



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: MALAWI





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ACRONYMS/ABBREVIATIONS

CCC	COMESA Competition Commission
CCPB	Competition and Consumer Policies Branch
CFTA	Competition and Fair Trading Act
CFTC	Competition and Fair Trading Commission
COMESA	Common Market for Eastern and Southern Africa
ICT	information and communications technology
MFIs	microfinance institutions
MSMEs	micro, small and medium enterprises
UNCTAD	United Nations Conference on Trade and Development

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1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY

1.1 Context and history

The competition policy for Malawi was adopted in 1997. Its broad policy objective is to promote economic efficiency and protect consumer interests. It has three broad strategies: lowering barriers to entry; reducing restrictive business practices; and protecting the consumer.

According to the policy, the main focus areas are business behaviour calculated to eliminate or reduce competition, including price fixing, collusive tendering, customer allocation and tied sales; and market structures which permit abuse by an entity in a position of market power. It is important to note that where economies of scale exist, there may be economic benefits arising from a monopoly or oligopoly situation. The focus is therefore on the abuse of dominant positions rather than the existence of monopolies or oligopolies per se; on government legislation, both existing and proposed, which may impact on the operation of the free market in Malawi; and on unfair business practices that have an impact on consumers.

In reducing restrictive business practices, the policy provides that the Government shall by statute make practices such as price-fixing, collusive tendering and undisclosed price cartels offences. Furthermore, the statute will discourage the abuse of a dominant market position by a monopoly or merger involving the acquisition of a substantial market share which might be to the detriment of the consumer.

The policy also states that the Government recognizes that there is a clear need for the establishment of an organ to lobby for change to legislation relating to competition and make appropriate recommendations to the Ministry of Justice, the parliament and a tribunal on matters relating to restrictive business practices. In that regard, Government shall:

- (a) Create an autonomous competition commission whose role will be to administer legislation on restrictive business practices and on consumer protection;

- (b) Establish a specialized tribunal to resolve contentious issues in certain specific fields subject to judicial review on matters of law.

The policy also calls for the establishment of a system for civil and criminal suits for the recovery of damages suffered as a result of a restrictive business practice.

The policy calls for the enactment of a law that would make unfair business behaviour an offence and protect the consumer from manufacturers or importers offering defective or substandard products or services by making them liable.

Examples of unfair business practices cited in the policy include: hoarding of producer and consumer goods for the purpose of bringing about a price increase; misleading the public as to the nature, price availability, characteristics, suitability for a given purpose, or quantity or quality of any product or service; and supplying any product which is liable to cause injury to health or physical harm to consumers when properly used, or which does not comply with consumer safety standards.

The Government of Malawi has enacted legislation that provides predominantly for competition and sparingly for consumer protection. The Malawi Competition and Fair Trading Act (CFTA) was enacted on 31 December 1998 and brought into legal force on 1 February 2000. On 14 November 2003 the Consumer Protection Act 2003 was enacted, establishing the Consumer Protection Council as a corporate body responsible for implementing the act.

The Competition and Fair Trading Act provides for the creation of a Competition and Fair Trading Commission (the Commission or CFTC) as the competition authority. However, because of the lack of financial and technical resources, the Government could not immediately set up the Commission. In 2003, the Ministry of Trade approached UNCTAD for assistance in establishing the Commission.

Based on the powers and provisions of the Competition and Fair Trading Act, within 10 months and with the support of the Norwegian Competition Authority, the Norwegian Consumer Ombudsman, the

Office of Fair Trading of the United Kingdom of Great Britain and Northern Ireland and the United Kingdom Competition Commission, UNCTAD completed an institutional framework for the Competition and Fair Trading Commission, including recommendations for an appropriate structure and institutional set-up for the Commission to discharge its functions.

UNCTAD further prepared a plan outlining the necessary manpower and financial requirements of the Commission and an appropriate staff training plan, in particular for those staff members who were to be recruited by the secretariat. It held two national stakeholder meetings for the private sector, State enterprises, regulatory bodies and consumer representatives to review the proposed regulatory framework and clarify the importance of enforcing the Competition and Fair Trading Act.¹

There are a number of government policies that have a bearing on competition in Malawi. Most of them have been developed as part of the movement of economic liberalization. Malawi has followed economic reforms that replaced controlled economic management with free markets, open borders for goods and services and non-protective tariffs. The speed of the reforms was quick, which mainly resulted in increased imports but limited investment in manufacturing.

The influx of imports started to choke the inflexible manufacturing sector as it failed to improve its efficiency sufficiently quickly. Over time and with increased imports, manufacturing firms started to reduce their production levels while others slowly died under intense pressure from the competition. This is evidenced by a drop in the contribution of manufacturing to gross domestic product from a high of 18 per cent in 1988 to an average of 13.3 per cent for the period 1991–1994 to an average of 11.7 per cent for the period 2000–2004.

On the other hand, enterprises operating in non-competitive markets took advantage of consumers by charging exorbitant prices. Others operating in oligopolistic markets opted to collude rather than compete. Both practices disadvantaged the consumer. The Government made some efforts to protect local industry from unfair competition and consumers from being unfairly taken advantage of by introducing various policies. As will be seen below in

the discussion of the major policies, not all of them were effective in promoting competition or protecting the consumer. Poor policy analysis and a lack of implementation were the major reasons for them not achieving their objectives.

Two development policy documents that had some bearing on competition in Malawi were the Malawi poverty reduction strategy and the Malawi economic growth strategy. The poverty reduction strategy was launched in 2002. It recognized the private sector as the driving force for growth with the Government, non-governmental organizations and donors as mere facilitators in terms of creating an enabling environment for pro-poor growth and supporting poor-friendly industries including micro, small and medium enterprises (MSMEs).

The poverty reduction strategy stated that the Government intended to broaden the industrial base by focusing on the development of export-oriented, high value-added and high-technology industries; developing new and competitive industry clusters through the integration of key industries, suppliers, supporting industries, critical business support services, the requisite infrastructure and institutions; accelerating regional development, especially the Zambia-Malawi-Mozambique growth triangle; and integrating MSMEs in industrial development by strengthening their competitiveness through improved access to finance, markets, infrastructure, information, the results of research and development, and training, among others.

According to the strategy, competition was to be promoted in the microfinance sector. The Government was to expand competition and efficiency in the credit market by commercializing and privatizing all government-controlled microfinance institutions (MFIs).

Competition in the financial sector was to be increased by eliminating the interlocking ownership linkages between the two dominant commercial banks, through full privatization, and encouraging new entrants to the system. Apart from competition, this was intended to expand coverage and innovative lending by financial institutions. The interlocking ownership was eliminated with the sale of Commercial Bank of Malawi. With the arrival of several commercial banks, privatization did indeed introduce more competition into the financial sector than had been the case.

¹ See UNCTAD/DITC/CLP/2004/2.

The poverty reduction strategy recognized that reform of the telecommunications sector (the separation of postal services from telecommunications and their incorporation as commercial statutory corporations) had not achieved the desired goal of facilitating growth and diversification. However, it fell short of proposing measures to deal with the problem. Most glaringly, the strategy did not mention the promotion of competition among large-scale manufacturing enterprises. In any case the strategy was not implemented as expected and so the achievements that it had envisaged with regard to competition were not realized.

The Malawi economic growth strategy was a reaction to the apparent glossing over in the poverty reduction strategy of the role of big business in the pro-poor growth that was intended. The economic growth strategy dealt with competition issues more clearly. One recommendation in the strategy was “to create a competitive domestic market by developing and implementing competition, consumer protection and trade remedies policies with supporting legislation and regulations for each”. Related actions for the strategy were to establish a competition commission and enact a consumer protection law by July 2003 and formulate a trade remedies law by July 2004.

The economic growth strategy was developed when the competition policy and its related legislation were already in place. For that reason, it called for the establishment of the competition commission provided for in the law. Consumer protection is covered by the competition policy but the legislation on competition excluded consumer protection, hence the call for a consumer protection law. Consumer protection was provided for in a law that also provided for trade remedies, with a consumer protection council as the vehicle for both. Some action had been taken towards the establishment of the Competition and Fair Trading Commission. Members of the Commission were appointed in early 2005 but the full-time secretariat had not yet been set up. However, none of these actions alone can increase competition or protect consumers.²

Both the growth strategies were replaced by the Malawi Growth and Development Strategy, which has for the past 15 years been the Government’s overarching operational five-year blueprint. The current strategy,

the Malawi Growth and Development Strategy III, runs from 2017 to 2022, succeeding the first strategy for the period 2006–2011 and the second which ran from 2011 to 2016.³ During the periods of implementation of the two previous strategies, Malawi recorded some commendable growth rates, although the growth was neither sustained nor inclusive.⁴

The theme of the third Growth and Development Strategy is “Building a productive, competitive and resilient nation”, which is expected to develop Malawi into a productive nation competing on the global stage.⁵ Further, the strategy aims to consolidate and build on the achievements of the earlier strategies. According to the Malawi national human development report on inclusive growth (2015), poverty has remained pervasive, especially in rural areas, among women and other disadvantaged groups. The challenge for development planning is therefore to pursue inclusive economic growth for all segments of the population and distribute the dividends of increased prosperity, in both monetary and non-monetary terms, equitably across society.⁶

One of the goals of the third strategy is to provide sufficient sustainable energy for industrial and socioeconomic development. As part of achieving this goal, there is a medium-term expected outcome from industrial development for an improved environment for investment and private sector development. The strategy was formulated to reform the regulatory and institutional framework through strengthened private sector investment and development, review and formulation of business-friendly laws and regulations, the development of new competition policies and legislation, and strengthening law enforcement and dispute resolution mechanisms.⁷ The strategy has a market-oriented approach by providing for the development of new competition policies and legislation. The present peer review exercise is anchored in the principles of the strategy.

The Malawi Growth and Development Strategy III is also linked to the Malawi National Export Strategy, which was operational between 2013 and 2018.

² See University of Malawi, Centre for Social Research “Competition regime in Malawi: country paper”, available from www.cuts-international.org/7up3/Malawi_CRR.pdf.

³ See <https://mitc.mw/images/downloads/other-documents/Malawi-Growth-and-Development-Strategy-August-2006.pdf> and www.resakss.org/node/6672.

⁴ *Malawi Growth and Development Strategy III (2017–2022)*, p. 1.

⁵ *Ibid.*, p. XIII.

⁶ *Ibid.*, p. 1.

⁷ *Ibid.*, annex 2.

During its implementation, the export strategy provided a prioritized road map for developing the country's productive base to allow for both export competitiveness and economic empowerment.⁸

The National Export Strategy promoted policy coherence, comprehensiveness and coordination, and created an environment in which to build the country's productive base. It further advocated for strengthened capacity for the Competition and Fair Trading Commission and set as a priority the pursuit of fair competition in the domestic transport sector. Unfair competition in that sector is a cause of the high cost of transport from rural areas to cities, making the produce of domestic farmers uncompetitive against imported agricultural produce.⁹ Competition policy is recognized in the strategy as one of the essential areas for the import substitution cluster to meet its potential and guideline targets.¹⁰

1.2 Political context of the Competition and Fair Trading Act

Development of the CFTA started immediately after approval by the cabinet of the Malawi Competition Policy in 1997. It received presidential assent on 30 December 1998 and was gazetted on 31 December 1998.

Before the liberalization era, the power of dominant firms, monopolies and oligopolies was kept in check by extensive price controls and other government policies. With economic liberalization, the Government allowed the market to set prices to enhance efficiency and competitiveness. As the economy continued to move progressively towards increased liberalization, certain undesirable but basic business practices cropped up, taking advantage of the "hands-off" approach at the expense of economic efficiency and indeed consumer welfare, both of which were the targets of the economic liberalization.

Typical of these undesirable and consumer welfare-reducing business practices that took advantage of the liberalization were price fixing, tied sales, speculative hoarding, market sharing and collusive tendering.

Anti-competitive practices included temporary underpricing of goods and services to fend off competition; seeking import protection against competing imports; buying up competitor enterprises; and unfair advertising about the products of new entrants.

That situation required the Government to take up its role of creating an enabling environment for fair competition. The philosophy was not to condemn or penalize those industries in Malawi that had large market shares but to ensure that consumers were adequately protected from exploitative pricing or collusion designed to prevent competition. Furthermore, the Government realized that economic liberalization, even over a long period of time, would not produce perfect markets. The existence of monopolies (natural and otherwise) and oligopolies require Governments to put protective mechanisms in place for potential competitors (attracted by abnormal profits) and consumers (who are exposed to the dominant firm). In Malawi, the ongoing privatization programme has also resulted and may also result in some public sector monopolies being divested by the State and sold into private ownership, with an attendant risk of abuse of dominant market power. The competition law was considered a good platform to address most of these real problems.¹¹

1.3 Objectives of the Competition and Fair Trading Act

The objectives of the CFTA are to encourage competition in the economy by prohibiting anti-competitive trade practices; to establish the Competition and Fair Trading Commission; to regulate and monitor monopolies and the concentration of economic power; to protect consumer welfare; to strengthen the efficiency of the production and distribution of goods and services; to secure the best possible conditions for freed trade; and to facilitate the expansion of the base of entrepreneurship and provide for matters incidental thereto or connected therewith.

