



Guidelines for Determining Dominant Market Position in the Communications Service Sector in Malawi

Adopted by the Malawi Communications Regulatory Authority in December 2021

The Authority issues this document as a source of information and guide to licensees and the general public. For this reason it should not be relied on as legal advice or regarded as substitute for legal advice in individual cases. The information contained in this document may be subjected to changes from time to time.

ACRONYMS

CFTC	Competition and Fair Trading Commission
HHI	Hirschmann Herfindahl Index
HNP	Hypothetical Monopolist Test
SCP	Structure-Conduct-Performance
SSNIP	Significant and Non-transitory Increase in Price
MACRA	Malawi Communications Regulatory Authority

1.0 INTRODUCTION

1.1 Background

The Malawi Communications Regulatory Authority (hereinafter referred to as “the Authority”) was established under the Communications Act No. 34 of 2016 (hereinafter referred to as “the Act”) to regulate and monitor the provision of communications services and ensure that, as far as it is practicable reliable and affordable communications services are provided throughout Malawi. The Authority, is further, mandated to promote efficiency and competition among entities engaged in provision of communications services or suppliers of communications equipment by promoting, developing and enforcing fair competition and equality of treatment among operators in any business or service relating to the communications services sector.

To discharge the above duties, Section 57 of the Act mandates the Authority to conduct annual market analyses to identify all retail and wholesale markets requiring ex-ante regulation and to determine licensees deemed to hold dominant market position for each identified relevant communications services market. The market analyses will identify conduct and conditions that can lead to market failures and impede opportunities for fair competition in the communications services sector. The legislative mandate to evaluate and address market failures in the communications sector stems from the Malawi Government’s policy of creating a competitive environment in the communications services sector through the Authority and the entire economy through the Competition and Fair Trading Commission under the Competition and Fair Trading Act.

1.2 Purpose and application of the Guidelines

The purpose of these Guidelines is to give practical advice and guidance on the application of the relevant procedures for conducting market analyses and determining dominant market position in the communications services sector. The Act, among other things, gives mandate to the Authority to undertake ex-ante regulatory interventions in relation to dominant market position. Where ex-post interventions are required, the Act requires the Authority to work in conjunction with the Competition and Fair Trading

Commission. Therefore, these Guidelines also provide guidance on how the two agencies will work together in regulating dominant position in the communication industry.

These Guidelines are not a substitute to the Act and only serve to reflect the Authority's approach in conducting market analyses. The Guidelines may be revised from time to time in the light of new legislation, legal precedent, evolving insights and best practices.

2.0 GUIDING PRINCIPLES

In applying Section 57 of the Act and any relevant regulations, the Authority will be guided by the following principles:

2.1 Market Forces

Market forces are more effective than regulation in promoting consumer welfare. Competitive markets are most likely to provide consumers with a wide choice of services at just and reasonable prices. Therefore, to the extent that markets or market segments are competitive, the Authority will primarily rely on negotiated private terms and voluntary compliance, subject to minimum requirements designed to protect consumers and prevent anti-competitive conduct.

2.2 Effective and Fair Competition

Recognizing the effectiveness of market forces in promoting consumer welfare, the Authority will endeavor to take resolute measures to promote and maintain effective and fair competition. Such measures will seek to:

- a) Remove or minimize any artificial form of impediment to market entry and exit;
- b) Curtail any concentration of market power that has the effect of unreasonably restricting competition;
- c) Eliminate anti-competitive behavior among operators in the communications service sector;

- d) Ensure that operators in the communications service sector have easy access to information on market conditions; and
- e) Ensure that there is reasonable access to networks to prevent impediments to effective competition and market growth.

2.3 Encourage Infrastructure Sharing

The Authority will, as much as possible, encourage infrastructure sharing among the competing licensees subject to technical feasibility. The focus of the licensee should not be investing in infrastructure that constitutes duplication of infrastructure already deployed by other competing licensees. The intention of the Authority is to promote full utilization of existing infrastructure.

2.4 Collaboration with the relevant stakeholders

The Authority will foster collaboration with agencies and sectoral regulators whose mandate contribute to promoting competition in the communications service sector. This principle is provided for in the Act. Collaboration with relevant stakeholders will ensure complementarity between the efforts of the said stakeholders and those of the Authority and will avert duplication of efforts and conflict.

