlimited Daily Plan*
> 4. *How come the unlimited Daily Plan has a usage limit*
>
> *The two messages contradict each other and would be interpreted as deception by us your customers. Would you shared (sic) more light?*
>
> *The above was my query."*
>
> (Italics ours)

Airtel's response at the same page was:

> *"Please note that it is called unlimited in that you do not loose (sic) the connection despite the speeds being slower after you reach your threshold."*

Airtel again stated:

> *"What is unlimited is the connection even after the threshold is reached."*
>
> (Italics ours)

Suffice it to state that the Complainant expressed dissatisfaction with Airtel's explanation and alleged that the latter's description of the service as "unlimited" was incorrect and a deception.

The Complainant's allegations against Airtel were explicitly repeated in the Commission's Notice of Investigation and accompanying letter to Airtel dated 11th

December 2013. The Commission stated, *"The Complainant alleged that there still would be internet connectivity but no upload or download activities would take place after one has reached the limit of the subscription. The Complainant allegedly contended that you are deceiving users by stating that the service is an unlimited daily/monthly plan and yet the service has limitations on the number of upload and download activities conducted per subscription."* (Italics ours) **(See pages 7, and 8 paragraph 2 of the Record of Proceedings)**

Airtel in its response did not deny that the product's characteristics were as alleged by the Complainant. Instead, Airtel stated that the "Unlimited Plan" service complained of was approved by ZICTA with the capping as observed by the Complainant and that the Complainant did not take time to understand the product construct which explained how the unlimited data plan operated.

Counsel for Airtel in her cross-examination of the first witness referred him to page 6 of the Record of Proceedings, the response from Airtel to the Complainant, which stated, *"What is unlimited is the connection even after the threshold is reached."* Counsel further asked the witness to confirm that according to what was communicated to the Complainant it was the connection and not the data usage, which the witness confirmed. Further, that Airtel did not deceive customers as product information was at the time and remained available to customers upon request. **(See pages 12 – 13 of the Record of Proceedings)**

Counsel also referred the witness to page 28 paragraph three of Airtel's response to the Commission's preliminary report, which read in part, *"Airtel submits that in no way was the product misleading to the customer as there was full disclosure of how the product worked. The said disclosure was by way of Terms and Conditions of the product which were published in the newspapers of national circulation and generally made available on our website, the Call Centre self-service portal and through fliers in compliance to section 47 of the ICT Act No. 15 of 2009."*(Italics ours)

The witness in re-examination referred to Airtel's application letter to ZICTA in which it had stated that, *"Also note that apart from fair usage quota, there are no special conditions attached."* True to this statement, we have not seen any special conditions in the public advertisement which we have reproduced above apart from the stipulation that once the allotted volume was exhausted, customers would continue enjoying the data usage service but at slower speeds of 128kbps download and 64kbps upload. The problem here was the contradiction of the actual characteristic of the product in relation to the "unlimited" data usage service which was advertised. This contradiction was confirmed by the explanation and position given to the Complainant by Airtel that the unlimited only applied to connectivity.

We accept the second witness evidence that in the first place Airtel should not have used the words "Unlimited Data Plan" at all unless the product had been one where the data usage would be maintained throughout the product validity period at the same speed (i.e. without slowing down the speed). That is, if plain language was used but, as the witness explained, Airtel provided ZICTA with a technical description of the product, which in effect had a limitation on data usage. In reality, once the data bundle was exhausted, Airtel did not even provide the limited data usage, but only connectivity.

We also accept the second witness' evidence that by attaching volume to data usage, "unlimited" was wrongly used by Airtel; the usage did not measure up to the unlimited offer of internet service. The witness affirmatively explained that if a customer bought 500 MB valid for 24 hours, if he used the 500 MB then he or she reached the limit and technically he or she would stop using the internet connectivity. That, even with the 24 hours subscription period, one would still encounter the limit even within 2 minutes based on the volume of data bundles. Yet, according to the public advertisement, upon exhausting the volume, Airtel was supposed to maintain the connectivity and data usage; the data usage was supposed to be maintained albeit at slower speeds.

We further accept the witness' evidence that in its letter of approval of the product dated 20th April 2012, ZICTA had restrained Airtel from using the word "unlimited" in its advertisements. Although counsel for Airtel in her cross-examination of the second witness appeared to suggest that there was no proof that the letter was served on Airtel, we are satisfied that Airtel itself had maintained that the product was approved by ZICTA and did not dispute or present any evidence disputing the letter. We also find it curious that while Airtel claimed that ZICTA had approved the product, the former did not produce the letter.

We therefore accept the letter of approval by ZICTA of the product in question as the one produced in ZICTA's bundle of documents, which letter we have also reproduced above. This is despite the reference in the letter to Airtel's application letter as dated 16th April instead of 18th April 2012. No dispute was raised about this and we are satisfied that the contents of the letter speak to the internet product in issue.

