RESULTS OF PUBLIC CONSULTATIONS ON GUIDELINES FOR DETERMINING DOMINANT MARKET POSITION IN THE COMMUNICATIONS SERVICE SECTOR IN MALAWI

December 2021

1. BACKGROUND

The Malawi Communications Regulatory Authority (MACRA) is established under section 4 of the Communications Act (Cap 68:01 of the Laws of Malawi). Its general mandate is to regulate and monitor the provision of communication services in Malawi in accordance with principles of transparency, certainty, market orientation and consumer satisfaction.

The Act further mandates MACRA to promote, develop and enforce fair competition in the competitions sector. In enforcing fair competition, MACRA must ensure that dominant market players do not abuse their position in their market to the detriment of competition.

Regulatory best practice requires that, first there be a determination of dominance before a regulator can put in place remedies to prevent or rectify any market failures. MACRA has therefore developed Guidelines for Determining Dominant Market Position in the Communications Service Sector (the Guidelines) which outline the principles MACRA will follow in determining dominant market players. This will ensure that there is certainty and predictability in regulatory decisions that will be taken by MACRA in regulating competition in the communications sector in Malawi.

The Guidelines were developed through a consultation process. MACRA commenced the consultation process in early 2021 by publishing a draft of the Guidelines and inviting stakeholders and the general public to submit written comments. MACRA duly considered these comments and provided responses to those comments. A final stakeholder validation workshop on the Guidelines was held on 18th June 2021 at Sunbird Capital Hotel in Lilongwe.

Section 202(2) of the Communications Act, requires MACRA to publish the results of any public consultation process. Pursuant to this provision, MACRA hereby publishes the results of the consultation on the Guidelines.

2. SUMMARY OF THE RESULTS OF THE CONSULTATIONS

The Comments received by MACRA are attached as **Annex 1** of this report**.** The comments were duly considered by MACRA and in some respects; this led to revision of the Guidelines based on the comments received.

The final version of the Guidelines is attached as **Annex 2.**

Some of areas addressed by the final version of the Guidelines, are as follows:

- the Hypothetical Monopolist Test for defining markets by the limits of substitutability;
- the Three Criteria Test for assessing whether a market is susceptible to ex-ante regulation; and
- the examination of market share alongside other relevant factors in determining dominance.

The final version of the Guidelines was adopted by the MACRA Board on 17th December 2021. They have published on the MACRA website. They can also be accessed at MACRA offices along Salmin Amour Road, Ginnery Corner Blantyre.

Dated this ……day …….. 2022

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DAUD SULEMAN
DIRECTOR GENREAL

Annex 1 – Comments on Guidelines for Determining Dominant Market Position in the Communications Service Sector in Malawi

Clause No.	Provision	Comments	Proposal by Operator	MACRA's response
Comments from TNM				
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.	This must be done without impeding companies from taking advantage of opportunities within a certain market. MACRA should constantly engage operators to avoid undue pressure on the operator who has invested in the facilities		**Infrastructure sharing will be mandatory unless the operator cannot provide the facilities on grounds stated in section 71 of the Communications Act and Access and Facilities Regulations.**
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	Whereas competition is good, there also has to be a limit to the number of players that can/should be allowed in the data/fibre space in this small economy in order to make the business sustainable for the long.		TNM will be asked to provide clarification on the comment. Furthermore, issues of infrastructure development and/ or deployment are spelled out in the access and Facilities Regulations

	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.	Too much competition may work to the detriment of operators. Alternatively, MACRA should direct new entrants to specific geographical areas to ensure national coverage.		
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, 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.	MACRA must also consider the return on investment before imposing responsibilities based on control of essential facilities. This is to avoid a situation where some companies stop investing in order to ride on other entities investments. The company that has invested must be allowed to make a return to recoup on its investment within a specific period.		**The sharing of facilities will be on regulated commercial terms that will allow the controller of essential facilities recovers its cost of investment and makes a reasonable margin of profit.** **In line CLF and the Access and Facilities regulations, the aim is to encourage efficiency and competition of the facilities.**
Comments from AIRTEL				