2.5 Proactive Regulatory Intervention

The Authority believes that it is not prudent to wait until a licensee's conduct has caused actual competitive injury in order to intervene. Therefore, the Authority can take action if it determines that a licensee has engaged in conduct that is likely to substantially lessen competition in the communications service sector.

3.0 DEFINING A RELEVANT MARKET

The general approach to reviewing the nature and level of competition in the communications services markets is two-fold. The first step, defines the boundaries of the relevant markets in which competition will be assessed. This is because competition takes place within economic markets and cannot be properly appreciated with a vague review of the overall sector. Defining a relevant market becomes an important prequel towards appreciating the degree to which a firm or firms have market power. In the absence of this definition and establishing the relevant boundaries, it becomes rather difficult to calculate relevant market shares. Once relevant markets are defined, the second step involves the assessment of competition within those markets in order to determine market dominance.

In defining a relevant market, there are two aspects namely:

- a) the products or services that are sold in the market (products or services market); and
- b) the geographical area within which the products or services are sold (the geographical market).

3.1 Products or Services Market

To define products or services markets, the Authority will consider primarily the demand-side substitutability (consumer focused alternatives). Examination of supply-side substitutability will only be considered in an event that demand-side substitutability does not result in clear definition of a relevant market.

a) Demand-side substitutability: occurs when consumers choose or are able to switch products or services based on the products' or services' characteristics, price and/or intended use. The extent to which consumers are able to choose different products or services to achieve the same end outcome determines the scale and scope of the market to be determined. If consumers are able to switch to other products or services, under demand-side analysis, the scope of the market will have to be expanded to include those other products or services.

This exercise of defining a market involves identifying a particular product or service supplied by one or more suppliers and evaluating whether the same or similar consumer-desired outcome may be achieved through the consumption of other products or services, if available. This exercise implies that the original hypothesis is that the desired consumer outcome may only be achieved from the consumption of a particular product or service.

If it may be shown that the similar desired outcome may be achieved through the consumption of additional products or services, then the definition of the market has to be expanded to include these additional products or services. The Authority may apply the Hypothetical Monopolist (HMT), or the Small but Significant and Non-transitory Increase in Price (SSNIP) test, as well as other alternatives.

The test involves an analysis of whether consumers of a particular product or service would be likely to switch to readily available substitutes in the short term and at a negligible cost in response to a hypothetical SSNIP in the range of 5 to 10% that is applied to the products or services under consideration.

b) Supply-side substitutability: occurs when a change in the market for example an increase in the sales prices of a product leads to an increase in the number of licensees who provide the same product to the consumer. An increase in the supply of products provided by different licensees in the market aiming to satisfy the same outcome as per demand-side substitutability, reduces the market power of supplying firms. The objective of evaluating supply-side substitutability is to establish whether a change in the price of a product would entice a greater number of suppliers to enter the market in question, thereby enhancing consumer choice and reducing market power of a firm.

The Authority will assess supply-side substitutability based on the overall costs to a provider of switching production to the product or service in question and any legal, statutory, or other regulatory requirements which could defeat a time-

efficient entry into the relevant market, for example, delays and obstacles in concluding agreements for collocation, interconnection, access, or rights of way.

The Authority will not take into account supply-side substitutability in the definition of a relevant market where such substitution would entail significant changes to existing tangible and intangible assets, additional investments, strategic decisions, or time delays.

The reaction of marginal customers to a shift in prices will be an important element of market definition. The Authority will generally define relevant markets at the wholesale level with reference to retail markets, as they usually establish the parameters of the corresponding wholesale markets.

3.2 Geographical Market

The geographic market denotes the location of licensees in the market and encompass the region from which sales are made. This often will be appropriate when consumers receive products or services at the licensee's location. Alternatively, the geographic market can be defined based upon the location of consumers in the market or the region into which sales are made. This will typically be appropriate when the hypothetical monopolist can discriminate based on customer location.

In determining the geographic dimension of the relevant market, the Authority will apply the same principles that are relevant to determine the relevant market's product dimension. The question is whether consumers would substitute the relevant product of suppliers in other geographic areas in sufficient volume to constrain the exercise of market power by a hypothetical monopolist.