Moving forward, the target of the conduct complained of has to be identified. Section 2 (1) of the Act defines "consumer" as:

> *"(a) for the purposes of Part III, any person who purchases or offers to purchase goods or services supplied by an enterprise in the course of business, and includes a business person*

who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer; and

(b) for the purposes of the other Parts of this Act, other than Part III, any person who purchases or offers to purchase goods or services otherwise than for the purpose of re-sale, but does not include a person who purchases goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale, or the provision of another service for remuneration;" (Italics ours)

There was no dispute and we are satisfied that in the context of the sections in issue, which fall under Part VII, the consumers in view in section 45 of the Act are those covered by the definition in paragraph (b). In the present case, these are members of the public who were either purchasers or prospective purchasers of internet services or products for direct consumption. By "direct consumption", is meant not using the product for resale or in the production of any other goods for sale or the provision of another service for remuneration.

Section 47 of the Act, on the other hand does not use the word "consumers". However, in the broader context of Part VII titled "CONSUMER PROTECTION" and its provisions focusing on consumers, in our view, the section also has in contemplation false representation to consumers and, in the present case, these were either purchasers or prospective purchasers of internet services or products for direct consumption. Even if we adopted an interpretation that does not restrict the section to the definition of "consumer" in Part VII as provided by section 2 (1) of the Act, rationally, the section would still have to relate to the class of persons who would be possible victims of violation of the section. These are members of the public who were either purchasers or prospective purchasers of internet services or products. In the High Court of Australia case of **Parkdale Custom Built Furniture Pty. Ltd. V. Puxu Pty. Ltd.** (1982) 149 Clr 191, in which the subject section simply read "*A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.*" Lord Gibbs C.J. said in paragraph 9:

"Section 52 does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct." (Italics ours)

The case for determination by the Commission did not, according to our understanding of the law, hang on the basis that there was evidence that the Complainant belonged to the class of consumers contemplated by the sections in issue or subjective test whether there was evidence that he or any particular consumer was

actually misled and deceived, nor whether there was evidence of actual false representation made to the Complainant or any other such particular consumer, nor indeed evidence whether or not as a result the Complainant or such a consumer suffered damage or loss.

In respect of section 45, the language used captures relevant consumers at large because it includes words such as, "misleads consumers" and "or likely to be distorted", while in respect of section 47, the target are also consumers at large because the language is not restrictive in that respect. It simply states generally that, "*A person who, or an enterprise which –*

(a) falsely represents that – " (Italics ours)

The bottom line in these consolidated appeals before us is that Airtel advertised the product in issue for sale to members of the public at large, which includes direct consumers contemplated by the sections in issue.

The Commission in its decision did not address itself to the class of consumers contemplated by the sections in issue, but specifically focused on the question whether or not the Complainant was misled. While this approach and evidence in respect thereof is admissible, it tends to narrow the scope of the conduct targeted by the law in question.

We have found no reason to arrive at a different finding from that reached by the Commission that by calling the tariff "Unlimited Data Plan" Airtel misled the Complainant as he believed that he would continue to use the internet service despite having exhausted his fair usage quota. There was evidence to that effect on the record, which was also referred to at the hearing of the appeal, as we indicate elsewhere in this judgment. We are, however, not particularly concerned with that issue. This is because such evidence is unnecessary and would not in itself conclusively determine the question of violation of the provisions in issue in the absence of a determination on the basis of the objective test, which alone is conclusive. Partly because of this same reason, we have not given serious consideration to the evidence by the second witness that a number of consumers, apart from the Complainant, complained to ZICTA about the perceived misuse of the word "unlimited" in Airtel's advertisement of the product in issue. The other reason is that no documentary evidence of any such complaint was presented before the Commission or the Tribunal.

In our view, the objective test would in respect of both sections 45 (a) and 47 (a) (v) relate to consumers who were either purchasers or prospective purchasers of internet services or products for direct consumption. In respect of section 45 (a), the objective test is whether the advertisement was misleading to ordinary or reasonable members

of the public who were purchasers or prospective purchasers, for direct consumption, of internet services or products and thereby distorted, or was likely to distort, the purchasing decisions of such consumers. Similarly, in respect of section 47 (a) (v), the objective test is whether Airtel's advertisement amounted to false representation about the characteristics of the product or service to ordinary or reasonable members of the public who were purchasers or prospective purchasers, for direct consumption, of internet services or products.

We have also borne in mind that the jurisdiction of the Commission gives it a wider mandate which includes investigating unfair trading practices and unfair contract terms and to impose such sanctions as may be necessary; and to act as a primary advocate for competition and effective consumer protection in Zambia. (Per section 5 of the Act) In any case, we have also noted that section 54 gives power to anyone (who alleges) to lodge a complaint in the prescribed manner and form that, *"a person or an enterprise –*

> *(a) is practicing any unfair trading;*
>
> *(b) has made a false or misleading representation in respect of any goods, services or facilities;*
>
> *(c) …;*
>
> *(d) …;*
>
> *(e) …;*
>
> *(f) has concluded or is enforcing an unfair contract or term of contract to the detriment of that person; or*
>
> *(g) has contravened any other provision of this Act relating to consumer protection or has failed to comply with a requirement under this Act, to the detriment if that person;*
>
> (Italics ours)

We also note that the Complainant complained that Airtel deceived internet users including himself. We have previously, for example, in the case of **Mica Zambia Limited v. Competition and Consumer Protection Commission 2014/CCPT/010/CON,** taken cognizance of the Commission's wide jurisdiction to investigate violations of consumer protection provisions. The primary objective of the Act with respect to consumer protection provisions is consumer protection at large as opposed to providing compensation for consumers for injury or damage specifically suffered.

