

Consultation Document Calling for Comments on the Legal Review Report

On behalf of
Government of Malawi
Malawi Communications Regulatory Authority (MACRA)



**Consultancy Services to Develop Draft Regulations
for Electronic Transactions and Cyber Security Act
for the Government of Malawi**

Publication date: 5 April 2021

Closing date for comments: 19 April 2021

Table of Contents

Invitation to Comment.....	3
Abbreviations.....	4
1. Background.....	5
2. Summary of Legal Review Report.....	6
3. Key Issues and Questions Posed.....	7
3.1 Constitution, Policy and Strategy.....	7
3.2 ETCA.....	7
3.3 Institutional Set-up.....	8
3.4 Lessons from International Practices.....	9
3.5 Identification of Regulations to be Drafted.....	10
Appendix A: Submission Form (with Consultation Questions).....	12

Invitation to Comment

This Consultation Document accompanies the Legal Review Report submitted to the Government of Malawi, the Malawi Communications Regulatory Authority (MACRA) on the 31st day of March 2021. It highlights key issues in the Legal Review Report on which feedback and input from stakeholders is sought. The input received will inform the drafting of regulations for the implementation of the Electronic Transactions and Cyber Security Act (ETCA).

The documents referred to can be found online here:

- i. Electronic Transactions and Cyber Security Act:

<https://www.macra.org.mw/?wpmpro=electronic-transaction-and-cyber-security-act-2016>

- ii. Legal Review Report:

<https://www.macra.org.mw/?wpmpro=consultancy-services-to-develop-draft-regulations-for-electronic-transactions-and-cyber-security-act>

The Consulting Team invites stakeholders to provide any and all relevant comments on the Legal Review Report, including the identification of any additional relevant information and documentation. Certain questions are posed herein, which may guide your comments. However, the Consulting Team encourages any comments, whether in direct response to the questions posed. For your convenience in preparing a written response, a list of the questions is provided in Appendix A:

All written submissions should identify the person(s) making the comments and, if any, the organisation(s) on whose behalf the comments are made and provide contact details for the person(s) and organisation(s), including e-Mail address(es) and telephone number(s). Written submissions should be sent by email to consult.etc@kcl.co.ug by the close of business on the 19th day of April 2021. All submissions will be acknowledged.

Abbreviations

Term	Description
CA	Certification Authorities
CERT	Computer Emergency Response Team
Consulting Team	KCL and LTC
eIDAS Regulation	Regulation (EU) No 910/2014 on electronic identification and trust services
ETCA	Electronic Transactions and Cyber Security Act
ICT	Information and Communications Technologies
KCL	Knowledge Consulting Ltd
LTC	Lisa Thornton Consulting
MACRA	Malawi Communications Regulatory Authority
MDAs	Ministries, Departments and Agencies of the Government of Malawi
MGDS	Malawi Growth and Development Strategy
PPPC	Public Private Partnership Commission
UNCITRAL	United Nations Commission on International Trade Law

1. Background

Information and Communications Technologies (ICT) are globally recognised as essential tools for promoting competitiveness, job creation, sustainable development, and overall poverty reduction. ICTs have the potential to transform business and government, driving entrepreneurship, innovation and economic growth and breaking down barriers of distance and cost in the delivery of services.

The ETCA, which was enacted in 2016, introduces the legal framework for electronic transactions in Malawi. It is aimed at alleviating uncertainties and challenges associated with e-Commerce, thereby facilitating the use of ICT. The Act provides for legal recognition and validity of electronic messages and further provides a legal framework for digital signatures, encryption services, online service provider liability, cyber security, and introduces statutory cybercrimes, among other things.

For this legislation to be implemented, the development of regulations required by it needs to be put in place. The drafting of such regulations for the ETCA will follow the process of a literature review, which is recorded in the Legal Review Report, as well as consultations and iterative drafting processes.

This consultation is one of two formal consultation processes that will take place prior to the completion of the drafting of regulations. Submissions made in this consultation process will inform the final identification of regulations to be drafted and the drafting of such regulations. This consultation process will be followed by the first draft of regulations submitted to the Project Team and thereafter, a validation consultation with key stakeholders, all of which will inform the final draft regulations.