The Authority will define the geographic dimension of relevant markets, taking into account any of the following conditions:

- a) The extent and coverage of the network and the customers that can economically be reached and whose demands may be met;

- b) Any legal or regulatory barriers limiting competitors and their right to provide a service or services in a defined area;
- c) The geographic distribution of, and evaluation over time of market shares;
- d) The pricing of services across the area under consideration;
- e) The pricing of services by different operators as well as its evolution over time in the relevant market;
- f) Additional supply and demand characteristics which may indicate the existence of different competitive pressures; and
- g) Any other factors which are, in the opinion of the Authority deemed relevant from time to time.

4.0 COMPETITION ASSESSMENT

4.1 Identifying a Licensee with Dominant Position

Having a dominant position in a relevant market is not a breach of the law *per se*. However, licensees with dominant position have a responsibility to ensure that they are not abusing or exploiting any market power this dominant position confers upon them. Therefore, the Authority seeks to eliminate any incentives for licensees to use their dominant position to prevent, distort or restrict competition in a relevant market.

In accordance with section 57 of the Act, the following factors will be considered in evaluating whether or not a licensee has dominant position:

4.1.1 Market Shares

Market shares provide an indication of the extent of market power a licensee may have in a particular market, which is one indicator that a licensee is a dominant market player but a dominant position generally derives from a combination of several factors including market share which, taken separately, are not necessarily determinative.

The Authority will determine the market share of the licensee in a market by reference to a number of factors including revenues, number of subscribers, or traffic or volumes of sales. In assessing the relative market shares of the licensee, the Authority will define a licensee as having a large market share in accordance with the following criteria:

- a) a licensee has market share of at least 30% of that market. An enterprise in a particular market may have 30% market share but not necessarily the market power to influence the market in any way. A dominant position therefore requires that an enterprise has 30% market share and is able to operate in that market, and to adjust prices or output, without effective constraint from competitors or potential competitors.
- b) a licensee has a market share of less than 30% but has market power. The presumption of dominant market position will be rebutted if the licensee can prove that it does not have market power in that relevant market.

c) Licensees will be considered to be jointly dominant in a calendar year concerned if;

- three or fewer licensees hold at least 60% share of the relevant market;
or
- five or fewer licensees hold at least 70% share of the relevant market.

Whilst an important indicator in pointing towards market power and concentration, market shares will be assessed in tandem with market conditions. This is done by understanding the evolution of market shares, the volatility associated with market share and the performance of new entrants in identified markets.

4.1.2 Control of Essential Facilities

Certain facilities required to facilitate the development of interoperable and interconnected networks require substantial investment to the extent that only a small number of licensees may be able to accomplish such investment. Whilst such investment is crucial for competition and market growth, it may be possible for the investing firm to foreclose firms from entering any market reliant on the existence of a specific facility. A forward-looking assessment of a market will therefore consider the value or importance of specific facilities in the provision of an end-user service and the extent to which ownership of such a facility impacts on the market power of a particular licensee.

4.1.3 Vertical Integration

Vertical integration exists where one licensee providing products/services in one market is also present in a market at a higher or lower level of the value chain. Vertical integration, as for access to capital markets and economies of scale and scope, may represent the most efficient outcome for the provision of services. However, vertical integration may also promote dominance by restricting market entry where a licensee has control of upstream and/or downstream markets and the potential to leverage

market power, thereby hampering the development of competition and most especially foreclosing retail markets.

4.1.4 Actual and potential existence of competitors

The existence of competitors or potential competitors may act as a restraint for a licensee with dominant position to exercise market power. The Authority will assess the existence of competitors or potential competitors in a relevant market to determine whether a licensee with dominant position can exercise its market power in a manner that prevents fair competition. In terms of actual and potential existence of competitors, the assessment will take due regard of all possible barriers to entry as well as the likelihood that entry will have an impact on the market powers of existing licensees. To this extent, new entrants to a market represent a form of supply-side substitution.

The assessment of barriers to entry will cover the following:

- Structural barriers such as:
 - Large sunk costs of network construction, which increase barriers to entry and exit and give significant competitive advantages to 'first movers'
 - Significant economies of scale and scope, which put newer 'smaller' entrants at a competitive disadvantage to the larger incumbent(s) or first-movers who have a lower per-unit cost base. The presence of very high fixed costs can result in one firm having control over core infrastructure critical in the provision of access. Economies of scale and scope arise when increasing production causes average costs to fall and where average costs for one product are lower as a result of it being produced jointly with another product by the same firm respectively. Both economies of scale and scope may arise naturally out of technological or product innovation and therefore not pose any concern regarding the effectiveness of competition within a market. However, substantial economies of scale and scope may act as a barrier to entry to specific markets and therefore increase the market power of a particular licensee. Economies of scale and scope are a concern when the minimum efficient scale of entry is large when compared to the

total market as well as there being substantial losses if exit were to be considered.