4 (1)(1)(i)	the Authority will define a licensee as having a large market share in accordance to the following criteria...the licensee has market share of at least 40% of that market;	To align with other countries in the region, we suggest that the benchmark of dominance be set at 30% and not 40% to align with the SADC region where most developing countries have 30% as the threshold of dominance. 40% benchmark is ideal for mature markets. We also suggest that the threshold for being declared dominant be calculated based on customer market share and not revenue		**The 40% was determined upon consultation with competition bodies including CFTC. The benchmark will be maintained in the meantime to be reviewed at a later stage.** **The Authority will take into account several relevant factors in determining dominance including revenue and market share.** **Whilst an important indicator in pointing towards market power and concentration, market shares will be assessed in tandem. This is done by understanding the evolution of market shares, the volatility associated with market share and the performance of new entrants in identifies markets.**
4 (1)(1)(ii)	the licensee has a market share of less than 40% but can operate in the market without effective constraints from its competitors, potential competitors, suppliers or customers;	We are of the view that the Authority should come up with ways which will prove that the licensee is abusing its dominance before being declared as such		**The guideline 4.1.1.ii has been revised to read, "The licensee has a market share of less than 40% and has market power unless it can prove that it does not have market power in that relevant market."** **The Guidelines already provide for ways of assessing the abuse of dominant position.**
4 (1)(1)(iii)	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	We suggest that declaration of joint dominance at 60% should take into account year of operations, services being offered. for example, a		

	market; or • five or fewer licensees hold at least 70% share of the relevant market.	licensee with 10 years of operations should not be declared dominant when compared with a 2 year old licensee In a market where the Authority gave out licences to players but failed to roll out their services, the authority should clearly state how it is going to consider the remaining licensees as dominant		**The critical issue is the actual market share of the operational licensees regardless of whether other licenses have rolled out or not or the years in the market.**
4(1)(4)	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.	Barriers to entry may exist in some markets for example due to lack of spectrum or existence high license fees, this need to be taken into consideration as well		**Comment noted.**
4(1)(7)	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	According to this clause the Authority is including investment into superior technology that would give a company a competitive edge as anti-competitive. We find this counterproductive since this would stifle growth and		**This Guidelines are not classifying investment into superior technology as anti – competitive. What the Guidelines seek to discourage is use of technology for anti – competitive practices such as bundling or tying of services.**

	bundling or tying practices as well as linked sales. Such practices may be deemed as harmful to competition.	innovation in the industry and generally competitiveness since the industry we are in is technological driven hence investment into relevant technologies is part of the growth strategies. Additionally can the Authority advise how competition will thrive in the face of all the imposed controls /restrictions One example of technological superiority can be being the only player that has 4G or that detains Fiber optic backhaul. Having this advantage goes with for example an obligation of giving access and non-discrimination.		
4 (1)(9)	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	How will the authority determine ease of access to capital market and financial resources? Access to financial resources or capital markets is usually a function of the business performance. Naturally a healthy performing business will have easier access to finance that		**Access to capital markets and financial resources is one of the factors that will be considered when assessing the level of competitive constraints.** **The Authority will consider access to financial services in similar markets.**

	equal potential access to capital and financial resources.	non-performing business. Hence including this as part of dominant player definition is not correct since it would wrongly punish performing businesses which are required in order for the industry to grow and improve quality of service through investments		
4 (1)(10)	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.	If the authority implement hard regulations that will stifle innovation, investment and competitiveness the end result will be a market that shows little differentiation, competition and maturity.		**These are guidelines and not regulations. The guidelines give an indication of how the Authority will implement economic regulation under the Communication act aimed at promoting completion.**
5(0)	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	We recommend that the Authority should come up with measures that would prove that a licensee is abusing its dominant position. We suggest that The proposed remedies for the		**Part IV of Communications Act focuses on Economic Regulations which provides the Authority to conduct Market Analyses and provide for obligations for market players as well as give powers to the Authority to prevent Anti-Competitive practices.**

	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.	dominant operator to only apply if it is proven that there is an abuse of dominance instead of being applied automatically We also suggest that there should be a laid down process in a specific market of how one licensee will be declared dominant. Before declaration of dominance, we suggest that the dominant licensees to be engaged with necessary details of their dominant activities		
5 (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	Considering that the Authority already approves Tariffs, we suggest that this requirement be made for both dominance and non-dominant players in the market. Not a good remedy as this will stifle growth, innovation and fair trading and competition.		**Part VIII of the Communications Act provides that the Authority may reframe tariffs in order to promote fair competition and the granting of new licences. It is an effective remedy so it should be maintained.**
5 (d)	Controls on the type of services to be provided - Sometimes, the scope of	Not a good business practice as this will also stifle growth,		**Once declared a dominant licensee additional obligations are imposed on**