The CFTA dwells much on institutional issues related to the Competition and Fair Trading Commission. It provides for establishment of the Commission, including its secretariat, its operations, funding, management and accountability. It also details the

⁸ *Malawi National Export Strategy (2013-2018)*, p. 7.

⁹ *Ibid.*, p. 41.

¹⁰ *Ibid.*, p. 31.

¹¹ *Ibid.*, p. 36.

areas and anti-competitive trade practices that the Commission would deal with.

The CFTA prohibits all anti-competitive trade practices defined as any category of agreements, decisions and concerted practices which are likely to result in the prevention or restriction of competition to an appreciable extent in Malawi or in any substantial part of it.

Furthermore, under Section 3 (f) the CFTA does not have extraterritorial jurisdiction. Rather, Section 3 (f) of the CFTA provides for links to any agreement or arrangement, be it bilateral, regional or multilateral to which Malawi is a party. Such an omission would mean activities carried on outside Malawi but with effects within the country cannot be dealt with under the CFTA. Rectification of this omission is of the essence and could borrow from Section 7 of the Fair Competition Act of the United Republic of Tanzania, in which the question of extraterritoriality is well addressed. Furthermore, the CFTA does not itself relate to any legislation that would deal with consumer protection, even though competition and consumer protection are related, as demonstrated by their both coming under one policy and consumer protection being one of the objectives of the CFTA.¹² Since Section 43 of the CFTA relates to consumer protection, it is vital to ensure that consumers are better protected by formally linking with other institutions having a bearing on the CFTA mandate in terms of enforcement and the effects thereof.

1.4 Competition policy in reforms: current issues

On 30 October 2020, the Competition and Fair Trading Commission initiated a project on the theme of “Enhancement of competition and consumer protection regulation”. The project commenced on 25 January 2021 and is expected to bring about major institutional and legislative reform of the competition and consumer protection laws in Malawi.

The Commission reported facing a number of challenges in its operations, including limited awareness among the business community and the general public: the concept is specialized

and stakeholders, including academia, the business community and the Government, give it a low priority for many reasons, including but not limited to finances, low human resource skills, the inadequacies of the CFTA and staff turnover; acute regulatory gaps in competition and consumer protection enforcement; limited institutional capacity; and informational gaps in market research as a result of the reasons set out above. It is against this backdrop that the Government enlisted support from the European Union Delegation to Malawi to resolve these challenges.¹³

The project, funded by the European Union, is to be implemented over the next two years (2021–2022) and is expected to result in the development of an integrated information management system for the Commission; a review of sectoral laws to bring them into line with competition and consumer protection policies; enhanced market regulation and monitoring through market studies and surveillance, as well as market inquiries; and enhanced advocacy and awareness of competition and consumer protection law and policy through stakeholder sensitization activities.

The project is expected, in particular, to result in legislative reform of the competition and consumer protection laws, long overdue in Malawi.

In other developments, following his election as President, Lazarus Chakwera appointed 12 additional judges to the High Court on 26 October 2020. Among the appointees is the former Executive Director of the Commission, who had served there for more than seven years and currently serves as a Commissioner on the Board of Commissioners at the Competition Commission of the Common Market for Eastern and Southern Africa (COMESA). Her appointment is likely to lead to competition matters in the High Court being given stronger impetus and becoming more pronounced.¹⁴

¹² See <https://competitionregimes.com/pdf/Africa/47-Malawi.pdf>.

¹³ European Commission, “EU and the Malawi Government launch the enhancement of competition and consumer protection regulation project”, 8 October 2020, available at https://eeas.europa.eu/delegations/barbados/86597/eu-and-malawi-government-launches-enhancement-competition-and-consumer-protection-regulation_ru.

¹⁴ See www.bowmanslaw.com/insights/competition/malawi-developments-in-competition-and-consumer-protection-enforcement/.

2. LEGAL FRAMEWORK

2.1 Competition and Fair Trading Act

Like other competition laws, the CFTA covers (a) anti-competitive agreements in both vertical and horizontal aspects, (b) abuse of a dominant position and (c) control of mergers. It also contains provisions relating to unfair trading and consumer protection.

The CFTA applies to all economic activities within or having an effect within Malawi. It does not draw a distinction between regulated sectors (i.e., natural monopolies especially those in utility networks).

2.2 Competition and fair trading regulations, 2006

The Competition and Fair Trading Regulations were drawn up under Section 53 of the CFTA to operationalize its provisions on both substantive and procedural issues, with a view to easing the dispensation of justice in competition matters in Malawi.

With regard to substantive competition law issues, Section 32 of the CFTA enumerates anti-competitive trade practices. These include predatory behaviour towards competitors; discriminatory pricing and discrimination; making the supply of goods or services dependent on accepting restrictions on the distribution or manufacture of competing or other goods, or the provision of competing or other services; making the supply of particular goods or services dependent upon the purchase of other goods or services from the supplier to the consignee; imposing restrictions on where, to whom or in what form or quantities goods supplied or other goods may be sold or exported; and resale price maintenance and trade agreements fixing prices between persons engaged in the business of selling goods or services.

2.3 Anti-competitive agreements

2.3.1 Per se prohibited agreements

The CFTA provides for the prohibition of trade agreements for enterprises engaged in the market in rival or potentially rival activities to engage in the

following practices, as set out in Section 33 (3): colluding in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in settling uniform prices in order to eliminate competition; collusive tendering and bid-rigging; market or customer allocation agreements; allocation by quota as to sales and production; collective action to enforce arrangements; concerted refusals to supply goods or services to potential purchasers; or collective denials of access to an arrangement or association which is crucial to competition.

Section 44 (2) of the CFTA further provides that: "The Commission shall not authorize acts, agreements or understandings of a kind described in sections 33 (3), 41 (1) and 43 (1)."

The letter and spirit of the two provisions cited above reflect per se prohibition provisions, as provided in many laws comparable with the CFTA.

Typical per se prohibitions usually include:

- (a) Price-fixing by competitors, purportedly provided for under section 33 (3) (a) of the CFTA;
- (b) A collective boycott by competitors, purportedly provided for under Section 33 (3) (e) of the CFTA;
- (c) Output restriction by competitors, purportedly provided for under Section 33 (3) (d) of the CFTA;
- (d) Collusive tendering and bid-rigging by competitors, provided for under Section 33 (3) (b) of the CFTA;
- (e) Market or customer allocation agreements by competitors, provided for under Section 33 (3) (b) of the CFTA.

Prohibitions on concerted refusals to supply goods by competitors, which has been provided for under Section 33 (3) (f) of the CFTA and collective denials of access to an arrangement or association, provided for under Section 33 (3) (g) of the CFTA, are not typical prohibitions under per se, rather the former resembles a theory of harm under abuse of dominance popularly known as a refusal to deal,

either unilaterally or under combined dominance, as presented in this case. The latter also follows the same pattern so that a dominant firm or firms under combined dominance may deny a third party access to an “essential facility”, which is crucial to competition as set out in the CFTA.

Notwithstanding the foregoing, prohibited practices are not defined to provide better and further particulars of the types of conduct that constitute prohibition and technically ease the establishment of elements to be proven for the said prohibitions to stand.

It is also observed that much as price-fixing can be construed as being per se prohibited, as explained earlier, that prohibition is put in jeopardy by the inclusion of per se prohibited conduct in section 32 of the CFTA and the omission thereof in the list of per se prohibitions under Section 44 (2) of the CFTA.

It is possible to make an application for exemption from a trade agreement by filling in form No. CFTC/V (application for authorization for a trade agreement made under Section 32 (2) (g) of the CFTA and regulation 7 of the Competition and Fair Trading Regulations, 2006),¹⁵ which provides that:

- “(1) An enterprise may apply to the Commission for authorization to enter into trade agreement where the enterprise is of the view that such agreement would not:
- (a) hinder or prevent the sale or supply or purchase of goods or services between persons;
 - (b) limit or restrict the terms and conditions of sale or purchase between persons engaged in the sale of purchased goods or services in terms of Section 32 (2) (g) of the Act.
- (2) The application referred to in sub-regulation (1) shall be made in the prescribed form contained in the second schedule hereto.”

In the absence of interpretation to the contrary, an enterprise can apply for authorization to enter into trade agreements that fix prices between persons engaged in the business of selling goods or services, which hinder or prevent the sale or supply or purchase

of goods or services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of goods or services; where the enterprise is of the view that such an agreement would not:

- (a) Hinder or prevent the sale or supply or purchase of goods or services between persons;
- (b) Limit or restrict the terms and conditions of sale or purchase between persons engaged in the sale of goods or services in terms of Section 32 (2) (g) of the CFTA.

Under the strict per se rule such an application would not be contemplated at all. Experience on the ground from interviews with the Commission staff shows that the provision has not been employed, thus making a compelling case for its removal.

Modern competition laws have also been enacted to prohibit vertical arrangements, to the extent that they bear the effects of “resale price maintenance” under per se prohibitions on the basis of a similar effect to price-fixing. That is seen in Section 26 of the Botswana Competition Act No. 17 of 2009, which states;

- “(1) An enterprise shall not enter into a vertical agreement with another business enterprise to the extent that the agreement involves resale price maintenance.
- (2) Notwithstanding subSection (1), a supplier or producer may recommend a minimum resale price to the reseller of a good or service if:
- (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and
 - (b) the product has the recommended price stated on it, and the words ‘recommended price’ appearing next to the stated recommended price.”

It is also observable that the CFTA does not provide for the handling of per se prohibited agreements (trade agreements as written in the CFTA) in terms of orders of the Commission on the same basis as it has provided for mergers under Section 39 of the CFTA.

These are anomalies worth noting and their rectification is being considered by the Commission.

¹⁵ See www.cftc.mw/legislations.

2.3.2 Agreements prohibited by rule of reason

Agreements prohibited by rule of reason are usually horizontal between competitors but do not fall under the per se prohibited category and are also applicable in vertical arrangements. This analogy would usually provide for a broad array of agreements to be considered under the rule of reason approach. The CFTA and the Competition and Fair Trading Regulations have somewhat restricted what qualifies for such consideration. The CFTA provides for notifications for rule of reason agreements under Section 44 (1), which states: “The Commission may authorize any act, agreement or understanding which is not prohibited outright by this Act, that is, one which is not necessarily illegal unless abuse of that act, agreement or understanding is consistent with the objectives of this Act and the Commission considers that, on balance, the advantage to Malawi outweigh the disadvantages”.

The notification for authorization that supposedly provides for applications for authorization under the rule of reason is provided in the Competition and Fair Trading Regulations on the following issues:

- (i) Relocation of core company assets under regulation 3;
- (ii) Exclusive dealing arrangements under regulation 4;
- (iii) Full line forcing, bundling, or tying arrangements under regulation 5;
- (iv) Resale price maintenance under regulation 6;
- (v) Entering into a trade agreement under regulation 7.

A close look at the issues permitted for authorization reveals that relocation of core company assets is an issue that could be considered under mergers as it connotes the “changing of hands” of the assets of a company. As for bundling or tying and exclusive dealing arrangements, these are prohibited under abuse of dominance, which should not warrant consideration under rule of reason. As for resale price maintenance and entering into trade agreements, the discussion under per se prohibited agreements provides an explanation as to their treatment to the extent that they are issues per se prohibited, either by conduct or on the basis of the effects they have,

thus being ineligible for consideration under the rule of reason approach.

The provision also lacks a combined market shares threshold for which the agreeing parties are prohibited to the extent of their potential effects in a particular market thus leaving too wide a room for agreements to be notified. It is helpful to establish numerical thresholds and they are easier to comply with compared to other more flexible approaches which require an in-depth understanding of competition.

Section 8 (3) of the Fair Competition Act, 2003, of the United Republic of Tanzania provides as follows:

“Unless proved otherwise, it shall be presumed that an agreement does not have the object, effect, or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either (a) or (b) applies:

- (a) the combined shares of the parties to the agreement of each market affected by the agreement is 35 per cent or less; or
- (b) none of the parties to the agreement are competitors.”

Similarly, a related provision is observed in Section 29 of the Botswana Competition Act 2018, which states:

“The Authority may carry out an investigation to determine whether the provisions of section 28 (1) should be applied if the Authority is satisfied that the parties to the agreement:

- (a) in the case of a horizontal agreement, together supply a prescribed percentage, or acquire a prescribed percentage, of goods or services in a market in Botswana;
- (b) in the case of a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, a prescribed percentage of goods or services of any description in a relevant market in Botswana.”

Such a threshold and a condition precedent give a definition of agreements that are considered under the rule of reason approach. The threshold also tends to leave out of scrutiny small companies that seek to grow and improve their efficiency through various

forms of such agreements. It is also worth mentioning that the provision does not provide for distinction from agreements insofar as they provide for mergers, since mergers too are a form of agreement that may be construed to be under the scrutiny of this provision.