- Demand-side network effects that reflect the desire by customers to be able to communicate to and receive communication from anyone.
- Legal and Regulatory barriers are those barriers to entry in place in terms of the Act and any other primary legislation.

4.1.5 The level, trends in concentration and history of collusion in the market

Concentration ratios indicate the degree to which specific firms within a market may have significant market power. The most common measurement is the Hirschmann Herfindahl Index (HHI). This method calculates the sum of the squares of actual competitors' market shares. The summation represents a concentration level for the relevant market. Although the HHI index is commonly used, other methods may be applied from time to time. This will provide an indication that the licensee with a dominant position may abuse its power.

The history of collusion will be assessed by evaluating conduct or behavior of competitors as well as making reference to any complaints lodged with or and initiated by the Competition and Fair Trading Commission.

4.1.6 Technological advantages or superiority

Technological advantages may “exist” as a result of one licensee using more efficient business processes. However, it is also possible for a licensee to leverage a specific technological advantage to enter into adjacent markets. Examples of such behaviour include bundling or tying practices as well as linked sales. Such practices may be deemed as harmful to competition.

4.1.7 The degree of countervailing bargaining power

The existence of customers with a strong negotiating position may act as a restraint for a licensee with dominant position to exercise its market power. When purchasers of a service are big and powerful, they can effectively halt an attempt by a licensee to

increase prices. The Authority will consider the following factors in evaluating the degree of countervailing bargaining power:

- The proportion of a licensee's total product purchased by a specific customer.
- The portion of the costs for a service in relation to total customer expenditure.
- the customer's sensitivity to the price and quality of products or services
- The availability of sufficient information for customers to make informed decisions as well as face insignificant switching costs.
- Alternative choices available to customers for the same product category.

4.1.8 Easy or privileged access to capital markets and financial resources

Network and facilities deployment and upgrades require substantial capital which has a rate of return of medium to long term. It is likely that only a few licensees will be able to access or have preferential access to this requisite capital. As such, access to capital markets and financial resources is naturally constrained by the costs of network and facilities. Therefore, the concern is to whether a market may be ineffectively competitive due to access to capital markets and financial resources. The Authority will evaluate whether all licensees participating in that market have equal potential access to capital and financial resources.

4.1.9 Dynamic characteristics of the market

High levels of growth, innovation and product/service differentiation cumulatively indicate a market that is dynamically competitive as different licensees enter/exit offering different services at different prices within the same market. A market that exhibits little or no change in the type of services available, limited growth and the lack of consumers being able to purchase differentiated components of a service (i.e.

bundling or product tying is prevalent) may serve as indications that competition is ineffective.

4.2 Reclassifying a Licensee with Dominant Position

The Authority will reclassify a licensee with dominant position as no longer holding that dominant position if the Authority concludes, based on market analysis, or any market review initiated by the Authority where such market analysis or review shows that the licensee no longer satisfies the conditions for dominant position specified in these Guidelines. Similarly, the Authority will reclassify a non-dominant licensee as holding dominant position if the Authority concludes, based on market analysis or any market review initiated by the Authority where such market analysis or review shows that the licensee that the Licensee satisfies the conditions for dominant position specified in these Guidelines.

The Authority may initiate a market review to reclassify a licensee based on a request from the licensee or any other interested party. A party seeking to have a licensee reclassified must provide information demonstrating whether or not the licensee meets the conditions specified in these Guidelines.

5.0 TREATMENT OF LICENSEES WITH DOMINANT POSITION

A licensee classified as having dominant position must not use its position in the communications services sector in a manner that prevents, restricts and distorts competition in any communications services sector. A range of possible pro-competitive terms and conditions will be imposed on the licensee with dominant position intended to correct the specific identified market failure. The Authority will only impose the obligations as recommended by the market analysis or review.