	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	innovation and fair trading and competition		**the licensee. The objective of those additional obligations is not to punish the dominant licensee, but to avoid market failure and promote healthy competition.**
6(0)	The following section provides examples of conducts that would constitute an abuse of dominant position:	We recommend that the Authority should come up with measures that would prove that a licensee is abusing its dominant position		**The measures are already provide for in the guidelines, which provide a guide on how conduct is going to be interpreted as abuse of dominant position.**
6 (a)	Excessive Pricing	The authority should define super normal profits and the period over which this definition on supernormal profits is applicable? And it will be unfair to compare profits in" similar markets " since the cost of operational & investments in networks might significantly be different. A fair approach should look at both the unique costs and the respective profits.		**The guidelines have considered excessive pricing as a standard measure of profitability test and the market analyses will consider the period on which the profitability test will be carried.**
6 (b)	Predatory Pricing	The Authority should define		**the market analyses that will be**

		unreasonably low price & the calculation leading to definition of low price / tariff		**conducted under the guidelines will apply costing methodologies which will determine predatory pricing.**
6 (c)	Margin Squeeze	The authority should define "acceptable margin"		**the market analyses that will be conducted under the guidelines will apply costing methodologies which will determine margin squeeze.**
6 (d)	Tying & bundling	How will the Authority determine that a bundle will likely lead to, or has the purpose of causing, a significant reduction in effective competition?		**The guideline is clear on how tying and bundling is defined and as such, in cases where the market analyses recommends for such then the definition will be applied.**
6 (e)	Price discrimination	The Authority should define when price discrimination is anti-competitive to avoid any ambiguity.		**Guideline 6 (e) (iii) provide guidance on when price discrimination will be deemed competitive**
8 (2)	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.	This part must be enriched by describing the successive steps from the first request for information to the final decision. This process must be a consultative i.e. operators must have the opportunity to provide theirs comments on the draft of decision. We suggest the following process to be included in the		**Each market analyses will have specific methodologies and follow the standard consultative processes. Draft findings are shared with the operators followed by the final report with recommendations.**

		draft guidelines 1. The regulator expresses its willingness to conduct a market study 2. The regulator collects Data from operators or uses data periodically collected 3. The regulator or an external firm performs the market study 4. Additional information needed from the operators? 5. The regulator requests additional data from the operators 6. The regulator organizes a meeting to discuss findings of the draft report 7. The regulator shares the draft report with all operators for written comments 8. The regulator reviews the draft report by taking into account relevant comments 9. The regulator publishes the final report and the determination with: (1) the relevant markets (2) the SMP operators (3) The remedies		
8 (1) and 8 (2)	Tables 1 and 2 contain a non-exhaustive list of the types of information the Authority may seek	To ensure objectivity of the market analyses, we suggest that an independent		**The Authority has over the years been building capacity to ensure that market analyses are carried out in a**

	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.	consultant be contracted to carry put all analyses. This will ensure impartiality, and objectivity in the exercises		**professional manner. Where the Authority deems it necessary to engage a consultant, it shall do so.**
Comments from Multichoice Malawi				
	PURPOSE AND APPLICATION OF THE DRAFT GUIDELINES	At the outset, we wish to emphasize that we support legislation, policies, guidelines and initiatives that seek to promote fair competition in the communications service sector. However, in striving to achieve this objective, any legislation and policy must guard against discouraging innovation, service, quality and investment in the economy.		**The guidelines are there to complement the provisions of the Act. These Guidelines are not a substitute to the Act and only serve to reflect the Authority's approach in conducting market analyses.**
		We understand the purpose of imposing *ex-ante* obligations on undertakings designated as having a dominant market position is to ensure that they cannot use their market power either to restrict or distort competition in the relevant market, or to		**Part V of the Communications Act mandates the Authority to co-ordinate with the Competition and Fair Trading Commission established under the Competition and Fair Trading Act on issues to do with Economic Regulation which facilitates fair competition.**

		leverage such market power onto adjacent markets. In this regard, intervention by the Authority would be warranted only if there is likely to be market failure and if this likelihood is attributable to the market power of the undertaking. As a result, a holistic approach ought to be adopted, which includes an assessment of the dynamic character and functioning of the market, including market characteristics, the nature of actual entrants and their scope for expansion, the threat of potential competitors, and technological developments.		**Ex-ante Regulations seek to identify problems before hand and shape the dominant player(s) behavior through regulatory intervention, hence, cannot wait for market failure. As such, the purpose of the guidelines is clear in how the Authority will apply Ex-ante Evaluation.**
		While the Authority acknowledges in Paragraph 7.0 of the Draft Guidelines that it will refer cases to the CFTC cases where anti-competitive business practices are suspected, that require ex-post interventions, it purports in paragraph 6 of the Draft Guidelines, to define and interpret abuse of dominance practices such as excessive pricing and		**These guidelines were drafted together with CFTC and the definitions were adopted from them.**