2. Summary of Legal Review Report

The Legal Review Report identifies the regulations that are necessary and appropriate for the implementation of the ETCA. The identification of the regulations to be drafted followed a process of literature review, namely of the Malawi Constitution and relevant policy and strategy documents and a detailed review of the provisions of the ETCA. Also informing the identification of the regulations to be drafted was a gap analysis of Malawian institutional frameworks, existing and anticipated, and a review of the regulation of electronic transactions and cyber security in selected jurisdictions.

Regulations regarding the following matters are identified as required or appropriate for the effective implementation of the ETCA:

- i. Digital signatures, Certification Authorities (CA) and encryption services
- ii. Interception
- iii. Procedures for Malawi Computer Emergency Response Team (CERT) / Protection of Critical Information Infrastructure
- iv. Appointment of cyber inspectors
- v. Online service provider liability (retention of data regulations)
- vi. Appointment of the Registrar to administer the .mw domain name space.

3. Key Issues and Questions Posed

This section is organised in line with the organisation of the Legal Review Report. It includes a short summary of the key issues and poses questions for comment.

3.1 Constitution, Policy and Strategy

These documents were identified as having bearing on the development of regulations. Key issues from the documents were distilled in the Legal Review Report:

- i. Constitution
- ii. The Malawi Growth and Development Strategy (MGDS) III (2017 – 2022)
- iii. National ICT Policy
- iv. National ICT Master Plan 2014 – 2031
- v. National Cybersecurity Strategy
- vi. Malawi Digital Government Strategy
- vii. Data Protection Bill, 2021.

Questions:

1. Are you aware of other policy or strategy documents that the Consulting Team should review, that may inform the drafting of regulations in terms of the ETCA?
2. Are there other key points to be noted in the policy and strategy documents that are relevant to the drafting of regulations in terms of the ETCA?

3.2 ETCA

The ETCA was reviewed in the Legal Review Report in these areas:

- i. Legal recognition of electronic transactions

- ii. Online service provider liability limitations and data.
- iii. Protections for consumers in e-Commerce transactions.
- iv. Digital signatures, certification authorities (CA) and encryption services.
- v. Personal data protection.
- vi. Domain name management.
- vii. E-Government.
- viii. Cyber offences, and
- ix. Protection of critical information infrastructure.

The Regulatory Project Plan for the Implementation of the Communications Act, 2016 and Electronic Transactions and Cyber Security Act, 2016 was also reviewed.

Questions:

3. Are there aspects of the provisions reviewed that need further exploration to inform the list of regulations to be drafted?
4. Are there other provisions of the ETCA to be reviewed that are relevant to the drafting of regulations in terms of the ETCA?

3.3 Institutional Set-up

The existing institutional set-up as well as that anticipated by the ICT Policy and the ETCA were reviewed. The existing institutional set-up includes the Ministry of Information, MACRA and collaboration with the Malawi Police Service, the Minister of Finance and the Governor of the Reserve Bank.

The ICT Policy anticipates restructuring of the Department of e-Government within the Ministry of Information, into the Malawi Information Technology Agency. It also calls for the establishment of a National ICT Steering Committee, District ICT Committees and Community ICT Committees.

The ETCA anticipates the establishment of the Computer Emergency Response Team (CERT) as a unit within the Malawi Communications Regulatory Authority (MACRA). It also provides for the appointment of cyber inspectors. The ETCA also calls for MACRA to appoint the

Registrar to administer the .mw domain name space.

Questions:

5. Do you have comments on the institutional set-up anticipated by the ICT Policy?
6. Do you have comments on the institutional set-up anticipated by the ETCA?
7. Do you have comments on the recommendations in the Legal Review Report related to collaborative regulation?
8. Do you have comments on the identification of key stakeholders set out in the Appendix to the Legal Review Report?
9. Are there other key stakeholders that may need to be consulted?

3.4 Lessons from International Practices

In addition to review of the Budapest Convention on Cybercrime of the Council of Europe, the United Nations Commission on International Trade Law (UNCITRAL) Model Laws on Electronic Commerce and on Electronic Signatures, and the African Union Convention on Cybersecurity and Personal Data Protection, the following country experiences were reviewed:

- i. European countries' experiences in the implementation of the eIDAS Regulation
- ii. Experiences of Australia, Canada and South Korea
- iii. Experiences in the South (Latin America and Asia)
- iv. Selected African experiences (Ghana, South Africa and Uganda)

Lessons from international practices include the following:

- a) Regulations should be technology neutral.
- b) Regulations should empower the regulator to enable effective implementation of the ETCA, including provisions governing the CERT and the appointment of cyber inspectors.
- c) Regulations should provide provisions on issues related to databases with critical data with clear roles for owners or operators and the regulator.