The Act provides a number of possible pro-competitive conditions, outlined in Section 57.

a) Transparency and non-discrimination

A transparency obligation may be imposed on a licensee found to have dominant position as per section 57 (a) (b) (d) and (e) of the Act. A transparency obligation does not necessarily have any impact on the conduct of a licensee in a market but it assists in identifying conduct which will reduce the effectiveness of competition as well as ensure that parties wishing to purchase services from the deemed licensee are sufficiently informed of its internal practices. A transparency obligation therefore represents an effort to enhance countervailing bargaining power within a market. However, increased publicly available information on its own may not have any impact on the structure of the market. Therefore, the principle of non-discrimination is often included in a transparency obligation.

One objective of a non-discrimination obligation is to ensure that a licensee that self-supplies specific inputs to its own operations does so at fair and reasonable prices. In other words, if a licensee self-supplies an input at a different price to the price of the same input as sold to competitors, such a differential must be justified.

b) Account Separation

An obligation for functional accounting separation and the submission of regulated financial records to the Authority aims to further ensure that internal transfer pricing between business units is transparent, with the objective of ensuring that cross-

subsidization does not occur. The requirement for the submission of such information may also form part of a price control remedy. The format and accounting methodology is to be stipulated by the Authority.

c) Tariff Reframing

Tariff reframing may be necessary whereby the Authority determines a tariff and impose it on a dominant licensee of wholesale and retail communications service which may include price caps and price controls. This would be determined on a case-by case basis, including the relevant costing methodology to be applied. Inherent in costing of the provision of a service, any tariff reframing intervention will have to consider the impact of product bundling, predatory pricing and any other behaviour which may harm competition.

d) Controls on the type of services to be provided

In certain cases, a licensee with dominant position may be the only licensee with the ability to ensure certain social objectives are achieved. Sometimes, the scope of services provided by a licensee with dominant position may negatively affect the ability of other licensees to compete. This means that the Authority may impose the requirement to provide particular services, or conversely, to limit the provision of specific services. Examples may include an obligation to provide access points in under-serviced areas.

e) Other remedies

The Authority may impose any other obligations aimed at mitigating any identified market failure.

6.0 FORMS OF ABUSE OF DOMINANT POSITION

The following section provides examples of conducts that would constitute an abuse of dominant position:

(a) Excessive Pricing

Excessive pricing is an abuse where a dominant licensee sets prices that take advantage of its strong position in the market (and the correspondingly weak position of customers and end users) to ensure supra-normal profits. The Authority can examine the licensee's accounts to determine whether over a significant period of time it has earned supra-normal profits from the provision of services in the markets in which it has market power.

The Authority can also examine the profits earned by other providers in similar markets subject to effective competition whether in Malawi or in comparable benchmarked countries, or use cost studies/data provided by the licensee concerned and the cost outputs of The Authority cost models to determine if the pricing is excessive when compared against long run costs for the services in question. The Authority would be guided by historic and current price levels to establish a pattern on if prices have been consistently higher than what would necessarily obtain in a competitive market.

(b) Predatory pricing

In general terms a company is said to be pricing in a predatory way when it prices at levels that are unreasonably low, whether because there are below some measure of costs or because they otherwise generate an inadequate rate of return below the weighted average cost of capital (WACC), and where they have the purpose or effect of eliminating, disciplining or otherwise inhibiting the competitive conduct of an existing or potential rival.

Tariffs must be in place for a sufficient period to cause competitive damage and it is therefore unlikely that promotional offers that operate for 1 calendar month or less on a non-extendable basis (up to the maximum 3-month period recommended) will have the intention or effect required to be predatory. The long term effect of predatory pricing is

an eventual increase in prices beyond the competitive level due to the initial competitive damage caused by the predatory firm.

Where a dominant licensee in a relevant market or a related market seeks to set a Tariff below the cost dictated by the relevant cost standard, it is presumed to be acting abusively and with the intention to abuse its dominance and will therefore be acting unlawfully. Where a dominant licensee in a relevant market or a related market seeks to set a tariff between the cost dictated by the relevant cost standard to be specified by the Authority in its assessment and its average total cost (which could be its fully allocated costs for the relevant service) and this is or appears to be done as part of a strategy to severely damage or eliminate a competitor the behaviour of the provider will be held to be predatory and therefore unlawful.

The burden of proof in relation to these cases is on the Authority. The Authority should take into account initial tariffs of telecommunications services where the service volumes are small and unit costs are high pending effective traction in the market and greater penetration of the service in question. The Authority will also consider certain issues of predatory pricing for new entrants especially on an individual case basis. This will in some instances allow induced demand to attain economies of scale.