		predatory pricing which are traditionally interpreted and assessed by competition regulators *ex post*. Abuse of dominance or monopolisation provisions are the most challenging provisions of competition law often requiring specialist legal and economic interpretation and we encourage the Authority, in line with international best practice and paragraph 7.0 of its Draft Guidelines, to refer such matters to the CFTC.		
		A lack of clarity regarding the roles of the two regulators will inevitably give rise to procedural uncertainty and possibly the application of different assessment standards and evaluation criteria for the same conduct. In addition, a lack of clarity could create confusion for all stakeholders, lead to forum shopping and risk licensees being exposed to multiple investigations of the same allegations with potentially dual penalties or remedies by the two regulators. There is also potential for the two		**Part V of the Communications Act mandates the Authority to co-ordinate with the Competition and Fair Trading Commission established under the Competition and Fair Trading Act on issues to do with Economic Regulation which facilitates fair competition.**

		regulators to arrive at different conclusions resulting in uncertainty in the industry as a whole and creating compliance difficulties for licensees. In addition, if the Authority and the CFTC were to arrive at different conclusions on the same matter or the interpretation of the abuse of dominance guidelines, one regulator's decision would ultimately trump and result in the overturning of the other regulator's decision resulting in the latter regulator's authority being undermined and distrusted in the industry.		
		Further, while the Authority accepts that it has concurrent jurisdiction with the CFTC to assess competition matters and we understand that indeed a cooperation agreement was concluded between the two regulators, this important document has not been made available to stakeholders. We are therefore unable to fully assess whether the provisions of paragraph 7.0 of the Draft		**The MOU is aimed at mitigating any potential conflicts and redundancies. It is there to create harmony and cordiality.** **The Authority is mandated by the Act to coordinate with CFTC on matters of concurrent jurisdiction.**

		Guidelines have been incorporated in this document and if there are any other details regarding how the two regulators propose to deal with their respective functions.		
		It is therefore our submission that a good starting point would be to draw a clear delineation of the powers of an *ex – ante* regulator such as the Authority and one imbued with *ex-post* powers, such as the CFTC.		**In part V of the Communications Act, the roles between CFCT and MACRA have already been delineated.**
	GUIDING PRINCIPLES	In Paragraph 2, the Authority outlines its guiding principles, recognizing that "*market forces are more effective than regulation in promoting consumer welfare*" and that "*competitive markets are most likely to provide consumers with a wide choice of services at just and reasonable prices*". Although not stated, it is trite that quality is also a very important element of the provision of services, often involving significant innovation and investment. As such, regulatory		**The guiding principles are derived from the Act which aims at ensuring fair competition in the communications service sector.**

		considerations ought to not just be based on the desire to have choice and low prices but also aim to ensure the supply of high-quality innovative products or services.		
		We are aligned with the Authority's view that where markets are competitive there are limited grounds for regulatory intervention and the best approach is to leave the market to function on its own. We would add further that, in line with international best practice, intervention in the form of any regulatory action should only take place when there are market failures. It is only in such circumstances that appropriate and proportionate regulation may be required provided it is grounded in economic principles and backed by objective evidence.		**The Act mandates the Authority to regulate the communications service market before market failures.**
	Effective and fair competition	The policy objective of ensuring effective and fair competition is legitimate and widely commended across the world. We also commend the Authority's recognition that		**Comment Noted**

		interventions ought to be targeted at conduct that impedes on competition. Measures aimed at addressing competition issues should ideally only be imposed following market reviews in which parties are given a meaningful opportunity to participate in the process, provide evidence and respond to any allegations raised against them. This will help ensure that decisions are evidence-based, balanced and fair, and regulatory processes leading up to the intervention are transparent.		
	Encourage infrastructure sharing	Obligatory infrastructure sharing may result in the unintended consequence of encouraging free riding by other licensees who may no longer see the need to make their own investments, opting instead to rely on regulation to take advantage of the investments of their competitors. Being aware of this risk, all licensees may end up withholding investments. Ultimately, this is detrimental to investment		**Infrastructure sharing will be mandatory unless the operator cannot provide the facilities on grounds stated in section 71 of the Communications Act and Access and Facilities Regulations to avoid duplication of infrastructure already deployed by other competing licensees.**

		and may offset the perceived benefits of avoiding duplication. Such an approach does not promote competition. For this reason, it is generally accepted best practice that only infrastructure that is demonstrably shown, based on application of economic principles to objective evidence, to be an essential facility which is essential for competition and which competitors cannot reasonably develop for themselves, ought to be considered for regulated sharing of facilities. This is in line with the Authority's obligations in terms of section 71(3) of the Act. It is incumbent on the Authority to encourage and favour investment and innovation and actively discourage free riding and ensure that market players succeed as a result of their own commercial negotiations and investment. We therefore propose that obligatory infrastructure sharing should		