Interviews with staff at the Commission revealed that there was an attempt to establish a defined threshold for mergers that could also be improvised in agreements prohibited by the rule of reason in a set of amendments that are currently under scrutiny. It is important that the same defined threshold for mergers is precise enough to make it clear to users of the law that it could be used in the context of the rule of reason agreements as provided in the CFTA.

Notwithstanding the general provision on offences and penalties provided for under regulation 13 of the Competition and Fair Trading Regulations, the CFTA does not provide for sanctioning agreements prohibited by the rule of reason in terms of orders of the Commission, as is provided for mergers under Section 39 of the CFTA. However, Section 8 (2) (c) of the CFTA allows the Commission to take any action it considers necessary to prevent or redress the creation of a merger or the abuse of dominant position by an enterprise.

It is further observed that the CFTA has not provided for a commonly found phenomenon in competition law and policy, known as block exemption, which exempts (after assessment) some identified activities in key sectors from competition law. Such activities include price-setting for cash crops in agricultural markets.

These are anomalies worth noting and the rectification related thereto being considered by the Commission.

2.4 Abuse of dominance

The legal text providing for abuse of dominance under the CFTA framework is Section 41. The Competition and Fair Trading Regulations are silent on the matter. Section 41 provides that:

- “(1) Any person that has a dominant position of market power shall not use that power for the purpose of:
- (a) Eliminating or damaging a competitor in that or any other market;

- (b) Preventing the entry of a person into that or any other market; or
- (c) Deterring or preventing a person from engaging in competitive conduct in that or any other market.

- (2) Any person who contravenes the provisions of subSection (1) commits an offence.”

The CFTA contains a general prohibition of abuse of dominance under Section 41 (1) and a declaration of a related offence under Section 41 (2), which is sanctioned under Section 51. Those provisions are consistent with international best practice.

However, it is observed that, generally, abuse of dominance is barely provided for under the CFTA, which lacks a definition of dominance or market power.

That differs from Section 5 (6) of the Tanzanian Fair Competition Act, which states:

“A person has a dominant position in a market if both (a) and (b) apply:

- (a) acting alone, the person can profitably and materially restrain or reduce competition in that market for a significant period of time; and
- (b) the person’s share of the relevant market exceeds 35 per cent.”

It also differs from Section 15 of the Competition and Consumer Protection Act of Zambia, which states:

“A dominant position exists in relation to the supply of goods or services in Zambia, if:

- (a) thirty percent or more of those goods or services are supplied or acquired by one enterprise; or
- (b) sixty percent or more of those goods or services are supplied or acquired by not more than three enterprises.”

The CFTA does not provide for either a market definition or the market share that a person must attain to be considered dominant. While several competition laws contain a market share threshold for the presumption of dominance, this is not compulsory and has also attracted some criticism, despite the fact that it creates legal certainty. The laws are criticized for being rigid and not allowing for the necessary

economic assessment of whether a company enjoys substantial market power.¹⁶

In the absence of a market share threshold that triggers a rebuttable presumption of a dominant position in the market, the Commission may consider the possibility of adopting guidelines on how it assesses market power, i.e., what type of factors it takes into consideration instead of market share. Experience shows that given the low level of competition expertise in the developing world, this should be considered for the future development of the Commission or used as an alternative to market share, provided that it will not confuse users of the law.

In practice, the Commission considers several administrative undocumented factors in order to establish that a person does or does not have substantial market control in Malawi. During the interviews with Commission staff, it was not clear why the practice had not been given legal force under section 53 of the CFTA, which provides for the Minister to draw up regulations to give effect to the CFTA on the advice of the Commission. That could, at least in the interim, establish a clear criterion for testing market dominance.

As noted earlier, the anti-competitive trade practices listed in Section 32 of the CFTA include certain conduct that is universally qualified as abuse of dominance and subsequently subjected to authorization, contrary to conventional abuse of dominance prohibitions which are treated on their own stand-alone merits and not necessarily as agreements.

The CFTA is ambiguously silent as to what constitutes a dominant position and what conduct is considered as abuse of dominance and can therefore be prohibited. It is recommended that the CFTA clearly provide a definition of a dominant position but maintain the existing prohibition of the abuse of a dominant position as a general rule. This general rule can then be followed by a non-exhaustive list of examples for abusive behaviour that are universally agreed, based on best practices such as those provided in Section 16 (2) of the Zambian law. For purposes of clarity, the whole of Section 16 is quoted here:

“(1) An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or

conduct limits access to markets or otherwise unduly restrains competition or has or is likely to have adverse effect on trade or the economy in general.

- (2) For purposes of this Part, ‘abuse of a dominant position’ includes—
- (a) imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress in a manner that affects competition;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties;
 - (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts;
 - (e) denying any person access to an essential facility;
 - (f) charging an excessive price to the detriment of consumers; or
 - (g) selling goods below their marginal or variable cost.
- (3) An enterprise that contravenes this Section is liable to pay the Commission a fine not exceeding ten percent of its annual turnover.”

This reaffirms, as stated earlier, that placing abuse of dominance issues under the rule of reason and per se prohibition is faulty. In the absence of a market definition and a definition of dominance, the pursuit and enforcement of abuse of dominance cases has been substantially weakened since the CFTA was enacted.

The CFTA does not provide for sanctioning the misuse of market power in terms of orders of the Commission, as is provided for mergers under Section 39 of the CFTA. However, Section 8 (2) (c) of the CFTA allows the Commission to take any action it considers necessary to prevent or redress the creation of a merger or the abuse of a dominant position by an enterprise.

¹⁶ For further details, see the UNCTAD Model Law on Competition (2010), chap. IV.

2.3.1 Monitoring the concentration of economic power

This function is provided under Section 42 of the CFTA:

“The Commission shall keep the structure of production of goods and services in Malawi under review to determine where concentrations of economic power or anti-competitive trade practices exist whose detrimental impact on competition and the economy outweighs the efficiency advantages, if any.”

This provision does not show how the monitoring should be done in order to ensure that the Commission is not statutorily empowered to either prescribe or fix prices in the market. According to key informants, this provision has been put into effect by putting markets under constant surveillance and conducting market studies, which are issues that can be dealt with indirectly through investigation and advocacy read together with the core competition provisions in the CFTA. Based on the foregoing, it is possible to say that, despite being provided for in the CFTA, the monitoring function has never really been executed in the whole existence of the Commission. That is a good reason to drop it from the CFTA. Similarly, Section 44 (1) of the CFTA should not be construed as meaning that the Commission is empowered to set prices in its orders regarding restrictive business practices.

2.4 Mergers and acquisitions

Section 2 of the CFTA has defined a merger to mean:

“(a) The acquisition of a controlling interest in:

- (i) any trade involved in the production or distribution of any goods or services;
- (ii) an asset which is or may be utilized for or in connection with the production or distribution of any commodity, where the person who acquires the controlling interest already has a controlling interest in any undertaking involved in the production or distribution of the same goods or services; or

(b) The acquisition of a controlling interest in any trade whose business consists wholly or substantially in:

- (i) supplying goods or services to the person who acquires the controlling interest;
- (ii) distributing goods or services produced by the person who acquires the controlling interest.”

The term merger as defined in the CFTA definitively covers both horizontal and vertical mergers. However, it does not include joint ventures resulting in the establishment of “green field” enterprises and the general definition of merger under Section 2 (2) cannot justify the omission of a specific provision to cover such mergers. The underlying principle is that such joint ventures and strategic alliances have the same effect as pure mergers and should therefore be examined for possible anti-competitive effects.

The omission of joint ventures in the definition of mergers should also be rectified for the improvement of competition policy enforcement on mergers and acquisitions in Malawi.

From the enactment of the CFTA in 1998 and the inception of the operations of the Commission in 2013, the CFTA has included a voluntary notification, whereby parties are not prevented from closing a merger deal and implementing the transaction in advance of having applied for and received merger clearance from the Commission.

Section 35 (1) of the CFTA has provided for control of mergers to the effect that:

“Any person who, in the absence of authority from the CFTA whether as a principal or agent and whether by himself or his agent, participates in effecting:

- (a) a merger between two or more independent enterprises;
- (b) a takeover of one or more such enterprises by another enterprise, or by a person who control[s] another such enterprise,

where such a merger or takeover is likely to result in substantial lessening of competition in any market shall be guilty of an offence.”

Despite the voluntary notification regime, anti-competitive mergers are prohibited if they are likely to result in a substantial lessening of competition.

In the text of the CFTA, a substantial lessening of competition has not been defined but Section 38 (1) (a) attempts to define it by setting out the criteria for evaluating applications for authorization of mergers which may be construed to define a substantial lessening of competition.

Those criteria are such that “a merger or takeover shall be regarded as disadvantageous to the extent that it is likely to reduce competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices, output, and sales”.

Section 38 (1) (b) of the CFTA provides that “a merger or takeover shall be regarded as advantageous to Malawi to the extent that it is likely to result in: (i) a substantially more efficient unit with lower production or distribution costs; (ii) an increase in net exports; (iii) an increase in employment; (iv) lower prices to consumers; (v) an acceleration in the rate of economic development; (vi) a more rapid rate of technological advancement by enterprises in Malawi”.

Section 38 (2) of the CFTA provides that “the Commission shall not authorize a merger or takeover unless on balance the advantages to Malawi outweigh the disadvantages”.

The foregoing is considered a prohibition of a merger and so it may be correct to say that in Malawi a merger is prohibited if it substantially lessens competition and/or if on balance the merger results in advantages to Malawi that outweigh the disadvantages to Malawi. This is a shortcoming that should be rectified, preferably by following the route of a substantial lessening of competition for an improvement in competition policy enforcement on mergers and acquisitions in Malawi.

Section 38 of the CFTA may be considered as covering the definition and mechanics for a clear operationalization of a substantial lessening of competition. However, there is still a need for more clarity, namely more certain provision as to what constitutes a breach of merger control requirements, especially considering that where such a merger or takeover is likely to result in substantial lessening of competition in any market, the actors will be guilty of an offence as provided under Section 35 (1) of the CFTA. Such clarity would make the law consistent with the legal principle of *nulla poena sine lege certa* which states that there is to be no penalty without well-defined law.

The principle of *nulla poena sine lege certa* requires that a penal statute must define the punishable conduct and the penalty with sufficient precision to allow citizens to foresee when a specific action would be punishable and to conduct themselves accordingly. The principle expresses the general principle of legal certainty in matters of criminal law such as in the CFTA. It is recognized or codified in many national jurisdictions.¹⁷

In practice, most merger control regimes are based on a similar underlying principle of prohibiting the creation or strengthening of a dominant position which would result in either substantial lessening of effective competition or in a significant impediment to effective competition in a particular market. The merger test is usually crafted to prohibit those mergers that either create or strengthen a position of dominance in a relevant market.

It follows under Section 35 (2) of the CFTA that no merger or takeover made in contravention to Section 35 (1) of the CFTA, as explained above, shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.

According to the interviews carried out with key informants, the Commission has dealt with a few ex post mergers that were undertaken, only to be found to have adverse effects on competition. It was also reported that the only remedy that the Commission has so far exercised is the imposition of ex post conditions to those transactions in a bid to undo the adverse effects identified. In the light of the nugatory status of mergers or takeovers which contravene the provisions of Section 35 (1) of the CFTA, proclaimed in Section 35 (2), it is reasonable to wonder how the Commission can actually deal with what is by default bad in law and how such decisions (imposing ex post conditions) can be in good standing under the law.

A reading of sections 36 and 39 of the CFTA suggests that any person may apply to the Commission for an order authorizing him or her to effect a merger or takeover. Under Section 39, the Commission shall, within 45 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

¹⁷ See Klip André, *Substantive Criminal Law of the European Union* (Apeldoorn, Netherlands, Maklu Publishing, 2011).

order to approve or reject the application, or approve it on certain conditions, and publish that order in the *Gazette* not later than 14 days after the decision is taken.

An assessment of the foregoing provisions shows that the CFTA does not provide for a binding statutory requirement and a deadline for ex ante notification of the public concerning an application for authorization for a merger of which, under the CFTA, it is mandatory for the public to be informed once it has been decided. Such an omission may cause undue difficulties for members of the public who would have their interests considered in the course of a review of an application under Section 38 of the CFTA.

The shortcomings in the CFTA means that such members are left with only one chance of redress through making an appeal under Section 48 of the CFTA. An appeal is technically more litigious and its pursuit more resource-intensive for the public compared to an ex ante petition which can be submitted to the CFTA in a friendlier manner (non-legal).

With regard to the 45 days allowed for clearance of merger authorizations, the experience of peers in the region suggests that it is relatively short. In the United Republic of Tanzania, for example, under Section 11 a full circle of merger examination can take 134 days, split into sessions of 14 days, 90 days and 30 days.

