

Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

Competition and Fair Trading Commission, Malawi

The following template is submitted by Competition and Fair Trading Commission, Malawi pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

I. Introduction

CFTC was established under Section 4 of the [Competition and Fair Trading Act CAP 48:09](#) of the Laws of Malawi. CFTC is dedicated to improving the efficiency of Malawi’s economy for the benefit of all Malawians. This is done in the following ways:

- Regulation of mergers and acquisitions of companies
- Monitoring monopolies and concentrations of market power and taking corrective action against abuse of dominance
- Prohibiting anti-competitive practices by enterprises against each other
- Protecting consumers from unfair trading practices

More information about CFTC can be obtained from its website www.cftc.mw.

II. Laws, Regulations, and Policies relevant for the implementation of the CAP

For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.

Please update your Template reflecting significant changes as they relate to the CAP, as needed.

b) Non-Discrimination

Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.

The Competition and Fair Trading Act is concerned with competition and fair trading issues in Malawi. However, if the conduct of an enterprise based outside the country affects Malawi market, the Commission takes necessary actions to address the situation the same way it would have been if the enterprise was from within Malawi. In the same way if a foreigner is affected by a conduct of an enterprise while within Malawi jurisdiction, that person will be assisted the same way if the person were Malawian consumer.

c) Transparency and Predictability

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

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| <ul style="list-style-type: none"><i>i. The Competition and Fair Trading Act, Consumer Protection Act, Merger Assessment Guidelines, Consumer Protection Guidelines and Competition and Fair Trading Act (2006) regulations were uploaded on our website www.cftc.mw so that the general public can access them. They are also available at our library, and members of general public can have their own copies for their reference. Further, the Commission conducts sensitization workshops for traders and consumers informing them about these pieces of legislation.</i><i>ii. Currently, the Commission has Competition and Fair Trading Act Regulations, Merger Assessment Guidelines, Consumer Protection Guidelines and Due Process Guidelines which guide the investigations. The Commission also is drafting several guidelines on various restrictive business practices, market definition, public interest and investigative processes to guide investigations.</i><i>iii. The regulations and the guidelines are available on the website for public access except those that are still at drafting process.</i><i>iv. The Commission follows all the investigative procedures as outlined in the Competition and Fair Trading Act, the Competition and Fair Trading Act Regulations and guidelines when adjudicating over a case.</i><i>v. The Commission already has Merger Assessment Guidelines and Due Process Guidelines that explain the Commission’s investigations and enforcement proceedings. More guidelines are being developed, and will be in use soon.</i> |
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d) Investigative Process

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable*

opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.

iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.

- i. Upon reasonable suspicion of an anticompetitive conduct, the Commission issues a Notice of Investigation to the undertaking suspected to have been engaged in the conduct. Among other things, the Notice of Investigation indicates the origin/source of the investigation, details of the allegation, the harm the alleged conduct has caused on the market or the potential harm it has on the market, the relevant section of the law that has been contravened, opportunity to respond to the allegations (within 14 days), and the consequences of not responding to the Notice
- ii. Once the investigations have been launched, the Respondent is provided with an opportunity to respond within a reasonable time; and is allowed to extend beyond the deadline upon given tangible reasons for failing to honor our deadline.
- iii. The respondents are informed of the kind of information they need to provide in the course of the investigation for the Commission to establish the commission of the conduct as stipulated in the law, and for the Commission to determine the extent of harm on competition and the market.

e) *Timing of Investigations and Enforcement Proceedings*

Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.

The Commission generally targets to conclude cases within 90 calendar days (one quarter). Merger investigations and decisions are made within 45 days as provided for under Section 39 of the Competition and Fair Trading Act, which states that:

“The Commission shall, within forty-five days of receipt of an application or the date on which the applicants provide the information sought by the Commission if that date is later, make an order concerning an application for authorization of a merger or takeover.”

f) Confidentiality

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

Regarding confidential information, the Commission is guided by Section 23 of the Competition and Fair Trading Act, which provides for all officers, members of the Commission and its committees, and consultants to take Oath of Secrecy.