Therefore, the language of the provisions alleged to have been violated, interpreted in context of the whole Act and in particular Part VII which is specifically concerned with consumer protection, would not permit an interpretation that overlooks unfair trading practices, or false representations in respect of goods or services on the market simply because there is no proof that a complainant or anyone was a victim of an alleged violation and or proof that such a person actually suffered damage or injury as a result.

In the case of **Australian Competition and Consumer Commission v. Coles Supermarkets Australia PTY Limited** [2014] FCA 634, the facts of the case were that the Australian Competition and Consumer Commission ("ACCC") claimed that Coles Supermarkets Australia Pty Limited ("Coles") had engaged in misleading conduct in the manner in which it advertised and sold bread. The particular phrases used by Coles were:

"Baked Today, Sold Today"

"Freshly Baked"

"Baked Fresh"

"Freshly Baked In-Store"

"Coles Bakery".

The legislation Coles was alleged to have contravened were:

"Section 18(1) of the Australian Consumer Law ("ACL"):

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

"Section 29(1)(a) of the ACL:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services, or in connection with the promotion by any means of the supply or use of goods or services: (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;"

"Section 33 of the ACL:

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, the characteristics, the suitability for their purpose, or the quantity of any goods."

(Italics ours)

The Federal Court of Australia had this to say concerning criticism that there was no evidence of a person having been misled (at pages 12 - 13):

"Where conduct or representations is or are directed to members of the public at large, the conduct or representations must be judged by their effect on "ordinary" or "reasonable" members of the class of prospective purchasers: .... In a context such as the present, the purchasing of a staple such as bread in a supermarket, the ordinary or reasonable person may be intelligent or not, may be well educated or not, will not likely spend any time undertaking an intellectualised process of analysis, will often be shopping for many other items, and will be likely affected by an intuitive sense of attraction rather than by any process of analytical or logical choice. The dominant message of advertising for bread is likely to be simple, though intuitively diffuse. What is reasonable care by members of the public ... must be judged in the above context. ....

....

Evidence that someone was actually misled or deceived may be given weight. The presence or absence of such evidence is relevant to an evaluation of all the circumstances relating to the impugned conduct. Where the conduct and representations are to the public generally and concern a body of simple direct advertising, the absence of individuals saying they were misled may not be of great significance. There was no such evidence here. The ACCC was criticised for that. That criticism is unfounded. The objective assessment of advertising using ordinary English words in an attempt to persuade can be undertaken without the lengthening of a trial by the bringing of witnesses of indeterminate numbers. Language, especially advertising, seeking to raise intuitive senses and associations, can have its ambiguities and subtleties. The task of evaluating the objective character and meaning of the language in the minds of reasonable members of the public is not necessarily one that will be assisted in any cost-effective manner by calling members of the public. The question is one for the Court: Taco Company of Australia v Taco Bell Pty Ltd (1982) 42 ALR 177 at 202.

Half-truths may be misleading by the insufficiency of information that permits a reasonably open but erroneous conclusion to be drawn: Fraser v NRMA Holdings Ltd (1994) 124 ALR 548 at 563; Tobacco Institute of Australia Limited v Australian Federation of Consumer Organisations Inc (1992) 38 FCR 1 at 50. In Tobacco Institute, Hill J referred to the valuable observations of Sheldon J and Sheppard J ... in CRW Pty Ltd v Sneddon (1972) AR (NSW) 17 at 28, as well as making pertinent and valuable observations of his own. Hill J said the following at 50:

'However, as was observed by Sheldon and Sheppard JJ in CRW Pty Ltd v Sneddon (1972) AR (NSW) 17 at 28 (the context was the Consumer Protection Act 1969 (NSW): "An advertisement published in a newspaper is not selective as to its readers. The bread is cast on very wide waters. The advertiser must be assumed to know that the readers will include the shrewd and the ingenuous, the educated and the uneducated and the experienced and inexperienced in commercial transactions. He is not entitled to assume that the reader will be able to supply for himself or (often) herself omitted facts .... An advertisement may be misleading even though it fails to deceive more wary readers.' (Italics ours)

In the High Court of Australia case of **Parkdale Custom Built Furniture Pty. Ltd,** earlier cited, the respondent was alleged to have violated section 52 (1) *of the* **Trade Practices Act 1974.** The section read in similar terms to section 45 (a) in contention in the consolidated appeals before this Tribunal, as follows:

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." (Italics ours)

The Court arrived at the verdict that section 52 (1) had been violated. In paragraph 8 of the judgment, Lord Gibbs C.J. had this to say in defining the conduct contemplated by the section:

"8. The words of s. 52 *require the Court to consider the nature of the conduct of the corporation against which proceedings are brought and to decide whether that conduct was, within the meaning of that section, misleading or deceptive or likely to mislead or deceive. .... The words "likely to mislead or deceive", which were inserted by amendment in 1977, add little to the section; at most they make it clear that it is unnecessary to prove that the conduct in question actually deceived or misled anyone. In McWilliam's Wines Pty. Ltd. v. McDonalds System of Australia Pty. Ltd (1980) 49 FLR 455; 33 ALR 394 it was rightly held by Smithers J. and by Fisher J. that to prove a breach of s. 52 it is not enough to establish that the conduct complained of was confusing or caused people to wonder whether two products may have come from the same source... .... I agree too with those learned judges that the court must decide objectively whether the conduct is misleading or deceptive or likely to mislead or deceive, and that evidence that members of the public have actually been misled is not conclusive ...."*(Italics ours and emphasis ours)