The 45-day provision may put the Commission in a situation where it is regarded as causing long delays to the notifying parties. The parties to a merger have a legitimate interest to have the merger control procedure last the shortest time possible. According to the Commission staff interviewed, in practice the 45 days have been construed as “working days” meaning elapsed time of approximately 90 days. That interpretation is contrary to the provision of the text, which clearly reads 45 days. The Commission should consider extending the number of days from the current 45 to a level that can be deemed reasonable based on their experience so far and that of their peers, including the COMESA Competition Commission, which have long-standing experience of such business.

The CFTA does not provide for exemptions for mergers, a provision that allows for a prohibited merger to proceed, albeit for a specified duration (usually not more than one year), in the event that it is established that benefits accruing from implementing

such a merger outweigh the disadvantages. That is a serious omission that the Commission should consider including in its amendments in future.

The discussion set out above presents shortcoming that should be rectified for the improvement of competition policy enforcement on mergers and acquisitions in Malawi.

In sections 26 and 27, the CFTA provides for the imposition of a levy to be appropriated for the general operations of the Commission. That provision can be construed as allowing for the collection of fees for the assessment of mergers by the Commission, as provided for in regulation 11 of the Competition and Fair Trading Regulations, read together with its fourth schedule. In addition, guideline 6.16 of the merger assessment guidelines of 2015 provides that:

“An application for merger authorization has to be accompanied by the latest audited financial accounts and a payment of notification fees. The notification fee is 0.05% of combined turnover or total assets, whichever is the higher, of the enterprises proposing to effect the merger or takeover. The Commission does not consider an application complete until a payment of notification fees is received and all the necessary information is submitted. For negative clearance, the fee is MK 700,000.”

It is observed that the merger assessment guidelines do not have legal effect (as is the case for all other guidelines of the Commission) and are thus not binding on the purported subjects. Irrespective of the non-binding nature of the guidelines, there is a restraining feature in that no consideration of a merger shall be done without payment of the fees, which should be codified in the Competition and Fair Trading Regulations at a minimum.

Further, guideline 6.16 on the payment of a merger notification fee, currently 0.05 per cent of the combined annual turnover or the combined value of assets of the merging parties (not restricted to Malawi), means, if interpreted literally, that the Commission may consider global turnover in the case of a merging entity with global operations.

That may place the Commission at risk of being subject to the grievances of stakeholders, based on the manner in which the notification fee is calculated, particularly in relation to holding companies, which may

involve the assets or turnover of unrelated businesses and thus attract exorbitant fees. That may also result in a proposed transaction being inconveniently restructured to avoid the fee. That can be rectified by introducing bands for assets or turnover, whether or not attracting a fixed percentage, but with ceilings to avoid exorbitant fees.

Furthermore, Section 36 of the CFTA appears to be all-encompassing, as it does not clearly set out which of the merging parties (acquiring or target firms) is responsible for notifying the Commission of the intended merger. Although this is a minor omission, its rectification may sharpen the provision and lead to better compliance with the CFTA.

Because the notification regime is voluntary, failure to notify a notifiable merger is not an offence. Clearly missing are provisions for the unwinding or revocation of a merger. In the event of a merger that is ex post found to be in breach of the prohibition test and the effects thereof cannot be fixed by any conditions, there is no remedy provided in the CFTA by way of revocation or unwinding of such merger.

Despite the experience of imposing merger conditions ex post for those transactions found to be in breach of the CFTA, there are no provisions for a procedure to handle a breach of merger conditions as may fall under Section 39 (2) of the CFTA.

There is no provision for sanctioning such breach in the CFTA. Section 40 inconclusively attempts to provide for this by allowing for the registration of CFTA orders for enforcement purposes and a penalty for failure to comply with such orders.

The penalties associated with a breach of the merger provisions (giving effect to a prohibited merger, giving effect to a merger before authorization and/or the failure to honour the conditions imposed on a merger), as provided in Section 51 of the CFTA, could be seen as so low that the deterrent effect is lost.

Increasing the penalties should be considered, particularly in relation to the gravity of the offences, by imposing a penalty of up to 10 per cent of either or both of the annual turnover in Malawi of the merging parties. The lower limit should be a reasonable amount above zero so as to avoid giving too much room for the exercise of greater discretion by the Commission than prudence would demand. These anomalies need to be addressed.

2.5 Consumer protection/unfair trading

Consumer protection laws are designed to ensure the existence of fair competition and the free flow of truthful information in the marketplace. They are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable to take care of themselves. It is a law that regulates private relationships between individual consumers and businesses that sell those goods and services.

The preamble of the CFTA provides that it is:

“An Act to encourage competition in the economy by prohibiting anti-competitive trade practices; to establish the Competition and Fair Trading Commission; to regulate and monitor monopolies and concentrations of economic power; to protect consumer welfare; to strengthen the efficiency of production and distribution of goods and services; to secure the best possible conditions for the freedom of trade; to facilitate the expansion of the base of entrepreneurship and to provide for matters incidental thereto or connected therewith.”.

There is a specific mention of consumer protection in the preamble, which chimes well with the accepted view that the ultimate objective of competition law and policy is the promotion and protection of consumer welfare through control of anti-competitive practices. It may also be construed that the consumer-related provisions in the CFTA could be considered as incidental to competition.

Consumer protection covers a wide range of topics, including but not necessarily limited to product liability, privacy rights, unfair business practices, fraud, misrepresentation and other consumer/business interactions. Consumer protection laws are therefore a form of government instrument aimed at protecting the universally accepted consumer rights derived from the general principles in the United Nations Guidelines for Consumer Protection.

The CFTA does not have a specific Section devoted to consumer protection. It does however have section 43 on unfair trading relating to consumer welfare and protection, which states that:

“(1) A person shall not, in relation to a consumer:

- (a) withhold or destroy producer or consumer goods, or render unserviceable or destroy the means of production and distribution of such goods, whether directly or indirectly, with the aim of bringing about a price increase;
- (b) exclude liability for defective goods;
- (c) in connection with the supply of goods or services, make any warranty–
 - (i) limited to a particular geographic area or sales point;
 - (ii) falsely representing that products are of a particular style, model or origin;
 - (iii) falsely representing that the goods are new or of specified age; or
 - (iv) representing that products or services have any sponsorship, approval, performance and quality characteristics, components, materials, accessories, uses or benefits which they do not have;
- (d) engage in conduct that is likely to mislead the public as to the nature, price, availability, characteristics, suitability for a given purpose, quantity or quality of any products or service;
- (e) supply any product which is likely to cause injury to health or physical harm to consumers, when properly used, or which does not comply with a consumer safety standard which has been prescribed under any written law;

- (f) claim payment for unsolicited goods or services;
- (g) engage in unconscionable conduct in carrying out trade in goods or services;
- (h) engage in pyramid selling of goods and services;
- (i) engage in bait selling;
- (j) offer gifts or prizes with no intention of supplying them; and
- (k) put out an advertisement which is misleading or deceptive.

(2) Any person who contravenes the provisions of subSection (1) commits an offence.”

The provisions related to consumer protection can be clustered into the following thematic areas as follows:

- (a) Misleading advertising;
- (b) False bargains;
- (c) Deceptive and unconscionable conducts of suppliers;
- (d) Supply of harmful products/product safety.

Notwithstanding the undisputed existence of the Consumer Protection Act, there also exists a bill on a new consumer protection act, 2016, which seeks to amend the 2003 Consumer Protection Act, which has never been finally adopted. On 30 October 2020, the Government initiated a project on the theme of “Enhancement of competition and consumer protection regulation” through the Ministry of Trade. The project is expected to bring about major institutional and legislative reform of the competition and consumer protection laws in Malawi.

3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

3.1 Competition policy institutions

The Competition and Fair Trading Commission is established under Section 4 of the CFTA, as a body corporate with perpetual succession and a common seal capable of suing and being sued in its corporate name and with the power, subject to the Act, to do or perform all such actions as a body corporate may by law do or perform. Section 5 of the CFTA provides that the Commission shall be constituted by 10 members nominated by the Minister and appointed by the President based on their ability and experience in industry, commerce or administration, or their professional qualifications or their suitability otherwise for appointment. They are specified as:

- (a) two persons representing business interests;
- (b) a lawyer;
- (c) an economist;
- (d) an accountant; and
- (e) two persons representing consumer interests.

And ex officio members:

- (f) the Secretary to the Treasury or his representative;
- (g) the Secretary for Commerce and Industry or his representative; and
- (h) the General Manager of the Malawi Bureau of Standards or his representative.

Section 5 (2), (3), (4), (5) and (6) of the CFTA sets out various conditions relating to the functioning of the Commission, including the appointment of the Chair, designation of the three ex officio members, gazetting of any change of membership etc. Section 6 of the CFTA provides that the members, other than the three ex officio members, serve for a period of three years and are eligible for appointment for another three years. Section 7 provides that members of the Commission shall be paid an allowance that the Minister will determine.

As can be seen above, the CFTA does not provide for the process preceding the nomination and eventual

appointment of the seven members (other than the three ex officio members). Furthermore, the CFTA does not expressly set out where the powers to fire/remove a member of the Commission lie or how the related process would work.

The appointment for a duration of three years is generally deemed too short for a part-time Commissioner to master the subject and be able to serve in the manner that is expected. Adding to this shortcoming is the fact there is no competitive selection process for the appointment of Commissioners to at least ensure that they have an interest in serving as Commissioners and have the requisite knowledge to make decisions from the time they are appointed. The other shortcoming of Section 6 of the CFTA is the indirect silence on staggering the membership of the Commissioners, based on the short duration noted above. The experience of peers elsewhere in the region includes a scenario whereby the conduct of up to three Commissioners (non-participatory presence and/or absenteeism) was directly related to the fact that they had no interest in serving as Commissioners in the competition authority concerned.

It is also observed that the three ex officio members are not bound by the three-year tenure limit and that they can be changed by the appointment machinery of the Minister and the President in a manner that is not prescribed. Given the quasi-judicial nature of the Commission in relation to competition and the fact that there is due process to be observed, should the provision be abused by frequently changing the designated members, it may pose a dilemma for some cases based on “right to be heard” requirements, in the event of such a member being changed midway through the hearing of a lengthy competition case.

The Chair is elected from among its members by the Commission and the process or procedure to be followed could vary from time to time as it is not prescribed by the CFTA. Literal interpretation of section 7 of the CFTA suggests that it is the members (up to 10) who appoint the Chair. Given that all 7 non-ex officio members are appointed by the President, having been nominated by the Minister, the ideal

situation would be for the Chair to have more powers than the other members and the conditions for his or her election should be clearly set out in the CFTA.

Without prejudice to the status quo, the ideal situation would be for the Minister to appoint the Commissioners, following an independent competitive process that would produce a list of qualified candidates for appointment. The President may be left to appoint the Chair, following an equally independent competitive process that would produce a list of qualified candidates for appointment. However, the power to remove members should be vested in the President alone.

Such a process would not diminish the ministerial powers of appointment but would ensure more transparency and the recruitment of suitable persons as Commissioners than under the current system. The initial term should also be increased to between five and seven years, staggered among the members, to ensure that institutional memory is statutorily sustained and carried over to successive Commissioners. The power to remove members should also have been statutorily provided for to ensure more versatility in decision-making.

Section 14 of the CFTA provides for establishment of committees. It states:

- “(1) The Commission may, for the purpose of performing its functions under this Act, establish committees and delegate to any such committee such of its functions as it considers necessary.
- (2) The Commission may appoint as members of a committee established under subsection (1) persons who are or are not members of the Commission and such persons shall hold office for such period as the Commission may determine.
- (3) Subject to any specific or general direction of the Commission, a committee established under subsection (1) may regulate its own procedure.”

This provision provides the means to ensure that the functions of the Commission are carried out with ease and smoothness. However, there remains no provision for delegating functions, such as those for adjudication of competition matters, including anti-competitive agreements, misuse of market power

and the regulation of mergers. That is provided for in Section 74 of the Fair Competition Act in the United Republic of Tanzania, which states:

- “(1) The Commission may delegate to a member of the Commission, either generally or otherwise as provided by the instrument of delegation, any of its powers other than:
 - (a) duties to make decisions under Part II of the Act;
 - (b) his power of delegation itself, and
 - (c) the powers to revoke or vary delegation.
- (2) A delegated power shall be exercised in accordance with the instrument of delegation.
- (3) A delegation may be revoked or varied at will and shall not prevent the exercise of a power by the Commission.”

For clarity, part II of the Fair Competition Act in the United Republic of Tanzania provides for anti-competitive agreements, misuse of market power and regulation of mergers.

It follows therefore, under the provision of Section 14 of the CFTA that the Commission is entitled to delegate its functions without limitation (including its duties to make decisions concerning anti-competitive agreements, misuse of market power and the regulation of mergers) to persons who are not members of the Commission. That situation requires urgent rectification.

3.1.1 Powers and decisions of the Competition and Fair Trading Commission

The independence of decision-making of the Commission is set out under Section 4 of the CFTA to the effect that it is a body corporate capable of suing and being sued in its corporate name, and with the power, subject to the CFTA, to do or perform all such acts and things as a body corporate may by law do or perform. The Commission is to be treated not as part of the Ministry as it has its own legal personality, that of a body corporate. As a body corporate, the Commission, unless otherwise provided, can be a party in civil proceedings arising from its administrative functions or as an employer.