- d) Regulations should look to Singapore and Korea for guidance on cybersecurity measures.
- e) Regulations should be specific where they require compliance by MDAs.
- f) Regulations should recognize the international nature of electronic transactions and cyber security and facilitate collaboration by Malawi with international bodies.

Questions:

- 10. Do you have comments on, or additions to, the documents and/or experiences reviewed?
- 11. Do you have any comment on the lessons to be learned from international practices?

3.5 Identification of Regulations to be Drafted

The Consulting Team divided the regulations that may need to be drafted in terms of the ETCA into the following categories:

- i. Regulations that must be made in terms of specific provisions in the ETCA
 - Digital signatures, Certification Authorities (CA) and encryption services
 - Interception.
- ii. Regulations that may be made in terms of the ETCA and are important to the effective implementation of the ETCA
 - Procedures for Malawi Computer Emergency Response Team (CERT) / Protection of Critical Information Infrastructure
 - Appointment of cyber inspectors
 - Online service provider liability (retention of data regulations)
 - Appointment of the Registrar to administer the .mw domain name space.
- iii. Regulations that may be made in terms of the ETCA, but where the matter is the subject of separate proceedings (e-Government and personal data protection) or where there is no guiding policy or legislative framework (online banking)

- e-Government
- Personal data protection
- Online banking.

Table 1 below provides a summary of the regulations to be drafted along with the provisions of the ETCA that govern the areas (if any) and the provisions specifically mentioning regulations (if any).

Table 1: Regulations to be Drafted

Regulations	Governing Provisions of the ETA	Provisions calling for Regulations
Digital signatures, Certification Authorities (CA) and encryption services	Sections 8-14; Part VI (sections 46-70)	Sections 51(2); 52(3); 53(3); 67(2)
Interception	Section 84	Section 84(2)
Procedures for Malawi Computer Emergency Response Team (CERT) / Protection of Critical Information Infrastructure	Section 6	Section 102(k)-(p)
Appointment of cyber inspectors	Section 69	none
Online service liability (retention of data regulations)	Part IV (sections 24-32)	Section 29(3) [MACRA]
Domain Name Management and appointment of the Registrar to administer the .mw domain name space	Part VIII (section 75-79)	Section 102(a-f)

Questions:

12. Do you have comments on the identification of the types of regulations to be drafted?
13. Are any of the regulations identified as appropriate (under item ii above) not necessary?
14. Are there other regulations that may need to be drafted in this process?

Appendix A: Submission Form (with Consultation Questions)

Name: _____

Name of organisation(s) represented, if any: _____

e-Mail address: _____

Telephone number: _____

The following is the full list of consultation questions.

1. Are you aware of other policy or strategy documents that the Consulting Team should review, that may inform the drafting of regulations in terms of the ETCA?
2. Are there other key points to be noted in the policy and strategy documents that are relevant to the drafting of regulations in terms of the ETCA?
3. Are there aspects of the provisions reviewed that need further exploration to inform the list of regulations to be drafted?
4. Are there other provisions of the ETCA to be reviewed that are relevant to the drafting of regulations in terms of the ETCA?
5. Do you have comments on the institutional set-up anticipated by the ICT Policy?
6. Do you have comments on the institutional set-up anticipated by the ETCA?
7. Do you have comments on the recommendations in the Legal Review Report related to collaborative regulation?
8. Do you have comments on the identification of key stakeholders set out in the Appendix to the Legal Review Report?
9. Are there other key stakeholders that may need to be consulted?
10. Do you have comments on, or additions to, the documents and/or experiences reviewed?
11. Do you have any comment on the lessons to be learned from international practices?

12. Do you have comments on the identification of the types of regulations to be drafted?
13. Are any of the regulations identified as appropriate (under item ii above) not necessary?
14. Are there other regulations that may need to be drafted in this process?

Name: _____

Signature: _____

kcl.co.ug
thornton.co.za

© 2021

All rights reserved.