



MEMORANDUM OF UNDERSTANDING

BETWEEN

THE COMPETITION AND FAIR TRADING COMMISSION

AND

THE COMESA COMPETITION COMMISSION

ON

**COOPERATION IN THE APPLICATION AND ENFORCEMENT OF
THEIR COMPETITION LAWS**

A handwritten signature in black ink, appearing to be "G. M. A." with a flourish.

A handwritten signature in black ink, appearing to be "Jek".

The Memorandum of Understanding is entered into on this day of 10th May 2021 between the Competition and Fair Trading Commission ("CFTC") and the COMESA Competition Commission ("CCC") hereinafter referred to individually as "Party" and jointly as the "Parties".

PREAMBLE

Whereas the Parties -

RECOGNISING:

- A. the provisions of Article 55(3) of the Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) under which the COMESA Competition Regulations ("the Regulations") are promulgated;
- B. the provisions of Article 5 of the Treaty as read with Article 5 of the Regulations regarding the obligations of Member States;
- C. the provision of Article 2 of the Regulations regarding the purpose of the Regulations;
- D. the provisions of Article 6 of the Regulations establishing the Commission and Article 7 of the Regulations which mandates the Commission to apply the provisions of the Regulations with regard to trade between Member States and be responsible for promoting competition within the Common Market;
- E. the provisions of Article 7(2) of the Regulations which empowers the Commission among others to: monitor and investigate anti-competitive practices within the Common Market and mediate disputes between Member States; initiate cooperation with competition and consumer protection authorities of Member States; help Member States promote national competition and consumer protection laws and institutions with the objective of harmonization with the Regulations and ensure uniform application of the same; assist Member States in the implementation of its decisions; support to Member States in promoting and protecting consumer welfare; facilitate the exchange of relevant information and expertise;
- F. the need for Member States to give effect to the principles of COMESA competition Regulations and Rules and to use moderation and self-restraint in the interest of co-operation in the field of anti-competitive business practices and consumer protection;
- G. the desirability of setting standards for procedures by which the regional competition and consumer protection agency can act as a forum for exchange of views, consultations and conciliations on matters relating to anti-competitive practices and consumer protection affecting COMESA regional and international trade;



- H. the provisions of Articles 24(8) and 26(6) of the Regulations which provides for the referral of a merger application for consideration under the Member State's national competition and consumer protection laws, and for the Commission to work with the relevant Member States in conducting merger enquiries, respectively;
- I. the provisions of Rule 40 of the COMESA Competition Rules (the "Rules") which provides for close and constant liaison between the Commission and the competition and consumer protection authorities of the Member States in establishing the existence of infringements of Articles 16 or 18 of the Regulations in the applications and notifications by undertakings;
- J. the provisions of Rules 41(1), 43(1) and 44 of the Rules which mandates the Commission to: obtain all necessary information from the Governments and competition and consumer protection authorities of the Member States and from undertakings and association of undertakings; to request competition and consumer protection authorities of Member States to undertake investigations which the Commission deems to be necessary; and for officials of the Commission to carry out investigations in Member States in consultation with the competent authorities of Member States in whose territory the investigation is to be made, respectively;
- K. section 4 of the Competition and Fair Trading Act (CFTA) that established the CFTC as a body corporate with power, subject to this Act to do or perform all such acts and things as a body corporate may by law do or perform.
- L. section 8(1) of the CFTA that provides that it shall be the function of the CFTC to regulate, monitor, control and prevent acts or behavior which are likely to adversely affect competition and fair trading in Malawi.

CONSIDERING:

- (a) that Member States should cooperate at regional level in the implementation of their respective national competition and consumer legislation in order to eliminate the harmful effects of anti-competitive practices;
- (b) that closer cooperation between the Commission; and competition and consumer protection authorities of COMESA Member States in the form of notification, exchange of information, coordination of actions, and consultation among Member States should be encouraged;

CONSCIOUS OF:

Article 7(2) (d) of the Regulations which mandates the Commission to cooperate with competition and consumer protection authorities of Member States in order to accomplish the mandate of promoting competition in the Common Market and



Section 8(2)(g) of the CFTA that gives the CFTC mandate to cooperate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the CFTA.