Given the quasi-judicial functions of the Commission, it is not clear whether it can be sued “as a body corporate” during the adjudication of competition cases. Under Section 48, the CFTA provides for an appeal route for the findings of the Commission. The status of Commission at the appellate level is not provided for in the CFTA but at the very minimum it should be that of a necessary party in an appeal case. Clarity in the CFTA on the status of the Commission at the appeals level is necessary to create certainty and predictability as to what to expect in proceedings at the High Court.

Under Section 8 (2) (a) and (b) of the CFTA, the Commission can investigate competition matters. Under sections 9 and 10 of the CFTA, it is entitled to collection information, summon and examine witnesses and administer oaths to witnesses, and under Section 11, it can conduct hearings (in public or in private) to complement the investigation process.

There is no express provision for the CFTA to determine cases other than for mergers in which decisions by way of orders are contemplated under sections 39 and 8 (2) (c) of the CFTA, whereby the Commission can take such action as it considers necessary or expedient to prevent or redress the creation of a merger or the abuse of a dominant position by an enterprise. Nevertheless, decisions of the Commission are expressly contemplated under Section 48 of the CFTA on appeals against findings of the Commission. Such an express provision for all competition matters, including the agreements currently completely omitted, needs to be made.

On the face of it, Section 4 of the CFTA can be construed as providing that in the lawful exercise of its functions, the Commission shall not be subject to the direction or control of any other person or authority. That can be taken to bestow statutory independence, particularly in decision-making, but that independence is silently withdrawn under Section 12, which states:

- “(1) The Commission may, where necessary, seek the general direction of the Minister as to the manner in which it is to carry out its duties under this part of the Act.
- (2) Any direction given by the Minister under subSection (1) shall be in writing and published by the Commission in the Gazette.”

The corollary of Section 12 is that the Minister may give the Commission general directions (not necessarily related to policy) as to how it is to carry out its duties under this part of the CFTA.

Ironically, the extent of those general directions has not been defined and in the general context within which they are mentioned, they pose a huge potential for interference with the independence rather faintly contemplated under Section 4 (1) of the CFTA, especially considering the manner in which the Minister is supposed to act in giving such policy directions as provided under Section 11 (2) of the CFTA, namely that they shall be in writing and published by the Commission in the *Gazette*, meaning they have a legally binding effect on the Commission.

Those are anomalies that need to be looked into as a matter of priority, as some go to the root of the existence of the Commission and the properness of its constitution and conduct of its proceedings, which may in turn have consequential bearings on the decisions taken by the Commissioners.

3.2 Separation of investigative and adjudicative powers

In Malawi, as in Botswana, the United Republic of Tanzania and Zimbabwe, the issue of separation of investigative and adjudicative powers has also not been addressed. Since it is a common occurrence, especially in Commonwealth/adversarial jurisdictions, the present review has found it worth tackling in the Malawian context.

The genesis of such controversy has always lain in the fact that the Commission is vested with powers to investigate, prosecute and determine matters that fall with its jurisdiction, as set out in Section 8 of the CFTA. In the Malawian justice system, which is based on Commonwealth practice, those functions are supposed to be separated so as to conform to the principles of natural justice. The temptation has always been to compare an establishment such as the Commission to the courts of law, hence the controversy.

The Commission has been in existence for over 10 years, during which there have been neither a legal challenge nor a complaint levelled against it while carrying out its functions in the manner prescribed above. As such, none of the stakeholders interviewed for the present report raised the issue, but it is of

concern to the staff of the Commission that although it has not yet been challenged, it may only be a matter of time before it is challenged in a court of law.

In addressing the issue of separation of powers, the two systems compared below indicate the diversity in ways and means of dispensation of justice that are applied in different jurisdictions.

3.2.1 Adversarial system

The adversarial system is one whereby the parties to a controversy develop and present their arguments, gather and submit evidence, call and question witnesses and, within the confines of certain rules, control the process. The fact finder, usually a judge or jury, remains neutral and passive throughout the proceeding.

3.2.2 Inquisitorial system

The inquisitorial system is a one in which a judge endeavours to discover facts while simultaneously representing the interests of the State. It was formerly a tribunal for suppressing heresy and is also known as an accusatorial procedure. It is commonly applied in jurisdictions in continental Europe.

3.2.3 Comparative analysis of the adversarial system and inquisitorial systems

Under the adversarial system, two or more opposing parties gather evidence and present the evidence and their arguments to a judge or jury. The judge or jury knows nothing of the litigation until the parties present their cases. The defendant in a criminal trial is not required to testify.

Under the inquisitorial system, the presiding judge is not a passive recipient of information. Rather, the presiding judge is primarily responsible for supervising the gathering of the evidence necessary to resolve the case. The judge actively steers the search for evidence and questions the witnesses, including the respondent or defendant. Attorneys play a more passive role, suggesting routes of inquiry for the presiding judge and following the judge's questioning with questioning of their own. Attorney questioning is often brief because the judge tries to ask all the relevant questions.

The goal of both systems is to find the truth. The adversarial system seeks the truth by pitting the parties against each other in the hope that competition

will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute.

As an administrative agency, the Commission is established to administer the CFTA with a view to promoting compliance. According to the definition, compliance means an act or process of complying with official requirements and recommendations, or is a state of being in accordance with established guidelines, specifications or legislation, or the process of becoming so.¹⁸ Compliance is usually complemented by enforcement, which refers to the act or process of compelling compliance with a law, mandate, command, decree or agreement. It also refers to giving force or effect to a law or compelling its obedience.¹⁹ Under this process, the Commission is statutorily empowered to investigate and determine a matter while ensuring that compliance is achieved.

It is therefore sound to say that law enforcement broadly refers to any system by which some members of society act in an organized manner to promote adherence to the law by discovering and punishing persons who violate the rules and norms governing that society.

The preamble and sections 4, 5, 6, 8, 26, 27 and 28 of the CFTA effectively state that the Commission is a regulatory body established to administer the CFTA, to encourage and promote competition and enforce compliance with the CFTA. It is a body corporate with powers to investigate complaints and as part of an investigation can hear interested parties and make decisions with the objective of promoting and enforcing compliance with the CFTA.

The reason for establishing the Commission was to have a regulatory body to provide for the monitoring of trade agreements, prevention and control of misuse of market power (restrictive practices), the regulation of mergers, the prevention, control and monitoring of concentration of economic power by enterprises and the prohibition of unfair trade practices (consumer protection) in the Malawian economy. All that boils down to the promotion and maintenance of competition through enforcing compliance with the CFTA in all sectors of the economy and that while doing so, the

¹⁸ See <http://searchdatamanagement.techtarget.com/definition/compliance>.

¹⁹ Ibid.

Commission may inquire into matters falling under the CFTA. It is apparent that the enforcement power of the Commission extends only so far as contravention of CFTA is concerned and not beyond.

Unlike the courts of law in Malawi, given its functions the Commission may investigate complaints and other impediments to competition, the appointment of its members and the power to initiate complaints and enforce compliance with the CFTA.

The Commission should therefore not be compared to a court of law.²⁰ Unlike a court, whenever the Commission conducts an investigation or a hearing of a complaint leading to a decision, it does so in its capacity as a regulator and in pursuance of its functions of administering and enforcing compliance with the CFTA.

The practice at the Commission is more inclined to an inquisitorial system, given that it has a competition division with powers to investigate complaints and that during the hearing of a complaint, it accords the offender an opportunity to make his case heard. The hearing is part of the investigation procedure that follows the completion of the preliminary investigation. This means that, unlike in a court trial, the Commission continues its investigation right up to the hearing. The corollary is that the hearing itself is simply a part of the investigation procedure.

In establishing administrative agencies, the parliament passes enabling legislation specifying the purpose, name, functions and powers of the agency (preamble and sections 1, 8 and 10 of the CFTA). It further describes the procedures of the agency for handling the issues submitted to it (sections 36, 37 and 38 of the CFTA and the Competition and Fair Trading Regulations, 2006) and provides for judicial review of the Commission (Section 48 of the CFTA). It is under the enabling legislation (the CFTA) that the rule-making power of the agency is described (Section 53 of the CFTA). Generally, the Commission lacks the power to act beyond the scope of its enabling legislation (doctrine of *ultra vires*). The CFTA is unlikely to bring up any issues that relate to a breach of natural justice insofar as separation of powers is concerned and takes account of the principle of natural justice, as explained above. To avert fear and speculation,

²⁰ The transfer of orders of the Commission provided in sect. 40 of the CFTA is for enforcement purposes only and it should not be construed to mean that the CFTC is equivalent to a High Court.

the Commission may provide information that it will adopt an inquisitorial approach in its case-handling procedure, so as to sharpen its differentiation from what is commonly understood as adversarial practice.

Without affecting the findings above, the investigatory and adjudicative functions of the Commission are attributed to different organs, namely the secretariat established under sections 19, 20 and 21 of the CFTA and the Commission itself established under sections 4, 5 and 6 of the CFTA. Thus it is possible to assert that a certain separation of powers exists in this respect.

Should there be a need for an adversarial practice that observes a strict separation of investigative and adjudicative functions, then the best institutional arrangement would be to establish three distinct institutions: one for investigation, one for adjudication and another for appeals, as is the case in South Africa. However, this would be costly to the Malawian economy and difficult to achieve, given the low level of competition practice currently observed.

3.3 Sanctions

Enforcement of compliance is usually criminal in nature. The CFTA in sections 24, 33, 34, 35, 41, 43, 47, 50 and 51 provides that any person who contravenes the relevant Section or subSection mentioned will be guilty of an offence and liable to a fine of a specified sum of Malawian kwacha or to imprisonment for a specified period of years. Competition violations are hence criminal in their nature, the only difference with penal sanctions being that the accused in competition cases is often a legal person, i.e., an enterprise and not a natural person.

The CFTA does not categorically provide for the procedure to be followed when a person is to be committed to prison. Responses from the stakeholders interviewed show that no one has been imprisoned for infraction of the CFTA, hence there is no experience of implementing these provisions.

That offences are created and sanctions levied in the same provision is good, as it reduces the inconvenience of going back and forth to match an offence with penalties, as provided in the competition laws of other jurisdictions. However, there are provisions, such as sections 33, 35 and 41 of the CFTA, for which sanctions (fines and/or imprisonment) are provided

under Section 51. That needs to be rectified for the sake of both consistence and convenience.

There is a possibility for a mismatch of the gravity of offences between competition and other offences that may make the CFTA less of a deterrent than is supposed. The minimum penalty (fine) is MK500,000, (about US\$640), which is comparatively low compared to the harm caused by offences such as cartels.

On the other hand, the penalty could go to a maximum of an amount equivalent to the financial gain generated by the offence, if such amount be greater, and to imprisonment for five years as provided under Section 51 of the CFTA. Section 50 also provides for a fine to be calculated based on the financial gain, which may be higher than MK500,000. Establishing the amount generated by the offence can be an onerous task, let alone providing legal proof under litigious circumstance. Equally difficult is operationalizing the sentence to imprisonment for five years, for which no procedure has been set out.

The same defects are observed regarding sanctions on the failure to comply with investigations of the Commission, as provided under Section 46 (2) of the CFTA, for which a convicted person is liable to a fine of MK10,000 or imprisonment for two years.

The ideal situation would be for CFTA to link sanctions for offences against the CFTA to the turnover of the guilty party, to ensure that offences are accorded commensurate penalties. That would not only ensure deterrence, but also bring about consistency because under regulation 11, read together with the fourth schedule, of the Competition and Fair Trading Regulations, notification fees are already pegged at 0.05 per cent of the combined annual turnover or combined value of assets of the merging parties.

3.4 Enforcement of the Competition and Fair Trading Act (role of the courts)

Section 40 of the CFTA provides for enforcement of the orders of the Commission by the High Court. It is sparing in its provisions for a procedure for the transfer of orders of the Commission to the respective courts for enforcement. It states:

“(1) The Commission or any person in whose favour or for whose benefit an order has been

made may lodge a copy of the order, certified by the Commission or a person authorized by the Commission, with the Registrar of the High Court and the Registrar shall forthwith record the order as a judgment of the High Court.

(2) An order that has been recorded under subSection (1) shall, for the purposes of enforcement, have the effect of a civil judgment of the High Court.”

Experience from peers elsewhere within the region has shown that, beyond registration by the Registrar of the High Court, judges have expressed hesitancy in executing a similar provision because it is improper to deal with an order not made by either the court hierarchy or the judge himself. Malawi has yet to face such a challenge but should be mindful of the experience of others.

The High Court in Malawi is also the appellate body for the decisions of the Commission. Section 48 of the CFTA states:

“(1) 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.

(2) The judge in chambers may:

- (a) confirm, modify, or reverse the findings of the Commission or any part thereof; or
- (b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

(3) In giving any direction under this section, the Judge shall:

- (a) advise the Commission of his reasons for doing so; and
- (b) give to the Commission such directions as he thinks fit concerning the reconsideration of the matter by the Commission.