We are further satisfied that it has been demonstrated by the text of the Airtel advertisement that Airtel conveyed the idea that the data usage service would still be available to a consumer even after reaching the limit of the data bundle purchased, albeit at the specified slower speeds, for as long this was within the product validity period. We are also satisfied on the basis of the internet communication exchanged between the Complainant and Airtel (at pages 5 and 6 of the Record of Proceedings),

on the other hand, that in actual fact the true characteristic of the product was that upon exhaustion of the data bundle purchased, while the connectivity would not be lost, data usage would terminate.

We have further addressed our minds to Airtel's response that the Complainant should have taken time to inquire from Airtel in order to understand how the product worked. We have also considered the obligation placed on consumers to solicit for information and be assertive, by the Code of Conduct for ICT Service Providers, which counsel for Airtel referred the second witness to in cross-examination (in the ZICTA bundle of documents). We have earlier reproduced these provisions.

Airtel's argument is akin to the issue of context of commercial advertising language and the cynical attitudes of the public towards these advertisements commented on by the Federal Court of Australia in the case of **Coles Supermarkets Australia PTY Limited**, earlier cited. In rejecting defence counsel's arguments on the notion that allowance ought to be made for commercial advertising language and the cynical attitudes of the public towards these advertisements, the Judge said at page 37:

> *"The conclusions that I have reached are such that I am satisfied that there has been a contravention of s 18(1) and s 33 of the ACL. As to s 29(1)(a) of the ACL, there has also been, in my view, a false or misleading representation that goods have a particular history. There has been, in my view, a misleading representation available to be understood that these goods have been baked on the day of sale, or baked in a fresh process, using fresh, not frozen, product. Thus, in my view, there has been a contravention of s 29(1)(a) also.*
>
> *The above analysis is a factual one, evaluative in character, by reference to the available meaning and connotation of general marketing expressions. There was some debate and discussion during the case about what was called the "degradation of language" and about a mistrust or healthy cynicism of advertising by the public. One needs, of course, not to be unrealistic about the world, advertising or consumer behaviour. Advertising should not be parsed and analysed in the fashion of a 19th Century equity draftsperson. Nevertheless, the courts should be astute and careful not to permit consumers to be misled on available meanings or connotations of phrases deliberately chosen to sell products on the basis that everyone takes advertising with a pinch of salt. To place emphasis on advertising licence that bends the truth will not only degrade the language, but lead to a culture of deception in the market. These matters do not elevate this case to a question of principle, but they should be borne in mind when broad laudatory language, intended to affect the buying decisions of members of the public, is such as to lead consumers into error and so to mislead or deceive, and the justification for such involves an intellectual shrug and a knowing nod to the effect that the public is cynical enough to look after itself."* (Italics ours)

In the case of Parkdale, cited above, Lord Gibbs, C.J. in balancing the required test with what is expected of reasonable consumers and other contextual issues, said (paragraph 9):

> *"9. .... It seems clear enough that consideration must be given to the class of consumers likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced, and the gullible as well as the astute, the section must in my opinion be regarded as contemplating the effect of the conduct on reasonable members of the class. The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of persons who fail to take reasonable care of their own interests. What is reasonable will or course depend on all the circumstances. ...."* (Italics ours)

We have taken into account that consumers of ICT products or services are reasonably expected to solicit for information on products or services they intend to purchase and to be assertive of their right to be availed such information. We are, however, of the view that in the circumstances of this case, a consumer would not be faulted for not inquiring further on the description of the product. Even the consumer obligations under the ZICTA Consumer Protection Guidelines do not make it mandatory for consumers to solicit for more information on every product advertised by a service provider. Further information is not necessary in every case. In the case at hand, the problem was not a misunderstanding of the language used by Airtel in the advertisement in question. The problem was that the advertisement contained a false representation which, in our view, was misleading and thereby distorted or was likely to distort purchasing decisions of consumers because what it conveyed as a performance characteristic of the product was contrary to the reality.

As a matter of fact, the description of the product that Airtel had given to ZICTA in its application letter differed from that given in its advertisement. The letter read in paragraph three as follows:

> *".... At the end of the validity period or by upon reaching the usage limit, whichever is earlier, the Advice Of Change (AOC) page will appear notifying the customer that they need either to re-subscribe or to enroll on another plan or go to PAYG plan which is K1,100.00 per Megabyte."* (Italics ours)

On the other hand, Airtel's advertisement read: *"once allotted volume has been exhausted, customers will continue enjoying the service but at slower speeds of 128kbps download and 64 kbps upload"*. According to the letter of application to ZICTA, upon exhaustion of the data bundle, a consumer would be required to re-subscribe or enroll to another plan or go to PAYG plan. As put to the first witness by counsel for Airtel and confirmed

by the witness, what Airtel stated in the letter to ZICTA meant that the service terminated upon exhaustion of the data bundle. But according to the advertisement, upon exhaustion of the data bundle, a consumer would continue enjoying the data usage but at slower speeds, which in actual fact turned out to be untrue.