Now, therefore, the Parties enter into the following Understanding -

Article 1

DEFINITIONS

In this MoU, unless the context otherwise requires -

“anti-competitive practices” means a conduct which appreciably restrains competition between the Member States and is not otherwise exempt by law or authorized in a manner required by the Regulations;

“Common Market” means the Common Market for Eastern and Southern Africa (COMESA) established by Article 1 of the Treaty;

“Competition and Consumer Protection authorities” means –

- (a) the COMESA Competition Commission established by Article 6 of the COMESA Competition Regulations (hereinafter referred to as the “Regulations”); and
- (b) the Competition and Fair Trading Commission established by Section 4 of the Competition and Fair Trading Act;

“competition and consumer protection law” means –

- (a) for COMESA, the Regulations promulgated under Article 55 (3) of the Treaty;
- (b) for Malawi, the Competition and Fair Trading Act (Cap. 48:09) of the Laws of Malawi and the Consumer Protection Act (Cap 49:02) of the Laws of Malawi;
- (c) any such other laws as the Parties may agree to be a “competition or consumer law” for the purpose of this MoU;

“enforcement activities” means any application of competition and consumer protection laws by way of investigation or proceedings conducted by a competition and consumer protection authority;

“Member State” means a Member State of the COMESA;

“regional dimension” means conduct or practice affecting two or more Member States;

“territory” means –



- (a) for the CCC, the territory of the Common Market; and
- (b) for the CFTC, the territory of Malawi; and

“Treaty” means the Treaty establishing the Common Market for Eastern and Southern Africa.

Article 2

OBJECTIVE

The objective of this MoU is to facilitate and promote cooperation and collaboration in implementation of Competition and Consumer Protection Laws of the parties in order to foster their effective enforcement.

Article 3

NOTIFICATION

1. Each Party will notify the other Party in writing whenever it becomes aware that its enforcement activities may affect important interests of the other Party.
2. Enforcement activities as to which notification generally will be appropriate include those that –
 - (a) are relevant to enforcement activities of the competition and consumer protection authority;
 - (b) involve a conduct that undermines consumer welfare or anti-competitive practices (other than a merger or acquisition) carried out in whole or significant part of the Common Market;
 - (c) involve conduct believed to have been required, encouraged or approved by a Party; or
 - (d) involve the imposition of remedies by a party that would require or prohibit conduct in the territory of the other Party.
3. With respect to mergers and acquisitions, each Party will notify the other Party of any significant information that comes to its attention regarding mergers with a regional dimension that it believes is relevant to, or may warrant, enforcement activity by the either party.
4. Each Party shall notify the other Party whenever it intervenes or otherwise participates in a regulatory or judicial proceeding that does not arise from its enforcement activities, if



the issues addressed in the intervention or participation may affect the interests of the other Party.

5. Notifications shall be made as soon as possible and shall include names and addresses of the natural and legal persons involved, the nature of the activities under investigation and the legal provisions concerned and will be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the activities on its territory.

Article 4

UNDERTAKINGS OF THE PARTIES

1. The Parties will take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this MoU or resulting from action taken by the Parties in implementing this MoU.
2. The Parties will facilitate the achievement of the objective of the Treaty and this MoU and in so doing, will abstain from taking any measure which could jeopardize the attainment of the objectives of this MoU.
3. The Parties may implement in their laws, more extensive provisions against restrictive business practices than is required by this MoU, provided that such provisions do not contravene the provisions of this MoU.
4. The Parties will determine the appropriate method of implementing the provisions of this MoU as long as such method of implementation enhances the efficient and effective attainment of the objectives of this MoU.
5. The Parties will make timely submissions of information related to mergers including timely remittance of merger filing fees in accordance with the Rules on COMESA Revenue Sharing of Merger Filing Fees.

Article 5

EXCHANGE OF INFORMATION

1. Each Party will provide the other Party with any information that comes to its attention regarding consumer protection, mergers and anti-competitive practices that the Party believes is relevant to, or may warrant, enforcement activity by the other Party.
2. Each Party agrees to provide to the other Party on request and to the extent compatible with their respective competition and consumer protection laws such information within its possession as the requesting Party may describe that is relevant to an enforcement activity that is being contemplated or conducted by the requesting Party's competition and consumer protection authority.