(4) In reconsideration of the matter, the Commission shall have regard to the judge's reasons for giving a direction.”

It is the High Court that presides over appeals emanating from the decisions of the Commission. According to the provision, the High Court gives

mandatory direction to the effect that the Commission shall have regard to the judge's reasons for giving such direction.

Further, the CFTA does not expressly acknowledge the inherent judicial review powers of the High Court. Those powers, no matter how inherent, exist and could have similar effects as those provisioned in appeals, as demonstrated above. The foregoing thus raises a possibility of parallel appeals to the High Court and a judicial review of the High Court, which may lead to serious conflicts in practice if the two approaches of appeals and judicial review use different standards of review and come to divergent results.

There have been cases emanating from the decisions of the Commission lodged at the High Court by way of both appeal and judicial review.

Table 1 List of appeals against the Competition and Fair Trading Commission at the High Court in Malawi

No.	Case	Where handled	Outcome
1	<i>Zain Malawi/Bharti Airtel v. CFTC</i> (2013) (Takeover)	Lilongwe	Concluded in favour of the Commission
2	<i>Airtel Malawi v. CFTC</i> (exclusive dealing) 2014	Blantyre	Concluded in favour of the Commission
3	<i>Bowler Beverages Malawi Limited v. CFTC</i> (2016)	Lilongwe	Settled out of court by the parties by mutual consent
4	<i>NBS Bank v. CFTC</i> (2014)	Zomba	Concluded in favour of the Commission
5	<i>Alliance Media v. CFTC and Lilongwe City Council</i> (2016)	Lilongwe	Concluded in favour of the Commission
6	<i>Ilovo Sugar Malawi Limited v. CFTC</i>	Lilongwe	Still in court
7	<i>MASM v. CFTC</i> (2017)	Blantyre	Settled out of court by the parties by mutual consent
8	<i>Mustard Ltd v. CFTC</i>	Blantyre	Still in court
9	<i>Clearing and Forwarding Agents Association of Malawi v. CFTC</i>	Blantyre	Settled out of court by the parties by mutual consent
10	<i>Maula Pharmacy v. CFTC</i>	Lilongwe	Still in court
11	<i>Excel Pharmacy v. CFTC</i>	Blantyre	Still in court

Source: CFTC

In terms of appeals at the High Court, the Commission has won four cases (36.3 percent), settled 3 (27.4 per cent) and has 4 cases still ongoing in the courts. In terms of performance, the Commission has not lost any cases, indicating a good track record so far.

There have also been two cases that were further appealed (secondary appeal) to the Supreme Court of Malawi. This demonstrates that the entire enforcement machinery for competition has been put to the test, namely the Commission, the High Court and the Supreme Court in Malawi.

The Commission has also experienced two judicial reviews at the High Court. One case was that of the *State v. the Registrar of Financial Institutions and the Competition and Fair Trading Commission (ex parte)*, the other was the *State v. Mulli Brothers Limited and Associated Companies and the Competition and Fair Trading Commission*.

Given the nascent nature of competition culture, the lack of formal competition training in curricula and the limited competition jurisprudence in Malawi, it can be concluded that it will be difficult to acquire a competent skillset and acumen in decision-making on competition cases. That is especially so, considering that there is a relatively dismal level of training on competition given to judges and technical staff in the judiciary. The most recent effort was undertaken by the Commission and the COMESA Competition Commission to train the judiciary on competition law, during which the Commission held two colloquiums for judges in 2014 and 2017.

The ideal situation would be to establish a specialized tribunal to handle competition and related issues, as contemplated in the 1997 competition policy for Malawi and as is the case in the United Republic of Tanzania and has been recently introduced in Zambia. To provide the tribunal with sufficient appeals, matters emanating from decisions by the authorities of the regulated sector should also be appealable at the tribunal. That might help in mobilizing sufficient political support for a stand-alone competition tribunal and defeat the argument that there is too low a number of appeals to justify such a body.

The tribunal should be manned by a full-time secretariat of technocrats, who would form the basis of decisions in terms of competition economics and law that accompany the dispensation of competition justice. Given budgetary restraints, it might be difficult to mobilize sufficient political support for a stand-alone competition tribunal for the reason given above. An alternative solution would be to limit the appeal to one jurisdiction of the High Court by creating a specialized

competition chamber to deal with such appeals and regulate the admissibility of judicial reviews at the High Court to avoid duplicating platforms that can hear appeals.

3.5 Other enforcement methods: the interface between the Competition Commission of the Common Market for Eastern and Southern Africa and the Competition and Fair Trading Commission

The COMESA Competition Commission and the Competition and Fair Trading Commission in Malawi are a supranational and a national institution respectively, dealing with the enforcement of competition according to the provisions of the legal instruments establishing the two, which have also provided for the modalities of their engagement. Their relationship and working methods are guided by a memorandum of understanding entered into by the two institutions on 4 September 2015.

The impact of the coexistence of two Commissions is significant, as on average 67 per cent of the mergers in Malawi are dealt with by the COMESA Competition Commission. That is not only a significant proportion of the whole, but most of the work done by the Competition and Fair Trading Commission on mergers is done in collaboration with the COMESA Commission. For this matter, it is important for the Competition and Fair Trading Commission to position itself to fully benefit from regional competition policy and law. To attain such benefits, according to the interviews carried out, Malawi and the Competition and Fair Trading Commission must observe the following:

- (i) Adherence to their obligations under the COMESA treaty and the COMESA competition regulations;

- (ii) Alignment of the CFTA with the COMESA competition regulations;
- (iii) Sharing of information on cross-border matters/ matters with a regional dimension;
- (iv) Participation in COMESA networks, such as those established for mergers, consumer welfare and restrictive business practices;
- (v) Enhanced cooperation between the Competition and Fair Trading Commission and the COMESA Competition Commission by implementing the provisions of the memorandum of understanding;
- (vi) Collaboration between the COMESA Competition Commission and sector regulators on cross-border matters facilitated by the Competition and Fair Trading Commission.

Further, it is observed that competition between the sector regulators in Malawi are subject to the jurisdiction of the COMESA Commission and the only way that it can reach the sectoral regulators is through the CFTA and thus the the Competition and Fair Trading Commission. The problem is that the CFTA neither recognizes the sectoral regulators, nor defines the way they should engage.

In a bid to ensure a comprehensive coverage of competition matters in Malawi that includes the sectoral regulators, the Competition and Fair Trading Commission should consider a number of actions as set out below.

3.6 International best practice in competition law enforcement

In this part, the review will cover the possible substantive elements for a competition law, commentaries and alternative approaches in existing legislations, as recommended by UNCTAD for a model competition law.

Table 2 Compatibility of the Competition and Fair Trading Act with the UNCTAD model law

UNCTAD model law provision	Provision in CFTA	Shortcomings	Recommendations
Title of the law	Section 1	–	–
Objectives or purpose of the law	Preamble	<ul style="list-style-type: none"> No stand-alone Section to provide for this important part of the law. 	<ul style="list-style-type: none"> Include a Section providing for the objectives or purpose of the law.
Definitions	Section 2	<ul style="list-style-type: none"> The language used to provide for most definitions (such as trade agreements or authorization of allowable acts) are not in concurrence with commonly used “competition language”, are used too interchangeably and are confusing. Omission of some key competition law terms, such as substantial lessening of competition or relevant market, to name but a few. 	<ul style="list-style-type: none"> Those definitions that are generally part of a substantive rule, e.g., the prohibition of restrictive practices, should be shifted from Section 2 to the part of the CFTA that contains the respective substantive provision. Clearer definitions and the use of important common competition language for terminologies should be introduced to avoid mix-ups that may start unnecessary arguments. Some provisions in the available guidelines to be adopted by the CFTA or the Competition and Fair Trading Regulations so as to gain the necessary legal effect. Guidelines should be strictly for purposes of explaining the mechanics of core competition law concepts.
Scope of applications	Sections 3 and 54	<ul style="list-style-type: none"> Economy-wide with no limitations that provide for concurrent jurisdiction with sectoral regulators. The Minister has unlimited statutory powers (legislate through the <i>Gazette</i>) to designate a business or activity that will not be bound by the Government. No exemption on the activities of the Government being bound by the CFTA. 	<ul style="list-style-type: none"> Clear separation of jurisdiction over competition issues in regulated sectors should be introduced into the CFTA. Specify activities of the Government that will not be bound by the CFTA and consider removing the Minister’s powers to gazette the exemptions.
Anti-competitive agreements	Sections 32 and 33	<ul style="list-style-type: none"> No clear line of demarcation between anti-competitive agreements, the abuse of market power and acts of unfair competition. Absence of a general prohibition of anti-competitive agreements and the abuse of a dominant position. Abuse of dominant position issues are provided for under the per se prohibition rule and under Section 33 (f) and (g), on restrictive practices. 	<ul style="list-style-type: none"> Introduce a general prohibition of anti-competitive agreements and concerted practices, followed by a non-exhaustive list of examples. Clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason. Ensure no mix of specific types of anti-competitive agreements with acts of misuse of market power or unfair competition.
Acts or behaviours constituting an abuse of dominant position of market power	Section 41	<ul style="list-style-type: none"> The law has indirectly dealt with the rule of reason referring to restrictive practices related to agreements, as defined in sections 32 and 44 of the CFTA. 	<ul style="list-style-type: none"> Introduce a general prohibition of the abuse of a dominant position, followed by a non-exhaustive list of examples. The language to be used in defining dominance should be consistent with common competition language that is easily understood by users. To be discussed whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced.

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UNCTAD model law provision	Provision in CFTA	Shortcomings	Recommendations
Notification, investigation, and control of mergers.	Sections 35, 36, 37, 38 and 39	<ul style="list-style-type: none"> Investigation procedures, in particular timelines, although specified, are considered too short at 45 days. Joint ventures not captured by the definition of a merger. 	<ul style="list-style-type: none"> Include a reasonable binding time frame for review of mergers. Include the establishment of a full-function joint venture in the definition of mergers. Consider introducing a mandatory and binding requirement for notification of notifiable mergers. Consider introducing thresholds for notifiable mergers.
Authorization of or exemption from agreements	Sections 3 and 44	<ul style="list-style-type: none"> Investigation procedures, in particular timelines, although specified are considered too short at 45 days. 	<ul style="list-style-type: none"> Include a reasonable binding time frame for the review of agreements.
Some possible aspects of consumer protection	Section 43	<ul style="list-style-type: none"> There is no clear provision that mandates CFTC to be the implementing institution for consumer protection. Section 43 provides for unfair trading but not consumer protection per se, hence the need for the competition bill, 2016. 	<ul style="list-style-type: none"> Based on the finding that the consumer protection bill, 2016, will seek for the Consumer Protection Act, 2003, to be administered by CFTC, should this be the case all consumer protection aspects should be incorporated in the competition law, i.e., the CFTA or its successor to avoid a scenario where there are two laws each for competition and consumer protection. That should be done in tandem with the competition amendments bill so as not to create a gap that will expose consumers to exploiters.
Investigation procedures	Sections 36, 37, 38, 39 and 40	<ul style="list-style-type: none"> Lack of express provisions on dawn raids. Lack of express provisions on leniency programmes for cartel members. Lack of express provisions on anticompetitive agreements and misuse of market power. 	<ul style="list-style-type: none"> Introduce express provisions on conducting dawn raids. Introduce express provisions on leniency programmes for cartel members.
Relationship between competition authorities and sector regulators	Sections 3 and 54	<ul style="list-style-type: none"> Notwithstanding the Government being bound by the CFTA. Not provided for specifically in the CFTA, although one regulatory authority has specific collaboration with CFTC on competition matters in its remit and another refers generally to cooperation with other relevant institutions, which could include CFTC. 	<ul style="list-style-type: none"> CFTC should acknowledge the coexistence of sectoral regulators and limit itself accordingly.
Establishment, functions and powers of the administering authority	Sections 4, 8 and 10	<ul style="list-style-type: none"> Unlimited power is vested in the Minister responsible for CFTC and the Minister of Finance; it poses a threat to either the independence or the integrity of CFTC. 	<ul style="list-style-type: none"> Minister(s) should be stripped of some powers to ensure that decisions of CFTC are independent of any ministerial directions. Sources of income of CFTC to be unambiguously consistent with issues incidental to functions and more particularly those that cannot be construed to be capable of compromising its integrity. Adopt a policy to place the competition and economic regulation institutions under one ministry so as to make coordination of policy decisions with regard to the interaction between the competition and regulatory regimes easier.