The duty imposed on consumers to take care of their own interest in the course of purchasing an ICT product or service, or any goods or services for that matter, is not a defence to be put up by ICT service providers engaged in unfair trading practices such as misleading advertisements or making false representations about a product.

The Commission in its decision referred to the case of **Keehn v. Medical Benefits Fund of Australia Ltd (1977) 14 ALR 77,** in which the principle was echoed that conduct is misleading or deceptive if it induces or is capable of inducing error. We have looked at the cited case and agree that this is an established principle in evaluating conduct in cases such as this.

We note that the ICT legislative and regulatory regime in relation to consumer protection emphasises that service providers have an obligation to be transparent and to provide "*clear, accurate and understandable description of available services, tariffs, terms conditions for each service*". This is aimed at, among other things, addressing unfair trading practices such as misleading consumers or false representations to consumers about products, as reflected in the ZICTA Consumer Protection Guidelines which we have previously quoted. In our view, the obligations imposed on service providers call for good faith or fair and open dealing. In this regard, Lord Bingham's finding in the leading case of **Director General of Fair Trading v First National Bank** [2002] 1 AC 482; [2001] UKHL 52 on the question of good faith, which fell to be determined, is instructive. He said:

> "*The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor .... Good faith in this context is not an artificial or technical concept; nor, ... is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.*" (paragraph 17) (Italics ours)

In this context, we have also looked at specific provisions of the Information and Communication Technologies Act, in particular:

1. section 47 which enjoins service providers to ensure that tariffs relating to communications services are transparent;

2. section 68 and the Consumer Protection Guidelines issued thereunder (some of which we have reproduced above) setting out requirements, among others, for the:

   (a) provision of information to consumers regarding services, rates and performance; and

   (b) advertising or representation of services.

Against this legislative and regulatory context, coupled with ZICTA's restraint in its approval letter of 20th April 2012 that Airtel should not use the word "unlimited" in advertising the product in issue, it is inconceivable that Airtel should have described the product in the terms it did and continued to run the same until November 2013 when it made an application to ZICTA to discontinue the product. Even assuming that the approval letter restraining Airtel from using the word "unlimited" had not been received by Airtel, the latter would still be expected to comply with the requirements of the law. Neither ZICTA's approval of the product without restraint nor non-receipt by Airtel of ZICTA's letter would have exonerated Airtel.

In light of the above, we conclude that the only reasonable inference to be drawn from Airtel's conduct is that it sought to lure consumers (being members of the public who were purchasers or prospective purchasers of internet services or products) into purchasing the subject internet product, believing that they would enjoy the data usage service for the whole product validity period, even if the data bundle purchased was exhausted. Specifically, we conclude that Airtel's public advertisement of the product in issue was clearly misleading to consumers and thereby distorted, or was likely to distort, their purchasing decisions, in terms of section 45 (a) of the Act. Airtel also falsely represented, per section 47 (a) (v), that the product had the performance characteristic of a consumer continuing to enjoy the service, albeit at the specified slower speeds, within the validity period despite the volume of bundles purchased having expired. In reality, once the bundle expired within the product validity period, Airtel only maintained connectivity.

In consequence, we conclude that the Commission's Board was on firm ground in arriving at the verdict that Airtel violated section 46 (1) of the Act as read with section 45 (a) and section 47 (a) (v) and we accordingly uphold the verdict.

The second question we need to deal with is:

2. **Whether the Commission's Board erred by not imposing a fine but simply warning Airtel.**

This question responds to Airtel's second ground of appeal and the Complainant's first and fourth grounds of appeal.

The relevant provisions of the Act are as follows:

> *"46. (1) A person or an enterprise shall not practice any unfair trading.*
>
> *(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher.*
>
> *47. A person who, or an enterprise which –*
>
> *(a) falsely represents that –*
>
> *(i) …;*
>
> *(ii) …;*
>
> *(iii) …;*
>
> *(iv) …; or*
>
> *(v) any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or*
>
> *(b) …;*
>
> *is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher."* (Italics ours)

Airtel's contention is simply that the Commission should not have warned it. By implication, and in order to make sense, we understand this ground of appeal in the context of the first ground of appeal in which Airtel has contended that the Commission erred in arriving at the verdict that it violated the Act. In other words, this ground of appeal has fallen away since we have upheld the Commission's verdict.

On the other hand, in the first and fourth grounds of appeal, the Complainant contends that Airtel being a perpetual violator, having the largest customer base in both mobile internet service provision and mobile communication subscribers, should have been fined and not simply warned. The Complainant in his submissions cited

previous appeal cases in which the Commission had fined the culprits for repeated violations (such as in the case of **African Life & CCPC (Re Martin Ilunga**) and the Commission's decisions had been upheld.

The Commission on its part has argued that in the case of **African Life Assurance Limited v. Competition and Consumer Protection Commission (Re Martin Ilunga)**, 2014/CCPT/014/CON at page 4, this Tribunal stated that "the Board of Commissioners did consider the Appellant's history of complaints in arriving at a fine and it was established that there had been four (4) cases *of the same nature involving the same appellant and all bordering on dishonest conduct by the Appellant*".