(c) Margin squeeze

Margin squeeze may occur where a vertically integrated licensee – that is, one that operates in the wholesale and retail markets – with significant market power in the relevant wholesale market, sets the margin between its wholesale and retail prices so that a reasonably efficient retail operator would not earn a sufficient margin to be able to compete effectively. Margin squeeze may occur if the dominant licensee increases the tariff for its wholesale service or reduces the Tariff for its retail service, or where it sets a tariff for its wholesale service that discriminates in favour of its own retail business.

Margin squeeze is unlawful if the available margin for an efficient retail competitor is insufficient to sustain effective competition. The Authority should investigate the costs associated with both the wholesale and retail services involved based on information

available from the licensee concerned and from the Authority's own network cost models.

The Authority may use the retail costs of the licensee concerned as the efficient costs for the purpose of the analysis in the absence of cost data for other operators that can be proven to be reasonably efficient retail operators.

(d) Tying and bundling

Tying or bundling occurs when a service is offered by a licensee under the condition that another service is also bought. Mixed bundles occur where the services that are included in the bundle are available separately from the licensee but at higher tariffs than in the bundle and on a standalone basis. Pure bundles occur where one or more of the services that are included in the bundle are not available separately from the licensee.

The Authority can decide whether, in the interests of subscribers, to allow pure bundles or not – the Act is silent on this. Mixed bundles are often accepted when provided by dominant licensees where the price discount implied by the aggregate tariff of the bundle compared to the sum of the tariffs of its component services is reasonably reflective of the economies of scope expected to arise from the provision of the services as a bundle. The dominant licensee concerned has the burden of showing that the discount referred to above is reasonably reflective of the costs that may be avoided through service provision as a bundle.

The Authority can impose remedies in relation to a bundle if the tariff has led or will likely lead to, or has the purpose of causing, a significant reduction in effective competition and / or the damage or effective elimination of competitors in the market for any of the services in the bundle.

(e) Price discrimination

Price discrimination exists when two units of the same service are sold at different prices, either to the same customer or to different customers. Price discrimination need

not be anti-competitive and might even be a pro-competitive strategy in some circumstances.

Remedies are only required when price discrimination has the intention or effect of substantially reducing competition in a relevant market by allowing a dominant firm to maintain its position in the market. The Authority shall assess whether it has any pro-competitive effects such as, without limitation, raising the overall demand level for the service and thereby achieving economies of scale that are available in the form of reduced unit costs to be passed on to all users of the service. The Authority shall focus on price discrimination at both wholesale and retail levels.

The Authority should also take account of whether the price discrimination has any substantial anti-competitive effects, such as, without limitation, passing on reduced costs only to large volume customers and keeping prices to small volume customers materially higher than they might otherwise be in the absence of the discriminatory tariffs. In other words, do the discriminatory tariffs enable a dominant licensee to maintain its position of significant market player in the relevant market.

To establish whether the price discrimination is anti-competitive or not, the Authority must consider the balance between anti-competitive effects (if any) and pro-competitive effects (if any).

(f) Refusal to Supply

Refusal to supply occurs when new/existing licensees need access to the infrastructure of another licensee to obtain services either at wholesale or retail levels. In the case of dominant/vertically integrated firms, this may involve refusing access without any justifiable technical or economic reasons for these actions. Unless, solid reasoning is provided to the satisfaction of the Authority, this is considered anti-competitive conduct requiring immediate redress.

It creates anti-competitive effects of limiting competition in downstream markets especially in instances where the identified infrastructure cannot be readily duplicated.

More nuanced approaches can be employed by offending operators through setting terms and conditions that would be injurious towards stimulating a competitive market.

To adequately cater for such issues, The Authority shall ensure adherence to section 68 of the Act requiring the publication of a list of licensees whose access may be shared with other licensees. On pricing, the Authority may use relevant cost methodologies and data to set price caps for dominant operators refusing to supply.