3. The information shared between the Parties will be used solely for the purpose of implementing this MoU.

Article 6

COOPERATION AND COLLABORATION IN MARKET INQUIRIES, INVESTIGATIONS AND ENFORCEMENT

1. The Parties will render assistance to each other in their investigations, to the extent compatible with their respective Competition and Consumer Protection Laws and the respective interests, and within the reasonably available resources.
2. The parties will review their Competition and Consumer Protection laws where necessary to facilitate cooperation and collaboration in market inquiry, investigations and enforcement.
3. The parties will support each other in undertaking market inquiries in identified sectors and to ascertain any competition concerns in those sectors.
4. The Parties will cooperate in the enforcement of their Competition and Consumer Protection Laws.
5. The Parties will, in this regard, assist each other in the enforcement of Competition and Consumer Protection Laws through-
 - (a) assisting the requesting Party in locating and securing evidence and voluntary compliance with requests for information from undertakings or natural persons within the respective jurisdiction;
 - (b) assisting the requesting Party with such information within the other Party's possession as the requesting Party may specify as relevant to the enforcement of the Regulations;
 - (c) assisting the Party with any information that comes to the attention of the other Party about consumer protection, mergers and anti-competitive practices that may be relevant to or may warrant enforcement activity of the beneficiary Party.
 - (d) assisting the requesting party in the implementation of the sanctions issued to any undertaking by the requesting party in the other party's territory; and
 - (e) assist in the implementation of remedies imposed by the other party.
6. Either Party may notify, the other Party, about consumer protection, mergers and anti-competitive practices and the effects of those activities in its territory, and to that end, request the other Party to initiate appropriate enforcement activities.



7. The notification will be as specific as possible, about the nature of the consumer protection, mergers and anti-competitive practices and their effects in its territory.
8. Upon receipt of a notification, the notified Party will advise the notifying Party of its decision.
9. If enforcement activities are initiated, the notified Party will advise the notifying Party of the outcome of those activities and, of interim developments and measures taken.
10. The requested Party will assist in the investigations which the requesting Party considers to be necessary and such investigations will be carried out with the assistance of officials of the requesting Party, upon request by the requested Party, in accordance with the respective Party's laws.
11. In cases where the Parties have an interest in pursuing enforcement activities with regard to related situations, they may coordinate their enforcement activities.
12. In considering whether particular enforcement activities should be coordinated, the Parties will take account of the following factors, among others -
 - (a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;
 - (b) the relative abilities of the Parties to obtain information necessary to conduct the enforcement activities;
 - (c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
 - (d) the possibility of reducing costs incurred by persons subject to the enforcement activities.
13. In any coordination arrangement, each Party will conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of its respective competition laws.
14. The Parties will carry out the investigations expeditiously and consistent with their relevant laws taking into account the enforcement objectives of the respective laws and the deadlines stipulated in their respective competition laws.
15. Nothing in this Article limits the discretion of the notified Party under its competition law and enforcement policies, to undertake enforcement activities with respect to the notified anti-competitive activities, or precludes the notifying Party from undertaking enforcement activities with respect to such anti-competitive activities.



Article 7

AVOIDANCE OF CONFLICT OVER MARKET INQUIRIES, INVESTIGATION AND ENFORCEMENT ACTIVITIES

1. The Parties will, in their common interest, minimize any potentially adverse effects of their enforcement activities in as far as the application of the respective competition laws are concerned.
2. Each Party will seek, at all stages in its enforcement activities, to take into account the important interests of the other Party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate.
3. Any divergent views arising out of the enforcement of the respective competition laws will be addressed in a timely and practicable manner as circumstances may permit.

Article 8

CONSULTATION

1. Each Party will promptly consult the other Party regarding any matter related to this MoU and the consulted Party will promptly respond to the request by the other Party for consultations.
2. The Parties will attempt to conclude the consultations expeditiously with a view to reaching mutually satisfactory conclusions.
3. Any request for consultations will include the reasons thereof and will state whether procedural time limits or other considerations require that the consultations to be expedited.
4. The consultations will take place at the appropriate level, which may include consultations between the heads of the Competition Authorities.
5. In each consultation under paragraph 1, each Party will take into account the principles of cooperation set forth in this MoU and explain to the other Party, the specific results of its application of those principles to the issue which is the subject of the consultation.
6. A Party will, as soon as is practical, inform the other Party of any amendment made to its competition laws as well as any change in the enforcement practice of its competition authority that may affect the operation of this MoU.



7. Upon request of either Party, the Parties will hold consultations in order to assess the specific implications of amendments or changes to this MoU, and in particular, to determine whether this MoU should be amended pursuant to Article 14.
8. The Parties will meet at the appropriate level, at the request of either Party to among others -
 - (a) update each other on their current enforcement efforts and priorities in relation to the Competition Laws of each Party;
 - (b) exchange views on economic sectors of common interest;
 - (c) discuss policy issues of mutual interest; and
 - (d) discuss other matters of mutual interest relating to the application of the competition laws of each Party.