The Commission has further argued that Airtel was not a repeat offender because in the two cases in respect of which the Commission had previously found it guilty, the provisions were section 46 (1) as read with section 45 (b) and not section 46 (1) as read with section 45 (a) and section 47 (a) (v).

Airtel in its submissions has argued along the same lines as the Commission. It has urged the Tribunal not to disregard the laid down rules and procedural practice to warn first offenders as opposed to imposing fines.

We have on a number of occasions in the past addressed appeals relating to warnings or fines imposed by the Commission. We now find it necessary, in view of the recurrence of such appeals, to address the subject more comprehensively.

The starting point in each case should be the relevant penalty provision in question. We find that all the penalty provisions providing for fines payable to the Commission are couched in the terms or at least including the terms "shall be" or "is" *"liable to pay the Commission a fine not exceeding ten percent of that person's or an enterprise's annual turnover."*

In the present case, section 46 (2), which relates to section 46 (1) and section 45, reads:

> *"(2) A person who, or an enterprise which, contravenes subsection (1) is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher."* (Italics ours)

Furthermore, section 47 states that (quoting only relevant parts):

> *"A person who, or an enterprise which –*
>
> *(a) falsely represents that –*
>
> *(i) …;*

(ii) …;

(iii) …;

(iv) …; *or*

(v) *any goods or services have sponsorship, approval, affiliation, performance characteristics, accessories, uses or benefits that they do not have; or*

(b) …;

is liable to pay the Commission a fine not exceeding ten percent of that person's or enterprise's annual turnover or one hundred and fifty thousand penalty units, whichever is higher." (Italics ours)

Pursuant to section 84 of the Act, the Commission has issued guidelines on fines, called Guidelines for Issuance of Fines and published on 25th June, 2014. Section 84 states that:

"(1) In the exercise of its functions under this Act, the Commission may make such guidelines as are necessary for the better carrying out of the provisions of this Act.

(2) The Commission shall publish the guidelines issued under this Act in a daily newspaper of general circulation in Zambia, and the guidelines shall not take effect until they are so published.

(3) The guidelines issued by the Commission under this Act shall bind all persons regulated under this Act." (Italics ours)

It is cardinal that the Commission's guidelines are merely guidelines aimed at assisting the Commission in carrying out the provisions of the Act. The policy objective of the guidelines set out in the document, are to:

"(a) To impose fines which reflect the seriousness of the violation.

(b) To ensure that fines deter future behavior or others from contravening the Act; particularly Part III, IV, VII and VIII and ensure compliance with the law.

(c) To raise awareness of the law." (Italics ours)

(Page 1)

It is trite that the guidelines cannot be applied in a manner as to supersede or contradict provisions of the Act. The Guidelines themselves restate this position of the law in describing their purpose in the following terms:

"These Guidelines are issued subject to the Competition and Consumer Protection Act … and the Competition and Consumer Protection (General) Regulations … and shall apply

to the extent that they are not inconsistent with both and any other written law." (Italics ours)

The Act prescribes the liability to pay a fine in mandatory terms. In the case of **Spar Zambia Limited v. Danny Kaluba and the CCPC** 2016/CCPT/009/CON, in which the appellant's contention was that the Commission erred its verdict and therefore in issuing a warning, we held that the Act does not give power to the Commission to issue a warning in lieu of a fine. In fact, even in the guidelines there is no provision that purports to give such power to the Commission. Moreover, if such a provision existed, it would have been contradictory to the Act and therefore a nullity.

In the same vein, the "caps" placed on fines by the guidelines on unfair trading practices and some other offence falling under Part VII should not be understood in absolute terms but as a general administrative guide or standard to the Commission indicative of the applicable fines. Fortunately, this qualification is set forth in the guidelines themselves at the outset, as we have already clarified. Furthermore, the Commission's leniency programme can only apply to an enterprise that voluntarily discloses the existence of an agreement that is prohibited under the Act, and co-operates with the Commission in the investigation of the practice, according to section 79 of the Act.

Despite the fact that the guidelines themselves have stated the qualification that they are to be interpreted or understood as being subject and not contrary to the Act or any other written law, we recommend that an amendment should be made to the guidelines in order to make abundantly clear the qualification that the levels of fines are indicative. For example, in the part where it is stated that, "*... the total fine applicable shall be capped for specific offences based on the turnover of enterprises. Table 2 below illustrates how fines for offenses provided for under Part VII of the Act will be determined.*" (Italics ours) This also applies to Table 2 itself (Pages 5 - 7).

The penalty prescriptions given by sections 46 (2) and 47 of the Act provide the overriding cap as either not exceeding ten percent of the person's or enterprise's annual turnover or one hundred and fifty thousand penalty units (currently a penalty unit is thirty Ngwee, therefore, translating to K45,000), whichever is higher.

We understand the Guidelines to mean that the Commission has guided itself that ordinarily it will impose fines not exceeding the amounts stated as the "caps" in respect of Part VII. There may, however, be circumstances when an indicative "cap" may be exceeded as it is only a guide.