UNCTAD model law provision	Provision in CFTA	Shortcomings	Recommendations
Powers of enforcement	Sections 40, 51 and 52	<ul style="list-style-type: none"> The actual enforcement of CFTC orders is done after those orders have been registered by the Registrar of the High Court (See Section 40 (2) of the CFTA. This may create a multiplicity of procedures and cause unnecessary delays in the delivery of justice. 	<ul style="list-style-type: none"> CFTC should assume some powers of actual enforcement and state those that the courts should deal with mostly criminal sanctions, particularly imprisonment.
Sanctions and remedies (actions for damages)	Sections 51 and 52	<ul style="list-style-type: none"> Using a static figure for fines does not provided enough deterrence to offenders. Omission of some offences such as breach of a merger condition following conditional approval of a merger. 	<ul style="list-style-type: none"> Introduce into the CFTA specific sanctions to bring about deterrence to offenders. Provide for the omitted offences as identified in the CFTA.
Appeals	Section 48	<ul style="list-style-type: none"> Both appeals and judicial reviews can be exercised by the High Court with no demarcations as to which processes are preferred when. Lack of a specialized competition adjudication platform. 	<ul style="list-style-type: none"> Establishment of a specialized competition adjudication platform as contemplated in the Malawi competition policy. Provide for distinct circumstances for the High Court to handle competition-related appeals and judicial review over competition cases. Possibility of having competition cases heard by specialized judges.

Source: UNCTAD²¹

It can be seen from table 2 that the CFTA is only fully aligned with 1 out of 13 recommendations on substantive possible elements for a competition law, commentaries and alternative approaches in existing legislation, as provided by UNCTAD.

Furthermore, 24 shortcomings have been identified related to the recommendations on substantive possible elements for a competition law, commentaries and alternative approaches in existing legislation provided by UNCTAD. Twenty-eight recommendations have been put forward in the present review.

These misalignments and shortcomings are perhaps the push factors that made the Commission justifiably open to the peer review. The Commission should take into consideration the practices recommended, with a view to improving competition law and practice in Malawi.

3.7 Agency resources, caseload and priorities

3.7.1 Agency resources

Human resources

The Commission has an approved human resources base of 49 staff. It is headed by the Executive Director as the head of the secretariat, which is organized in four directorates, namely: competition, consumer affairs, legal services and corporate services. There are 11 sections and units below the directorate level. The Executive Director and the other Directors form the executive management. The heads of the 11 sections and the Executive Director form the extended management of the Commission.

The records at the Commission show that most of the current senior staff (the Directors of Competition and of Legal Services and the Executive Director) are relatively new to the organization. Among the operational staff, none has undergone competition training at university, other than a few who have undergone competition-

²¹ UNCTAD, Model law on competition, available at https://unctad.org/system/files/official-document/tdrbpconf5d7rev3_en.pdf.

related training in university degrees that included modules on industrial economics. There has not been any comprehensive in-house training of staff.

At best, members of staff and Commissioners have attended short training courses for 2–5 days abroad on issues related specifically to competition enforcement. In this area, the Commission should consider mobilizing resources and organize a tailor-made training programme aimed at addressing knowledge and skills gaps for both Commissioners and staff.

According to the staff interviewed for the present report, staff turnover at the senior level of the Commission has been high, because the officials in question chose not to renew their three-year contracts, although they were potentially renewable; otherwise staff turnover is low. Efforts to build the capacity of the Competition Directorate appear to have been fruitful, as evidenced by the presence of newly recruited staff. The challenge for the Commission is to ensure their retention to perpetuate the greatly needed institutional memory on competition.

According to information collected at the Commission and its corroboration from other stakeholders interviewed, staff members are paid salaries that are pegged at civil service scales. Within its limited resources, the Commission has attempted to provide for non-salary benefits in a bid to raise staff remuneration; nonetheless, the salaries remain generally low compared to those paid to staff of other sectoral regulators.²² It was difficult to get hold of the documents for the salary scales of the other regulators, as their release is guided by strict confidentiality rules, but according to alternative sources that the consultant could not independently verify, the average difference between the salary scales of the Commission and other regulators could be as much as 200 per cent.

There is also a significant difference between the salary scales at the Commission and other competition authorities in the region, such as in Botswana, the United Republic of Tanzania and Zambia. This scenario is highly capable of triggering staff turnover and other human resource problems, hence a prompt remedy is called for to normalize the situation.

²² Practice in other similar jurisdictions is such that salary scales at competition authorities are compared to those of the sectoral regulators and not civil service scales, which are usually low.

Information and communications technology resources

According to the staff interviewed for the present report, the Commission has a dedicated information and communications technology (ICT) department, with one member of staff dealing with ICT resource management. Currently, the ICT infrastructure is basic and does not fulfil the requirements of a case-handling institution. This situation may have been partly caused by financial constraints because of dependency on limited government funding. Nonetheless, there is a functioning website and the Commission has established its own email domain.

There is no use of ICT in the electronic documentation of proceedings, or the deposit or retrieval of archives at the Commission, a situation that may lead to avoidable delays in the implementation of its activities. There are no electronic business processes involving the lodging of documents required in dealing with competition issues, such as mergers and authorizations. The Commission currently uses a manual system. Application forms for mergers and acquisitions are submitted to the Commission and a physical file is opened. All documents are kept in a hard copy format.

The proceedings of meetings of members of the Commission, at which decisions on cases are made, are dealt with in the same way. Documentation of meetings and decisions are kept in physical files, but they are also registered with the High Court.

In regard to the case management system, the retrieval of files and decisions, the Commission still keeps a manual case management system, whereby a unique file is opened for every case investigated. All files related to cases are kept in the manual library. Any member of staff wishing to access the files submits a request to the ICT and Library Office. The Commission does not have an electronic library.

Through the assistance from the European Union mentioned above, the Commission is implementing a project to address the inadequacy of its ICT systems, services and infrastructure by implementing an effective information management system. The terms of reference focus on automation of the complaint form, all application forms and all workflows. The automation project is currently under way and is expected to be concluded in two years.

With regard to electronic business processes involving support functions, the Accounts Section uses QuickBooks for its operations. Human Resources Management and Procurement use manual systems.

Given the diverse nature of ICT requirements, there is a justifiable demand for additional full-time personnel to complement the existing competencies and skills. Additional financial resources are another limiting factor to such facilities.

Despite the progress observed, there is room for improvement on ICT usage that may lead to more efficient implementation of activities at the Commission.

Financial resources

In terms of financial resources, the Commission has limited funds for carrying out the broad mandate it has been statutorily given. Table 3 shows that government funding is the main source of income for the Commission, followed by statutory fees, with merger notification fees contributing the most. The overdependence on government funding, combined with the powers of the Minister responsible for the Commission giving unguided policy direction, poses a real potential threat to the independence of the decisions of the Commission.

On average, and notwithstanding the difference in the size of their respective economies, the Commission operates with a budget of \$1million annually, which is low compared to its counterparts in the region: the Fair Competition Commission of the United Republic of Tanzania has a budget of \$4.2 million and the Competition and Consumer Protection Commission of Zambia a budget of \$3 million.

Under Section 26 of the CFTA, the Commission receives funds from a variety of sources, including

parliamentary allocation, grants or donations and the proceeds of sales of annual progress reports, subject to the approval of the Minister of Finance, loans from any source in or outside Malawi, fees in respect of programme publications, seminars, documents, consultancy services and other services it provides.

It is of particular interest to know whether any sources inside or outside Malawi vested in or accruing to the Commission are consistent with integrity standards acceptable in terms of the CFTA. Unless carefully defined, this provision can be construed too broadly to accommodate sources inconsistent with the spirit and objectives of the CFTA. It needs therefore to be limited to issues consistent with the intentions of the CFTA so as to ensure that the integrity of the institution is and remains uncompromised by questionable sources of income.

Generally, across the globe, there is evidence that regulatory authorities in sectors such as telecommunications, energy and civil aviation have excess funds that emanate from their regulatory functions. Pursuant to Section 27 of CFTA, the Commission may, from time to time, by order published in the *Gazette*, impose a levy that will be appropriated for the general operations of the Commission. The Commission may consider exploring Section 27 of the CFTA and sourcing funds from the regulated sectors. In jurisdictions such as Turkey and the United Republic of Tanzania, the competition legislation statutorily provide that the competition authorities shall receive funds from the authorities of the regulated sectors. These would-be examples are worth emulating so as to boost the coffers of the Commission in a bid to have the competition frontier pushed forward in tandem with the regulated sectors. This re-emphasizes the need to have the relationship with the regulated sectors well defined and provided for statutorily by the laws governing competition and those of the sector regulators.

Table 3 Competition and Fair Trading Commission income distributed by source

Source	2016		2017		2018	
	Amount (US\$)	% Contribution	Amount (US\$)	% Contribution	Amount (US\$)	% Contribution
Government funding	371 619	48	668 291	88	909 140	75
Statutory fees	366 477	47	83 676	11	238 149	20
Other income	39 365	5	6 684	1	66 583	5
Total	779 478	100	758 651	100	1 215 890	100

Source: CFTC annual reports for 2016, 2017 and 2018

3.7.2 Caseload

Restrictive business practices

The Commission pointed out that the peer review would be a good way to show that it has handled some cases of restrictive business practices, as set out in table 4.

Table 4 Restrictive business practices handled between 2015 and 2018

Status of case	2015–2016	2016–2017	2017–2018
Number of cases investigated and concluded	8	21	6
Number of cases handled through advocacy	-	6	-
Number of cases dismissed at preliminary review	33	5	18
Number of cases under ongoing investigation	12	8	14
Total number of cases reported	53	40	38

Source: CFTC annual reports for 2016, 2017 and 2018

Based on the performance record of the Commission on restrictive business practices, as shown in table 4, most of the cases concluded are by way of cease-and-desist orders for compliance, on which the Commission follows up. Without prejudice to the sovereignty of the decisions of the Commission, this approach, although progressive, can be considered disproportionate to the severity of the offences (misuse of market power and anti-competitive agreements) and the harm inflicted on the markets.

There also arises an issue of concern as to why so many cases are being dropped at preliminary review, that is after having been initiated. It is observable that most of the cases that were dismissed were brought by small market players threatened by big players in the same line of business, but without nexus to the CFTA prohibitions. It has been reported that the CFTA is construed by the public as a tool for the protection of small players against big players, a notion that is not always correct. This confirms the earlier finding that the provisions in

the current wording of the CFTA on the creation of prohibitions, offences, handling of procedures and sanctioning related to restrictive business practices are inadequately understood.

Furthermore, according to the staff of the Commission who were interviewed, the Commission has not registered much progress in handling cases of either misuse of market power or trade agreements (restrictive business practices) since it became operational in 2013. While partly due to the inadequacies in the law, a lack of proper competition knowledge and skills at the Commission has contributed to the situation. Consequently, there is a need for remedial action to address the issues that impede the efficiency of the Commission.

Given the architecture of the provisions in the CFTA regarding the issues considered to be restrictive practices and the nature of the prohibitions associated with anti-competitive restrictive practices, without prejudice to the sovereignty of the Commission and its decisions, it is logical to conclude that there is a need for improvement to properly provide for restrictive practices, identify and define more precisely the offences associated with such practices and prohibit them.

Control of mergers

The mergers that the Commission has been assessing fall into two categories: local mergers notified directly to the Commission and cross-border mergers notified to the COMESA Competition Commission.

Table 5 shows the numbers of mergers handled by the Commission under the CFTA and those emanating from or having cross-border effects in Malawi but handled by the COMESA Competition Commission over the years.

Operationally, the same case officers handle restrictive practices, unfair trading practices and merger control. There is no separation of duties as to cartel, abuse of dominance and merger control cases. According to the detailed records of the Commission, as shown in table 5, between 2012 and 2020, the two commissions handled a total of 136 mergers. The trend is such that the annual average of mergers handled stands at 17 of which the COMESA Competition Commission handled an average of 13 (66.7 per cent) whereas the

Table 5 Mergers handled between 2012 and 2020

Financial year	Mergers handled by CFTC	Mergers handled by CCC	Total	% of mergers handled by CCC
2012/2013	6	0	6	0
2013/2014	2	5	7	71.4
2014/2015	5	7	12	58.3
2015/2016	4	9	13	69.2
2016/2017	3	11	14	78.6
2017/2018	4	24	28	85.7
2018/2019	2	28	30	93.3
2019/2020	6	20	26	76.9
Total	32	104	136	76.5
Annual average	4	13	17	66.7

Source: CFTC

Commission handled an average of 4 annually. Most of the local mergers (handled by the Commission) were from the banking sector. It can be seen that the number of mergers handled annually is increasing.

According to the staff of the Commission who were interviewed, the modus operandi between the Commission and the COMESA Competition Commission is such that, pursuant to article 24 of its regulations, the COMESA Competition Commission requests the Commission to assist in the collection of information and views regarding a particular merger from stakeholders in the Malawian market. It follows that the Commission assesses the merger, taking into consideration the provisions set out in sections 35 and 38 of the CFTA. Based on its findings, the Commission then recommends for or against authorization of the merger in Malawi to the COMESA Competition Commission. The COMESA Competition Commission decides on whether to allow the merger and informs the Commission accordingly.