Further, Section 24 of the Competition and Fair Trading Act restricts Commission officers from divulging information to the public without authority.

The Commission recognizes the need to have policies and guidelines on confidential information.

g) Conflicts of Interest

Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.

CFTC is impartial in the way it conducts its investigations and enforcement proceedings as per provisions of the Competition and Fair Trading Act.

Specifically, Section 16(1) and (2) of the Competition and Fair Trading Act provides for Commissioners to disclose their conflict of interest. The said section states that:

“(1) If any member is present at a meeting of the Commission or of any committee of the Commission at which any matter which is the subject of consideration is a matter in which that person or his immediate family member or his professional or business partner is directly or indirectly interested in a private or professional capacity, he shall, as soon as is practicable after the commencement of the meeting, disclose such interest and, unless the Commission or the committee otherwise directs, that person shall not take part in any consideration or discussion of, or vote on, any question touching on such matter.

(2) A disclosure of interest shall be recorded in the minutes of the meeting at which it is made.”

For the Secretariat and the consultants, Section 22(1) and (2) of the Competition and Fair Trading Act provides that:

“(1) An employee of the Commission or a consultant to the Commission who, or whose immediate family member is directly or indirectly interested in a private or professional or official capacity in any matter being considered by the Commission, shall disclose such interest.

(2) A disclosure of interest made under this section shall be made to the Executive Director who shall take such decision as s/he considers appropriate in each case and submit a report thereon to the Commission.”

Further, the Commission has clauses on conflict of interest in its procedures concerning recruitment and procurement.

h) Notice and Opportunity to Defend

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

- i. Upon suspicion of contravention of the Competition and Fair Trading Act, the Commission issues a Notice of Investigation to the concerned undertaking. The Notice states the alleged anticompetitive conduct under question, and the relevant sections of the law allegedly contravened.
- ii. The Commission has the Competition and Fair Trading Act, the Competition and Fair Trading Act Regulations and the guidelines available on its website for ease of reference by undertakings at any time including when there is a contested matter between the Commission and the undertaking. Further, upon completing its investigations, the Commission shares the report with the concerned undertaking for their input before the final determinations are made.
- iii. Upon issuing our Notice of Investigation, the person subject to the proceeding is given an opportunity to respond within 14 days. Further, the person is given an opportunity for public hearing for further submissions or contest of evidence as provided for under Section 11 of the Competition and Fair Trading Act.

I) Representation by Counsel and Privilege

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

- i. The Commission allows a person to be represented by a qualified legal person on any matter before the Commission.*
- ii. The legal person is given an opportunity to present views and any evidence regarding substantive and procedural issues as deemed fit in the matter before the Commission.*
- iii. The Commission recognizes applicable privileges in accordance with legal norms in Malawi governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. The Commission is yet to formulate rules, policies and guidelines on the treatment of privileged information.*

j) Decisions in Writing

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

- i. Upon making its determination on a particular matter, the Commission issues an order letter and a Board Decision paper to the Respondent for their information and/or further action(s). The order letter and the board decision paper set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. The final decisions are announced to the general public through a press conference and releases in electronic media. They are also publicized on our website and Facebook page. Decisions on mergers and acquisitions are also announced in a Government Gazette. Confidentiality rules and applicable legal exceptions are adhered to whenever the Commission announces its decisions.*

ii. Where structural or behavioral remedies have been issued to undertakings, the Commission enters into a memorandum of understanding (MOU) with the concerned undertaking to ensure compliance. Currently the Commission does not make public the commitments that are made in the MOU **probably because** of confidentiality issues.

k) Independent Review

No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).

The decisions of the Commission are appealable by any person to whom the decision was not in favor. This is provided for by Section 48(1) of the Competition and Fair Trading Act, which states that:

“Any person who is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding, appeal to a Judge in Chambers.”