		only apply in narrow circumstances i.e. for infrastructure that objectively qualifies as an essential facility.		
	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 and that it should take proactive steps to curb the risk of harm to competition. While we appreciate the stated rationale for this, it is important to state that such a policy objective does not obviate the need to ensure that regulatory interventions are based on proper application of economic principles to objective evidence, with affected parties being afforded the opportunity to participate meaningfully in the process.		**The Authority will only impose regulatory interventions based on economic principles after a thorough market analysis as provided by the Act which are consultative and transparent.**
	Defining Relevant Market	The definition of relevant markets is an intermediate step that is aimed at identifying, in a systematic, evidence-driven way, the competitive constraints that		**It is agreed that the Hypothetical monopolist and SSNIP tests are essentially the same with no deviation. The SSNIP is required to ascertain the boundaries of the relevant market. Detailing that the SSNIP test does not**

		exist in the markets under consideration. The Draft Guidelines correctly identify the two dimensions involved in defining relevant markets, namely, the product/service dimension and the geographic dimension. Within these two dimensions, competitive constraints are assessed with reference to the likely response of consumers to changes in pricing (demand-side substitution) and the likely response of suppliers who may switch to start producing competing products or services without incurring significant switching cost (supply-side substitution). The SSNIP test is used to perform the hypothetical monopolist test[1] (often called the HMT) by asking the question *'could a hypothetical monopolist over a product profitably raise the price of the product by a small but significant non-transitory increase (SSNIP) of 5% to 10%?'* As such, the		**call for switching costs to be negligible would entirely miss the importance of it within the paradigm of the Hypothetical Monopolist. High switching costs decrease the anticipated levels of competition that may occur from the price increase considering the following scenario where "if Operator A charges P_A for its service, operator B can charge no more than $P_B \leq P_A - s$, where s is the switching cost that the customer incurs from changing from A to B". On the aspects relating to the marginal customers switching to make the price increase unprofitable for the hypothetical monopolist, this is captured in the paragraph being a key element of defining the relevant market thus focusing on the competitive constraints. The Authority will consider the critical loss analysis, which essentially details the loss of volume/subscribers that would make the price increase unprofitable during assessment.**

[1] See Niels *et al*, 2011, *Economics for Competition Lawyers*, Oxford University Press, p.39, 55,56.

		HMT and SSNIP are not separate tests. This is clearly articulated by the United States' Federal and Trade Commission which describes the concept applicable when defining markets for the same purposes as contemplated by the Authority in the Draft Guidelines. Further, the Draft Guidelines suggest that the Authority '*may'* use the HMT as well as other alternatives. In this regard, it is important to note that the principle underlying market definition is the systematic identification of competitive constraints in response to attempts by a hypothetical monopolist to raise prices above the competitive level. As a result, any evidence that the Authority may seek to rely on ought to be evaluated from the prism of competitive constraints in a manner that accords with the profitability of price increases by a hypothetical monopolist. In addition, the SSNIP test also does not call for switching costs to be negligible as		

		implied in the Draft Guidelines. Negligible switching costs certainly suggest a broader market, but it is not automatic that when switching costs are not negligible, the market is narrower. The critical and most relevant question is whether a significant number of customers (commonly referred to as marginal customers) switch in response to a price increase by the hypothetical monopolist such that the price increase is unprofitable. If, in the presence of non-negligible switching costs, a significant number of customers switch such that the price increase is unprofitable, then the market is expanded to include those products that the customers switch to. It is also important to highlight that not all customers are required to switch, but that a significant enough number of them		

		switches such that the price increase is unprofitable.[2] From a supply-side substitution perspective, the Draft Guidelines state that the Authority will consider the overall costs to a provider of switching production of the product or service in question, among other factors.[3] There is limited basis in economics for considering overall costs. The question of supply-side substitutability should be evaluated from the perspective of the incremental switching costs or additional 'sunk' investments involved and the impact they have on the ability and likelihood that suppliers in adjacent markets can switch parts or whole sections of their production to produce substitute products.[4] In relation to the geographic dimension of the market, the same principles broadly apply, only focusing on		

[2] Ibid, p.56.

[3] See Draft Guidelines, Paragraphs 3.1, p.7.