7.0 COLLABORATION WITH THE COMPETITION AND FAIR TRADING COMMISSION

Section 55 (2) of the Act provides for the Authority to co-ordinate with the Competition and Fair Trading Commission (CFTC) in regulating competition in the communications services sector. Therefore, the Authority will establish formal cooperation arrangement with the CFTC. In particular the Authority will:

- Refer to the CFTC cases where anti-competitive business practices are suspected, that require ex-post interventions;
- Conduct market analysis in order to reframe tariffs in accordance with section 78 (3) of the Act.
- Share information with the CFTC where such information is required by the CFTC to discharge its mandate in relation to the communications services sector. Where the information has been declared by the licensee as confidential, the Authority shall seek permission from the concerned licensee before sharing the information with the CFTC. The Authority shall not share information about a licensee with the CFTC without explicit consent from the licensee. Notwithstanding the above, the Authority may disclose information pursuant to a court or any applicable written law requiring or mandating such disclosure.
- CFTC will share information in its possession with the Authority where such information is required by the Authority for the regulation of the sector subject to confidentiality obligations.
- Provide technical expertise to the CFTC, where required, with regard to investigation of cases on alleged anti-competitive business practices. Similarly the Authority will seek the technical assistance from the CFTC where required in its regulatory work;
- The Authority will seek the assistance of the CFTC in enforcing remedial measures imposed by the Authority on the licensee. Similarly, the CFTC will

seek the assistance of the Authority in enforcing remedial measures imposed by the CFTC on a service provider in the communications service sector; and

- Any other ways as stated in the Memorandum of Understanding signed between the CFTC and the Authority.

8.0 INFORMATION REQUIREMENTS TO COMPLETE MARKET REVIEWS

Tables 1 and 2 contain a non-exhaustive list of the types of information the Authority may seek when defining a market and evaluating the effectiveness of competition. In addition, benchmarking data, evidence of prior anti-competitive behaviour and any other additional information may be used to support the Authority’s decision-making process.

Table 1: Possible data requirement for defining the market

Factors to be considered	Criteria	Type of information
Non-transitory barriers to entry		
	Structural	<ul style="list-style-type: none"> • Network infrastructure • Fixed investment trends • Level of self-provisioning
	Legal	<ul style="list-style-type: none"> • Qualitative review of legislation that may hamper market entry
	Regulatory	<ul style="list-style-type: none"> • Qualitative review of existing regulatory body that may hamper the development of competition
Dynamic character and functioning of the market		
	Substitutability	<ul style="list-style-type: none"> • Product/service characteristics per type of customer, e.g residential versus non-residential • Churn rates • Switching costs • Price transparency on the supply and demand side • Prices and volumes (for bundled and unbundled products)

Table 2: Possible data requirements to evaluate the effectiveness of competition

Factors to be considered	Type of information
Assessment of market shares, the level and trends in concentration, overall size of market participants, economies of scale and scope	<ul style="list-style-type: none"> • Turnover/revenue • Volume of traffic per service • Number of end-users (subscribers) • Number of “transactions” (e.g. calls, dial up or connection sessions etc) • Network capacity utilization

	<ul style="list-style-type: none"> • Bundling of services (including sales volumes and utilization)
Control of essential facilities, nature and extent of vertical integration and technical superiority	<ul style="list-style-type: none"> • Network infrastructure • Investment and operational expenditure • Control and ownership of infrastructure • Relationship between companies • Qualitative information regarding product/service characteristics
Actual and potential existence of competitors	<ul style="list-style-type: none"> • Number and dates of new market entry and exit
Degree of countervailing bargaining power and dynamic characteristics of the market	<ul style="list-style-type: none"> • Specific customer (or category) share of total turnover • Price trends and consumer switching data • Price transparency of available products • Rate of product differentiation / new product introduction
Easy or privileged access to capital markets / resources and the ease of entry into the market	<ul style="list-style-type: none"> • Qualitative information • Financial Statements/ Loan Agreements • Trends in market shares • Market growth

8.1 Powers of the Authority to request information

The Authority may base its decisions on publicly available information, information obtained through specific requests to licensees or a combination of the two. It is in the interest of all parties to co-operate with the Authority in order to ensure that sound regulatory decisions are made. The Authority has the power to require licensees to submit information on request, as outlined in Section 6 (2) (I) of the Act and in their operating licences.

8.2 Timeframes and Collection methods of information

The accuracy of defining and analysing markets depends to a large degree on the timely provision of market information as well as the accuracy and reliability of the information provided. The Authority will from time to time release questionnaires in order to make up-to-date evidence-based decisions. Licensees are typically required to provide such information within 30 working days of the request for information.

Dated this 17th day of December 2021

Stanley Kaila Ph.D

Chairperson

Malawi Communications Regulatory Authority