Article 9

TECHNICAL ASSISTANCE AND CAPACITY BUILDING

1. The Parties will pursue technical assistance and capacity building programs through integrated strategies that incorporate economic, social, cultural, environmental and institutional elements that are unique to each Party. In this context, and within the framework of development policies and reforms pursued by the Parties, the Parties' will take into account the different levels of development as well as the economic needs of each Party and the challenges met in implementing their undertakings under this Agreement.
2. The technical assistance and capacity building programs will pay systematic attention to institutional aspects and in this context, will support the efforts of either Party to develop and strengthen structures, institutions and procedures that enhance the effective enforcement of competition laws and policies in their respective territories. In this context, the Parties will jointly, among others -
 - (a) mobilize resources for capacity building aimed at assisting the Parties in the establishment or strengthening of the respective competition laws and enforcement agencies;
 - (b) facilitate and develop competition and consumer protection advocacy programmes involving the sensitization of policy makers, parliamentarians, the judiciary, the business community, and the general public, about the role of competition and consumer protection laws and policies; and



- (c) facilitate the establishment of a mechanism to enable the Parties to take the necessary steps to adopt, strengthen and implement the necessary competition and consumer protection laws in their respective territories.

Article 10

CONFIDENTIALITY OF INFORMATION

1. Notwithstanding any other provision of this MoU, neither Party is required to provide information on request, to the other Party if disclosure of that information to the requesting Party is prohibited by the law of the Party possessing the information, or would be incompatible with important interests of the Party possessing the information.
2. Each Party agrees to maintain, to the fullest extent possible, the confidentiality of significant information provided to it in confidence by the other Party under this MoU and to oppose, to the fullest extent possible, any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.

Article 11

COMMUNICATION UNDER THIS MOU

1. Communications under this MoU will be in writing and in English.
2. Communications will be by direct communication between the Parties and will be addressed to –

For CFTC: Executive Director,
Competition and Fair Trading Commission,
Private Bag 332,
Lilongwe 3,
Malawi

For CCC: The Director and Chief Executive Officer,
COMESA Competition Commission
P.O. Box 30742
Lilongwe, 3
Malawi

3. Each Party will designate a desk officer for the purpose of liaison with the other Party in the enforcement of the respective competition laws.



Article 12

EXISTING LAW

Nothing in this MoU will be interpreted in a manner that is inconsistent with the existing laws of the Parties, or as requiring any change in the competition and consumer protection laws of the Parties.

Article 13

DISPUTE RESOLUTION

1. Any disputes that may arise from this MoU will be amicably resolved through consultations.
2. Where consultations fail, the dispute will be resolved through mediation.
3. The parties agree to participate in mediation for an agreed time period in accordance with agreed mediation procedures. The parties also agree to equally share the costs of the mediation.

Article 14

ENTRY INTO FORCE, DURATION, AND IMPLEMENTATION

1. This MoU will enter into force upon signature by both Parties and will remain in force unless terminated by either Party.
2. The Parties, will agree on the mechanism and mode of implementation of this MOU.

Article 15

REVIEW, AMENDMENT AND TERMINATION

1. The Parties will, at any time, review this Memorandum of Understanding, with a view to adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of the respective competition and consumer protection laws.
2. The Parties may, at any time, on agreement, amend this MoU.
3. Either Party may terminate this MoU by giving the other Party sixty days' written notice of intention to terminate this MoU.



Article 16

REPEAL

The MOU signed on 4 September 2015 between the CCC and CFTC is hereby repealed and replaced with this MOU.

IN WITNESS WHEREOF, the undersigned, being duly authorized representatives of the Parties, have signed this Memorandum of Understanding.

DONE in two original texts on the 10th day of May 2021 in Lilongwe, Malawi.

For COMESA Competition Commission
Dr WILLARD MWEMBA



Acting Director and CEO

Competition and Fair Trading Commission
Mr. JAMES KAPHALE



EXECUTIVE DIRECTOR

Witnessed by:
MARY GURURE



MANAGER, LEGAL SERVICES
& COMPLIANCE

Witness by:
APOCHE ITIMU



DIRECTOR OF LEGAL SERVICES