In arriving at the position that the Commission has no power to issue a warning in lieu of imposing a fine, and that the capping is statutory, being provided by the Act and not the Commission's guidelines, we have looked at other related laws. Section 43 (1) of the Interpretation and General Provisions Act states that:

> *"Where in any written law a penalty is prescribed for an offence against that written law, such provision shall mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed."*

In the present case, the offences in question are punishable by a penalty; therefore, they shall be punishable by a penalty not exceeding the limit prescribed by the Act.

Similarly, although we are dealing with regulatory offences as opposed to criminal offences, we have drawn guidance from provisions of the Penal Code, Chapter 88. Section 26 (2) on imprisonment states, *"A person liable to imprisonment for life or any other period may be sentenced for any shorter term."* It does not state that a person liable to imprisonment may be given a warning or charged a fine in lieu of imprisonment. Section 28 (a) and (b) which provide that, *"Where a fine is imposed under any written law, then, in the absence of express provisions relating to such fine in such written law, the following provisions shall apply:*

> *(a) Where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive.*
>
> *(b) In the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court.*

In respect of paragraph (b), our understanding is that the choice between a fine and imprisonment is a matter of discretion to be exercised by the court. Furthermore, the law does not provide that if an offender is liable to a fine, a warning may be issued in lieu of a fine. There is no such practice by courts either. Interpreting "liable", which is used in the same terms as in other penal laws of Zambia, including the Penal Code, as giving the Commission the discretion to impose a fine or issue a warning is a misdirection, particularly in light of section 43 (1) of the Interpretation and General Provisions Act earlier cited. Such an interpretation may, if left uncorrected, introduce arbitrariness in the enforcement of the Act and undermine the objectives of the Act and the ends of justice.

Lastly, counsel for the Commission and Airtel have both argued that Airtel was a first offender because in the previous two violations the offences were section 46 (1) as read together with section 45 (b). We reject this argument because the offence of unfair

trading is prescribed by section 46 (1) whereas it is earlier defined as any of the acts falling under section 45 which distorts, or is likely to distort, the purchasing decisions of consumers. Section 45 reads:

> *"A trading practice is unfair if –*
>
> *(a) it misleads consumers;*
>
> *(b) it compromises the standard of honesty and good faith which an enterprise can reasonably be expected to meet; or*
>
> *(c) it places pressure on consumers by use of harassment or coercion;*
>
> *and thereby distorts, or is likely to distort, the purchasing decisions of consumers."* (Italics ours)

In short, the provision of the Act which Airtel was previously found to have violated is unfair trading practices which is the same as in the present case, and in fact in the present case Airtel has been found in violation of section 47 (a) (v) as well. However, by the same principle on the basis of which we have rejected both counsel's argument, we treat the latter violation as part of a continuum of breaches arising from the same facts.

We therefore conclude that Airtel was not a first offender. In light of our earlier conclusion that the Commission is mandatorily obligated by the Act to impose a fine, this means that Airtel should be fined not as a first but a repeat offender having been found in violation of the same provision twice before.

Furthermore, we accept the second witness' evidence, which was not challenged, that in 2012 to 2013, among the telecommunications service providers, Airtel had the largest customer base, in terms of mobile communication, data and internet provision, followed by MTN and ZAMTEL. This is an additional aggravating factor to be considered in determining the fine, as provided by the Commission's guidelines. That is, in addition to the aggravating factor of the violator being a repeat offender as well as the aggravating factor of running the internet product for close to two years.

In consequence, Airtel has not succeeded on both grounds of appeal while the Complainant has succeeded on the two grounds of appeal.

We have considered the aggravating factors, as outlined above. We have also considered the indicative cap of K50,000 contained in the Guidelines for enterprises with a turnover above K1,000,000. It has not escaped our attention that the background to the indicative cap appearing in Table 2 is the consideration that the majority of enterprises found in

violation of provisions on unfair trading practices are MSMEs, and that these categories of businesses should not be strangled by burdensome fines.

Airtel is not in any category of MSMEs.[1] According to business performance reports on Zambia, the company is featured among top highest revenue generating enterprises in Zambia.[2] According to its annual report and audited financial statements (published on Airtel's website and reproduced in the Complainant's "Notice to Produce" filed on 24th November 2015), Airtel's turnover for the financial year ended 31 December 2013 was K1,618,796,000 and its net profit was stated as K320,020,000. Therefore, the indicative cap of K50,000 reflected in Table 2 of the guidelines for enterprises with a turnover of more than K1,000,000 would be so marginal as to amount to nothing for the purpose of punishment and as a deterrent to Airtel and other large enterprises. The objectives of the Act and the Guidelines on Fines would be defeated.