[4] See Niels *et al*, 2011, *Economics for Competition Lawyers*, Oxford University Press, p.70.

		whether enough customers can switch to suppliers in other regions in a manner that makes an attempted SSNIP in the geographic area under consideration unprofitable. On the supply-side, the question would be whether suppliers in other regions can switch to start supplying customers in the region that a hypothetical monopolist attempts to implement a SSNIP. As such, even from a geographic perspective, the focus should be on evidence of the likely responses of customers and suppliers in other regions to a SSNIP and the impact that these have on the profitability of an attempted SSNIP.		
	Competition Assessment The Structure-Conduct-Performance (SCP) model	The Authority confirms in the Draft Guidelines that it will base its assessment of the effectiveness of competition on the Structure-Conduct-Performance (SCP) model. It is, however important to note that the SCP model faces significant limitations as a basis for understanding the effectiveness of competition.		**Comment noted. The Authority will remove the introductory part under section 4 in reference to the SPC Model due to the fact that literature varies considerably on its ethicacy.**

		At its foundations is the notion that the structure of the market determines the conduct of firms in the market and the conduct in turn determines the performance of the firms in the market. One of the larger challenges of the SCP model is that it implies that concentrated markets are characterised by uncompetitive behaviour. However, according to advancements in economics theory even concentrated markets can result in competitive outcomes. The SCP model also risks reducing the analysis of markets to counting the number of firms in the market, the relative size of the firms as suggested by their market shares and an assessment of concentration levels, which is closely linked to market shares. These measures are static in nature, ignoring the highly dynamic and disruptive nature of most communications markets. Because the SCP model is		

		founded in neoclassical economics, some of its core assumptions (e.g. equilibrium states and perfect information) may not exist in practice, resulting in misleading results and policy recommendations. Similarly, the model faces significant limitations when used in highly dynamic markets, which are characterised by disruption enabled by technological changes and changing consumer behaviour.[5] This is characteristic of most communications-related markets today. The SCP paradigm also faces significant challenges in establishing causation, that is, whether the market structure determines conduct and performance.[6] The market structure may itself be a result of performance and conduct as opposed to the other way around. Similarly, the conduct may be a result of the		

[5] Ferguson, P.R., 2016, *Industrial Economics: Issues and Perspectives*, Macmillan International Higher Education, p.37.

[6] Ibid, pp. 22 – 23.

		performance of the firms rather than performance being a result of the conduct. Firms that invest and innovate, providing high quality products may well have higher market shares and this is not anticompetitive as it produces procompetitive benefits for consumers and the economy at large. Firms compete to win market share from their competitors and do so by providing high quality products at the best possible price. At a practical level, it is difficult to generalise the relationship between market structure, conduct and performance. Markets that are characterized by higher levels of commercial risk and variable levels of profitability require a higher level of profitability to ensure that investors are appropriately compensated and incentivised to keep investing in the products and services they provide.[7] An observation of		

[7] Ibid, p.23.

		higher levels of profitability therefore does not automatically follow from higher concentration levels. While it is admirable for the Authority to be precise, we advise the Authority not to box itself into an analytical framework that has widely recognised limitations and which may not be readily applicable to markets in the sector that the Authority regulates. We respectfully submit that the Authority's view that it will mainly focus on the structural characteristics in assessing competition[8] is not a sufficiently robust approach to understanding whether there is market failure and to justify intervention. This is especially so when it is common cause that holding a dominant position is not a breach of the law,[9] and does not amount to an abuse. We would also recommend that the Authority avoid the		

[8] See Draft Guidelines, Paragraph 4, p.9.

[9] See Draft Guidelines, Paragraph 4.1, p.9.

		temptation to presume that dominant firms have an inherent incentive to prevent, distort or restrict competition.[10] This is not always the case and the existence of such incentives should be proven by properly applying economics principles to objective evidence from the market in question.		
	Identifying a licensee with a dominant position	At paragraph 4.1, the Draft Guidelines outline the Authority's proposed approach to identifying a licensee with a dominant position. … Our submissions regarding some of these factors and the way the Authority proposes to assess them follow below.		
	Market shares	The Draft Guidelines provide for market share thresholds for defining *"a licensee as having a large market share"*.[11] It is not clear from the Draft Guidelines what the relationship is between the Authority's position on what		**There is broad agreement that market shares alone are not determinative of market dominance. However, in the context of competition analysis, it does provide certain levels of indication towards market power. A firm with relatively high market shares would in most probability be able to set higher**

[10] See Draft Guidelines, Paragraph 4.1, p.9.