Interview findings show that between 2012 and 2020, an average of 17 notifications were lodged either at the COMESA Competition Commission or at the Commission and most were approved unconditionally. A few were cleared conditionally

and there have been no cases where a merger has been prohibited. So far, mergers appear to be the success stories of the enforcement record of the Commission, as discussed above.

3.7.3 Priorities

The priorities for the Commission are derived from its strategic plan for the period 2015 to 2020. The strategic objectives are measured through outputs as follows:

- (i) To enhance competition advocacy and mass awareness at all times. It focuses on making the business community and consumer population aware of their rights and duties in competition and fair trading;
- (ii) To regulate and monitor markets at all times. It aims at a significant reduction in barriers to market entry and in abuse of market power in markets throughout Malawi;
- (iii) To enforce competition and fair-trading laws at all times. It targets a substantial reduction in incidences of restrictive business practices and a major increase in voluntary compliance with merger notification requirements. Further, it aims for a large reduction in incidences of anti-competitive and unfair trading practices;
- (iv) To strengthen institutional capacity at all times. It aims at competitive terms and conditions of work being put in place and always applied. Further, it aims at efficient internal administration, human resources, procurement, accounting, auditing and communication systems that are operational at all times. It also aims to achieve permanent optimal capacity in human resources, finance, equipment, infrastructure and technology.

The priorities and their corresponding outputs are well aligned to the extent that they are potentially capable of ensuring smooth operations of the Commission. The Commission will conduct a baseline study and the findings will inform the monitoring and evaluation framework.

4. LIMITS OF COMPETITION POLICY: EXEMPTIONS AND SPECIAL REGULATORY REGIMES

4.1 Economy-wide exemptions and special treatments

Section 3 (1) of the CFTA provides that it applies to all economic activities within or having an effect within Malawi but it is not construed to apply to:

- “(a) activities of employees for their own reasonable protection as employees;
- (b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;
- (c) activities of trade unions and other associations directed at advancing the terms and conditions of employment of their members;
- (d) those elements of any agreement which relate exclusively to the use, license, or assignment of rights under, or existing by virtue of, any copyright, patent or trademark;
- (e) any act done to give effect to a provision of an agreement referred to in paragraph (d);
- (f) activities expressly approved or required under a treaty or agreement to which Malawi is a party;

- (g) those activities of professional associations which relate exclusively to the development and enforcement of professional standards of competence reasonably necessary for the protection of the public; and
- (h) such business or activity as the Minister may, by notice published in the *Gazette*, specify.”

4.2 Sector-specific rules and exemptions

The CFTA does not provide for sector-specific exemptions, other than those provided in its Section 3 as quoted above. Furthermore, Section 54 provides that the CFTA shall apply to and bind the Government. It follows therefore that all sectors are bound by the CFTA with no exception.

On the face of it, that should be construed as a conscious choice that Malawi has made against the alternative of having a regime of competition with concurrent jurisdiction between the competition authority and the sectoral regulators.

Competition and other economic policy regulation institutions should be placed under one Ministry to ease decision-making and facilitate interaction between the various institutions in the course of performing their regulatory functions.

5. COMPETITION ADVOCACY

The CFTA indirectly provides for advocacy as one of the functions of the Commission in Section 8 (2) in regard to:

- (a) Providing persons engaged in business with information regarding their rights and duties under the CFTA;
- (b) Cooperating with and assisting 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; and
- (c) Advising the Minister on such matters relating to the operation of the CFTA as it thinks fit or as may be requested by the Minister.

5.1 Competition advocacy and regulatory policy (link with sector regulators)

Based on the provisions of and exemptions under Section 3 of the CFTA, the Commission is deemed to have jurisdiction over all the regulated sectors (network-based utilities) which include electricity, petroleum, water, and gas (collectively known as energy), communications, surface and marine transport and civil aviation.

Statutorily, the Commission is not barred from exercising its jurisdiction in the regulated sectors, even though the sectoral regulators are also mandated by their laws to deal with competition issues, as is the case for the telecommunications sector as discussed below.

5.1.1 Telecommunications sector

Section 6 (2) (e) of the Communications Act, 2016, provides that one of the functions of the Malawi Communications Regulatory Authority shall be to promote efficiency and competition among entities engaged in the provision of communications services or in the supply of communication equipment.

Section 55 of the Communications Act, 2016, states that:

- “(1) The Authority shall, in the performance of its functions under this Act, promote, develop

and enforce fair competition and equality of treatment among operators in any business or service relating to the communications service sector.

- (2) In the exercise of its powers under this Part, the Authority shall co-ordinate with the Competition and Fair Trading Commission established under the Competition and Fair Trading Act.”

5.1.2 Energy sector

As regards the energy sector, Section 9 (2) of the Energy Regulatory Act, 2004, states that:

“(2) In exercising its powers and functions under this Act and the Energy Laws, the Authority shall be independent of interference or direction of any other person or authority, and shall—

- (a) promote the interests of consumers of energy with respect to energy prices and charges and the continuity and quality of energy supply;
- (b) monitor the efficiency and performance of energy undertakings, having regard to the purposes for which they were established;
- (c) in conjunction with other relevant agencies, monitor the levels and structures of competition within the energy sector in order that competition in and accessibility to the energy sector in Malawi is promoted;”

It is clear that at least the two regulatory authorities mentioned above have acknowledged the existence of the competition regime in Malawi and the Commission in particular. Despite mentioning this, the two acts do not provide for how the function(s) shall be dealt with nor how the interaction with the Commission be handled insofar as competition is concerned, as these issues are not even provided for in the relevant regulations.

Furthermore, it was reported in its annual report for 2013–2014 that the Commission had entered into separate memorandums of understanding with

the Malawi Communications Regulatory Authority and the Malawi Energy Regulatory Authority.²³ In the absence of reciprocal provisions in the CFTA, it cannot be expected that the desired outcome of the memorandums of understanding between the two sector regulators and the Commission is realized. A reciprocal provision in the CFTA would address the lack of a legal basis for such memorandums of understanding.

In the absence of individuals with good character and professionalism in the relevant offices, the coexistence in professional harmony of the two sectoral regulators with the Commission could be in jeopardy because of the unavoidable mutual relations between them that have not been properly legislated for. The relevant provisions in the legislation cited as they currently exist and as previously explained, provide a recipe for clashes between the Commission and the two institutions.

The analogy of the legislation in the two regulated sectors, as they relate to the CFTA dictates that there be harmonization between sector regulation and competition legislation, and that there should be uniformity in sectoral legislation on the treatment of competition issues in the regulated sectors.

According to interview findings, the Commission and the sector regulators should be alive to the fact that they are not competitors but partners who should work together for the common good. Where jurisdictional issues arise, they should be resolved through dialogue, without diluting their respective mandates.

In addition, the Commission and the sector regulators should engage in discussions of *ex post* and *ex ante* issues, for better appreciation of their mandates and to clarify jurisdiction.

5.2 Competition advocacy and public education

The Commission coordinates media engagements and the production of radio and TV programmes, organizing stakeholder sensitization meetings and other related activities, as well as coordinating

commemoration of World Competition Day and World Consumer Rights Day.

According to the Commission staff interviewed, the main challenges faced by the Commission in its relations with the media include a lack of technical knowledge of competition issues to enable them to do proper analysis and reporting. The Commission also lacks sufficient financial resources to provide training and incentives to the media, which mostly lack interest in the activities of the Commission. As such, according to the staff interviewed, the Commission always has to initiate news stories, which leads to unbalanced coverage.

The interview findings also indicate the need to designate separate staff for investigations and advocacy respectively, to give competition advocacy the prominence it requires. Since meaningful advocacy must be supported by either empirical findings or information on the enforcement of cases, which have already been reported to be few, the policy and research departments should be operationalized to improve capacity in carrying out market research and the advocacy related thereto in the short term.

In the mid- to long term, the Commission should revert to the golden rule that states that “in competition, the best advocacy is enforcement” by growing the jurisprudence and using resolved cases as a means of advocating for pro-competition markets.

The academic world has also been reached, as the Commission has been providing public lectures to universities and other tertiary education institutions, as well as to secondary schools, as reported in the annual reports.

With regard to there being a course on competition at university level, there are currently no specific studies on competition at either undergraduate or postgraduate level. However, responses from the interviews have shown that in some universities competition is taught as part of other courses. That is the case for the Department of Economics at the University of Malawi, where a course in industrial economics/organization deals with efficiency issues in competition economics. The details and relevance of the contents of the course to competition enforcement as practiced by the Commission could not be established during the present review.

²³ Competition and Fair Trading Commission, *Annual Report 2013/2014*, p. 15.

6. RECOMMENDATIONS

6.1 Recommendations to the Government

The Government should increase the budget of the Commission to optimal levels and make comparisons with the sector regulators, since both serve the same consumers, the more so because the mandate of the Commission cuts across all sectors and is wider than those of the sector-specific regulators. Among sources for the funding increase to be considered are government grants and the introduction of a statutory regime that will provide a mechanism for the Commission to receive funds from the regulated sectors.

Salaries for Commission personnel should also be substantially increased in the cause of staff motivation and retention and for the reputation of the Commission as an employer.

The competition and economic regulation institutions should be placed under one central ministry for ease of policy harmonization between the competition and economic regulation regimes.

6.2 Proposals for amendments to the current Competition and Fair Trading Act

Most of the reasons that made the United Republic of Tanzania in 2003 and Zambia in 2010 repeal their competition laws exist in the Malawian competition legal and institutional framework. Considering the gaps that have been identified in the CFTA and drawing on the experiences of peers such as the United Republic of Tanzania and Zambia and given the volume of issues that may require either introduction or amendments in the current CFTA, it is recommended that it be repealed and replaced with a new act that will address the gaps and other issues identified in the present report.

The reasons for a new law include:

- (a) The unlimited scope of the law in relation to the regulated sectors;
- (b) Flaws in the appointment of Commissioners and the functioning of the Commission;

- (c) Unclear provisions on the operational autonomy of the competition authority.
- (d) The lack of comprehensive consumer protection provisions;
- (e) The lack of provisions that ensure possible non-competition interventions by the executive arm of the Government are curbed;
- (f) The challenging drafting of core competition law provisions and the mix-up of competition theories of harm leading to the law appearing unfriendly to users;
- (g) Too much power given to the Minister(s), with the potential for interference with decisions of the competition authority;
- (h) A lack of provision for the supremacy of competition law over other laws to eliminate the possibility of the competition legislation being subordinate to other subsequent laws.

The drafting of the new law should be preceded by a comprehensive study to examine the economic and legal aspects of the competition regime, based on the requirements of contemporary Malawian social, economic, and political contexts. The study should support the development of a new, more comprehensive competition policy, replacing that of 1997, and potentially a new law replacing the CFTA.

6.3 Recommendations to the Competition and Fair Trading Commission

The Commission should consider introducing an inquisitorial approach to its enforcement practice, including its case determination function. That would most likely exonerate it from the liability of compliance with the requirement of separation of powers that may impede its functioning.

The Commission should focus its advocacy component for competition issues by separating it from consumer protection.

The Commission should use all readily available opportunities for disseminating better knowledge of its

functions, such as engagement with the Government, the business community, the Bar Association, and academia.

6.4 Technical assistance needs

It is recommended that the existing ICT department at the Commission be strengthened. That should include the website, the electronic documentation of proceedings, the archives, and an electronic library.

The establishment of a competition law and policy course at the University of Malawi to ensure the availability of basic competition training is also recommended.

There is a great need to organize tailor-made training and training of trainers on competition law and policy for Commission staff, Commissioners, the appellant bodies in the judiciary, academia, practising lawyers and the staff of the sector regulators as a matter of

course for three to five years, to improve the capacities of different stakeholders.

6.5 Specific policy options and follow-up actions for consideration

As noted above, the integration of the competition and regulatory authorities under one central ministry should be considered to avoid competing and conflicting policy objectives and a disjoint between competition and economic regulation within Malawi on the one hand and economic regulation in Malawi in relation to the COMESA Competition Commission on the other. That would ease implementation of the coexistence of competition and regulatory authorities as economic entities that serve the same consumer in the Malawian economy, hence the need to share information and financial and other resources for the benefit of the consumer and the economy.

ANNEX

Annex: List of institutions and individuals consulted

Institutions

1. Competition and Fair Trading Commission.
2. Charlotte Thomas Consultants.
3. Ritz Attorneys at Law.
4. COMESA Competition Commission.
5. National Bank of Malawi.
6. Northern Region Water Board.
7. Poultry Industry Association of Malawi.
8. University of Malawi, Department of Economics.

Individuals

1. Lewis Kulisewa, Director of Consumer Affairs and Education at the CFTC.
2. Apoche Itimu, Director of Legal Services at the CFTC.
3. Bertha Baloyi, Head of Information and Communications Technology at the CFTC.
4. Rex Nyahoda, Director of Competition at the CFTC.
5. Peter Mota, Chief Legal Officer at the CFTC.
6. Dalitso Chimota, Competition Analyst at the CFTC.
7. Goldameir Marobe, Competition Analyst at the CFTC.
8. Fexter Katungwe Senior Competition Analyst at the CFTC.