We have also sampled few other Commonwealth jurisdictions.[3] In South Africa, for similar offences, the penalty is a fine not exceeding one tenth of the enterprise's turnover or R1,000,000 (equivalent to K842,239.60), whichever is the higher.[4] South Africa's GDP in 2013 was USD366.6 billion, which was thirteen times more than Zambia's USD28.05 billion.[5] The general penalty under the Kenyan law provides for a maximum fine of One million shillings[6] (equivalent to USD9,880 and to K97,262). The country's GDP in 2013 was USD55.1 billion, which was twice Zambia's[7]. In Australia, the maximum penalty for similar offences is AUD1.1 million for corporations[8] (which is equivalent to USD873,015 and to K8,555,547). Australia's GDP in 2013 was USD1.567 trillion[9], which was fifty-six times more than Zambia's. In the UK, similar offences attracted the statutory maximum fine under the Consumer Protection from Unfair Trading Regulations 2008. Magistrates' jurisdiction (as opposed to higher courts[10]) had a limit on fines of £5,000 (equivalent of

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[1] The 2008 policy document on development of MSMEs gives an indication of categories of MSMEs. A Micro Enterprise's features include an annual turnover of not more than K150,000. A Small Enterprise's annual turnover ranges from K151,000 to K300,000. A Medium Enterprise's annual turnover ranges from K300,000 to K800,000. (Ministry of Commerce, Trade and Industry: The Micro, Small and Medium Enterprise Development Policy, 2008 (Final). See also similarly ZDA's definition of Micro and Small Enterprises in the Registration Form (page 5).

[2] https://zambiabusinesstimes.com/

[3] With the exception of South Africa, the laws of other jurisdictions reviewed tend to lean on criminal penalties rather than administrative penalties. However, there is hardly any distinction from administrative fines in terms of penalties.

[4] Section 112 (2) Consumer Protection Act.

[5] Source: World Bank.

[6] Consumer Protection Act No. 46 of 2012

[7] Source: World Bank

[8] Australian Competition and Consumer Act 2010

[9] Source: World Bank

[10] For instance, in 2013 Tesco, a giant supermarket was fined £300,000 by the Birmingham Crown Court after admitting to misleading customers in 2011 by advertising half-price British strawberries for a longer period than when they were sold at a higher amount, in contravention of the Consumer Protection from Unfair Trading Regulations 2008. (unreported, see http://www.dailymail.co.uk/news/article-2397291/Tesco-fined-300-000-misleading-customers-half-price-strawberries-offer.html)

USD7,000 and of K69,108). But effective March 2015, there is no statutory cap on fines for such offences.[11] In 2013, UK's GDP was USD2.72 trillion which was ninety-seven times more than Zambia's.[12] This sampling yields an indicative cap for Zambia in the region of K90,000 more or less.

Accordingly, we are of the view that in applying the Commission's Guidelines, which includes consideration for business economic factors (such as indicated above), a graduated escalation in the indicative caps covering categories of businesses or enterprises larger than MSMEs, according to turnovers, would be appropriate. Thus, pending the Commission developing comprehensive guidelines addressing the existing gaps, we determine that the following indicative caps shall apply to these categories of persons or enterprises according to their turnovers:

(i) K50,000 for a person or enterprise with annual turnover above K1,000,000 and up to K50,000,000;

(ii) K75,000 for a person or enterprise with annual turnover above K50,000,000 and up to K250,000,000;

(iii) K95,000 for a person or enterprise with annual turnover above K250,000,000 and up to K500,000,000;

(iv) K115,000 for a person or enterprise with annual turnover above K500,000,000 and up to K750,000,000;

(v) K135,000 for a person or enterprise with annual turnover above K750,000,000 and up to K1,000,000,000; and

(vi) K150,000 for a person or enterprise with annual turnover above K1,000,000,000.

There is need to avoid further delays which would result from referring the matter back to the Commission for imposition of the fine. In line with the appellate jurisdiction vested in the Tribunal by section 68 (a) read with section 71 (1) (b) of the Act, we order Airtel to pay the Commission a fine calculated, per the Commission's Guidelines and taking into account the indicative cap we have determined above, as follows:

[11] Legal Aid, Sentencing and Punishment of Offender Act 2012 (Commencement No. 11) Order 2015 (SI 2015-504)
[12] Source: Ibid.

0.5% of the enterprise's turnover for the financial year ended 31 December 2013 with a cap of K150,000 as baseline;

plus 0.5% of the said turnover with a cap of K150,000 in respect of the first repeat offence;

plus 0.5% of the said turnover with a cap of K150,000 in respect of the second repeat offence;

plus 0.5% of the said turnover with a cap of K150,000 in respect of the aggravating circumstances; that is, having the largest customer base in terms of mobile communication, data and internet provision, and having run the subject product for close to two years;

We further order Airtel to submit to the Commission its latest report and audited financial statements as at 20th June 2014 (that is for the financial year ended 31st December 2013). We further order that the Commission shall within thirty days from the date of this judgment give a report on the execution of our order in respect of submission of the report and audited financial statements as well as payment of the fine.

We order costs for the Complainant, to include costs of the proceedings on the preliminary issue raised by Airtel and in respect of which we rendered our ruling on 14th July 2015. Costs to be borne by the Commission and Airtel in proportions of one-third and two-thirds, respectively. The costs to be agreed and in default to be assessed by the Tribunal.

A person aggrieved with this judgment may appeal to the High Court within 30 days.

Delivered at Lusaka this 28th day of February 2018

REPUBLIC OF ZAMBIA
MINISTRY OF COMMERCE
TRADE AND INDUSTRY
2 8 FEB 2018
COMPETITION AND CONSUMER
PROTECTION TRIBUNAL
P.O. BOX 31968, LUSAKA.

Willie A. Mubanga, SC
Chairperson

Miyoba B. Muzumbwe-Katongo
Vice Chairperson

Chance Kabaghe
Member

Rocky Sombe
Member

Eness C. Chiyenge
Member