[11] See Draft Guidelines, Paragraph 4.1.1, p.9 - 10.

		would constitute a 'large market share' and the thresholds contained in paragraph 4.1.1.[12] We recommend that the Authority reconsiders its suggested use of the thresholds in determining what amounts to a large market share. Further, it is worth emphasising that market shares are not in themselves conclusive regarding the existence of market power since they are neither evidence of nor an indicator of the competitive constraints faced by firms. Firms with a large share of the market may face very strong competitive constraints from firms with small market shares and as such may not be able to act independently of competitors and customers. In addition, market shares based on existing actual competitors do not reflect competitive constraints that are posed by potential competitors. Furthermore, market share		**prices above competitive levels without hindering its profitability. Regarding the threshold, there is no set in stone approach with some jurisdictions setting it as low as 25%. European case law has at times pegged it at 50%. The thresholds in the draft guidelines have been set in consultation with the Competition and Fair Trading Commission (CFTC). Nonetheless, there is agreement that when analysed, market shares have to be seen within the prism of prevailing conditions and the time evolution of markets.**

[12] See Draft Guidelines, Paragraph 4.1.1 (i) and (ii), p.9 – 10.

		evidence requires that the relevant markets are properly and accurately defined, otherwise they give a false impression of the relative sizes of the various players in the market. This can in turn lead to findings of dominance when in fact it does not exist. It is therefore important to ensure that focus is placed on analysing and understanding economic evidence of how firms competitively interact with each other and with customers. It is also important to consider other evidence cumulatively rather than simply relying on market share information.		
	Control of Essential Facilities	The regulation of essential facilities has a long-standing history which recognizes that there are a narrow set of facilities that can and should be characterized as essential. This appears to be what is contemplated by the Act. If a wide range of facilities are characterized as such, this is likely to encourage free-riding and disincentivize		**The guidelines do capture and recognize these constraints from both a competition perspective in terms of market foreclosure and an industry perspective which requires the Authority to conduct forward looking assessment in relation to these facilities before they are termed essential. The assessment shall look at corresponding issues of ownership of these facilities and how it affects market power.**

		investment by dominant firms for fear that their competitors will simply benefit from their investments. As such, it is important that the Draft Guidelines, as does the Act, explicitly recognize this, limiting the scope of such facilities to the narrower set, identified using clear economically justifiable criteria. It is universally accepted that, for a facility to be essential it must be indispensable for firms to compete in the relevant market and it must not be capable of being reasonably duplicated. We propose that this test be incorporated into the draft Guidelines for determining what constitutes an essential facility.		
	Vertical Integration	We commend the Authority for recognizing that vertical integration can be pro-competitive. In fact, except under a few exceptional circumstances, vertical integration is either competition neutral or pro-competitive. However,		**The spirit of the guidelines is to ensure the most competitively favourable outcome for all market participants. Should a firm be able to utilize market power in upstream markets in relation to downstream retail markets, it presents a context of market failure for the Authority especially in the context where non vertically**

		despite recognising the procompetitive nature of vertical integration, the Draft Guidelines are silent on the need for the Authority to balance any proven competition concerns against the pro-competitive benefits from vertical integration. Ignoring the pro-competitive benefits will undermine incentives to invest and internalise efficiencies, and will potentially undermine the benefits to consumers, the economy and licensees from vertical integration. We recommend that the Draft Guidelines be amended to provide for the recognition of efficiencies and the weighing up of efficiencies against objectively proven competition concerns. This will enable the Authority to make objective, fair, balanced and evidence-driven decisions which do not result in unintended consequences.		**integrated firms need access to the same upstream resources. The possible competition impacts from vertical integration are quite significant from anti-competitive cross subsidization to predatory pricing. Any Authority assessment in this regard will have to weigh the totality of facts and establish if the vertically integrated firm is actually foreclosing retail markets or competition is sufficient.**
	Technological advantages or superiority	The Draft Guidelines highlight the potential for technological advantages		**This guideline is not classifying investment into superior technology as anti – competitive. What the guideline**

		being used to enter adjacent markets using bundling or tying. The Draft Guidelines state that such practices may be deemed harmful to competition. While we recognise the potential for bundling and tying to raise competition concerns under certain conditions, it is important to state that such practices may also generate pro-competitive benefits which ought to be recognised. For instance, if bundling and tying enables a licensee to enter a new market and raise the level and intensity of competition in that adjacent market, then such conduct ought to be encouraged. We encourage the Authority to avoid artificially partitioning the markets by preventing practices that reflect the natural evolution of the markets. Bundling is a common practice in many markets in both the communications space and other sectors of modern economies. We respectfully recommend		**seeks to discourage is use of technology for anti – competitive practices such as bundling or tying of services.**

		that the Authority avoid creating conditions where licensees are penalised for behaving in a procompetitive manner. The very nature of competition is to push firms to adopt the most efficient business processes, invest in the best and most superior technology. Licensees should not be penalised for being efficient. This is one of the goals of regulating for competitive markets.		
	Easy or privileged access to capital markets and financial resources	We note the Authority's view around access to capital markets and financial resources. We would advise the Authority to avoid placing undue weight on this very subjective factor given that investments that are made by licensees are generally determined on the merits of the commercial viability of the business proposal in the market at hand. In our experience, it is not the case that licensees and providers of capital make sub-commercial decisions simply because they have access to capital markets and financial		**In terms of analysis, the Authority will weigh all options as setting the wrong remedy in this regard might affect issues relating to affordability. In terms of guiding criteria, metrics such as the WACC will be utilized which is in some ways unique to each operator. Access to finance alone will not be the only guiding factor in conducting assessments but will have to be viewed in the totality of market conditions**

		resources. Further, capital markets are generally well developed and accessible today than they were in the past and these markets will lend to borrowers provided the projects under consideration are commercially feasible. The Draft Guidelines do not specify the Authority's criteria for assessing *"whether all licensees participating in the market have equal potential access to capital and financial resources"* or how such an assessment will be conducted. We propose that this be clarified to ensure consistency. The Authority should also avoid creating the perception that investments in world class networks which ensure that consumers have the best in class services and consumption experience will be treated as anticompetitive and penalized. This will result in investment hold-ups, undermining investment and ultimately the development of		

		the economy.		
	FORMS OF ABUSE OF DOMINANT OF DOMINANT POSITION	Section 6 deals with abuses of dominance, covering excessive pricing, predation, margin squeeze, tying and bundling and price discrimination. Our overarching submission on these issues is that they are best dealt with by the CFTC. Our views in this regard are outlined in paragraphs 3 – 9 above. We also submit that, in general, allegations relating to pricing conduct which involve consideration of costs should be evaluated based on the costs of the licensee involved. This will help avoid penalizing the licensee for the inefficiencies of other competitors. Further, conduct that may appear to be predatory, margin squeeze, tying and bundling and price discrimination has the potential to generate pro-		**Part V of the Communications Act mandates the Authority to co-ordinate with the Competition and Fair Trading Commission established under the Competition and Fair Trading Act on issues to do with Economic Regulation which facilitates fair competition.** **The Authority has taken into consideration the indicators listed in the guidelines to be a constraint to competition as such, thorough consultations will be done during market analyses.**

		competitive benefits which are good for consumers, the economy and licensees. As such, they should not appear to be roundly condemned. Instead, provision should be made for the pro-competitive benefits to be recognised and objectively weighed against objectively proven anticompetitive effects. In relation to predatory pricing, we encourage the Authority to amend the guidelines to avoid vague language that is highly subjective. For example, the Draft Guidelines refers to prices that are *unreasonably low* or *generate an inadequate rate of return*. Prices may fall below a certain measure of costs for a legitimate reason. For example, to stimulate demand during an economic downturn, introduction of a new product etc. In these circumstances, one cannot simply take the view that prices are unreasonably low because they are lower than a		

		given measure of cost. The commercial rationale for the conduct is a highly relevant consideration as identified in mainstream economics literature. The same reasoning applies to the *inadequate rate of return* criterion highlighted in the Draft Guidelines. It is difficult to know how a determination will be made that there is an inadequate rate of return. We are of the view that the commercial context and rationale matter, otherwise the approach would become subjective and not grounded in commercial reality. The reality of commercial enterprise today is that, in many instances, firms use introductory pricing to bring new services into the markets and to stimulate demand during economic downturns. In both instances, firms can be said to be charging prices that are unreasonably low and earning an inadequate rate of return simply because their		

		prices fall below some measure of costs. The remedy to such situations is to raise prices which means consumers are denied the benefit of lower prices. Some consumers may end up being excluded from consuming certain products because of higher prices compared to the situation where licensees are allowed to use introductory and demand stimulation pricing. Such an approach to economic regulation would be harmful. This is exacerbated by the fact that the relevant measures of costs have not been identified in the Draft Guidelines. The Authority would have benefited from receiving inputs on the appropriateness of different measures of cost, which apply to excessive pricing, predatory pricing, margin squeeze and tying and bundling. We encourage the Authority to consult on these very critical elements of the assessment of conduct.		

Annex 2 – Guidelines For Determining Dominant Market Position in the Communications Service Sector

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	• Network infrastructure • Fixed investment trends • Level of self-provisioning
	Legal	• Qualitative review of legislation that may hamper market entry
	Regulatory	• Qualitative review of existing regulatory body that may hamper the development of competition
Dynamic character and functioning of the market		
	Substitutability	• 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	• 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 • Bundling of services (including sales volumes and utilization)
Control of essential facilities, nature and extent of vertical integration and technical superiority	• Network infrastructure • Investment and operational expenditure • Control and worship of infrastructure • Relationship between companies • Qualitative information regarding product/service characteristics
Actual and potential existence of competitors	• Number and dates of new market entry and exit
Degree of countervailing bargaining power and dynamic characteristics of the market	• 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	• 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) (l) 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