



**United Nations Conference
on Trade and Development**

Distr.: General
28 April 2021

Original: English

**Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on
Competition Law and Policy**

Nineteenth session

Geneva, 7–9 July 2021

Item 8 of the provisional agenda

**Voluntary peer review of competition law
and policy of Malawi**

**Voluntary peer review of competition law and
policy of Malawi: Overview¹**

¹ The findings, interpretations and conclusions expressed herein are those of the author and do not necessarily reflect the views of the United Nations or its officials or Member States. The present document is an overview of a full report on the voluntary peer review of the competition law and policy of Malawi.



Contents

	<i>Page</i>
I. Foundation and history of competition policy.....	3
A. Context.....	3
B. Political context	3
C. Competition policy in reform: Current issues	3
II. Legal framework	4
A. Competition and Fair Trading Act.....	4
B. Anticompetitive agreements	4
C. Abuse of dominance	5
D. Mergers and acquisitions	5
E. Consumer protection and unfair trading	7
III. Institutional issues: Enforcement structures and practices	7
A. Competition policy institutions.....	7
B. Separation of investigative and adjudicative powers	9
C. Sanctions.....	9
D. Enforcement of the Act: Role of the courts	10
E. Other enforcement methods.....	10
F. International best practices	11
G. Agency management, resources, caseload and priorities.....	11
IV. Limits of competition policy	12
A. Economy-wide exemptions and special treatment.....	12
B. Sector-specific exemptions and rules.....	12
V. Competition advocacy.....	13
A. Advocacy and regulatory policy	13
B. Advocacy and public education.....	13
VI. Recommendations	14
A. Recommendations for the Government	14
B. Proposals for amending the competition law	14
C. Recommendations for the Competition and Fair Trading Commission.....	14
D. Technical assistance needs.....	14
E. Policy options and follow-up action	15

I. Foundation and history of competition policy

A. Context

1. The Malawi competition policy was adopted in 1997, with a focus on business behaviour that eliminated or reduced competition, including price fixing, collusive tendering, customer allocation and tied sales, that is, market structures that lead to the abuse of market power. Where there are economies of scale, there may be economic benefits arising from a monopoly or oligopoly situation.

2. The current supporting policy is provided in Malawi Growth and Development Strategy III 2017–2022, the successor to Strategy I 2006–2010 and Strategy II 2011–2016. During the implementation of the earlier strategies, Malawi recorded commendable growth rates, but these were neither sustained nor inclusive. Phase III provides for the development of new competition policies and legislation and was linked with Malawi National Export Strategy 2013–2018. Notably, the latter recognized competition policy as one of the essential areas necessary to allow the cluster on import substitution, among others, to meet its potential and guideline targets, as outlined in the strategy document. The peer review report is based on the new strategy.

B. Political context

3. Before the liberalization era, the power of dominant firms, monopolies and oligopolies was kept in check through extensive price controls and other government policies. Following liberalization, the Government permitted markets to set prices, to enhance efficiency and competitiveness. As the economy continued to move progressively towards increased liberalization, certain undesirable but basic business practices emerged, taking advantage of the hands-off approach at the expense of economic efficiency and consumer welfare, both of which were objectives of economic liberalization. The competition law was considered a good tool in addressing most of these problems.

4. The Government enacted the Competition and Fair Trading Act in 1998 and the Act came into effect in 2000.

5. The Consumer Protection Act was enacted in 2003, establishing the Consumer Protection Council as a body corporate responsible for the implementation of the Act.

Objectives

6. The objectives of the Competition and Fair Trading Act are to: encourage competition in the economy by prohibiting anticompetitive trade practices; establish the Competition and Fair Trading Commission; regulate and monitor monopolies and concentrations of economic power; protect consumer welfare; strengthen the efficiency of the production and distribution of goods and services; secure the best possible conditions for the freedom of trade; and facilitate the expansion of the base of entrepreneurship and provide for matters incidental thereto or connected therewith. The Act focuses on institutional issues related to the Competition and Fair Trading Commission. It provides for the establishment of the Commission, including its secretariat, operations, funding, management and accountability. It details the anticompetitive trade practices that the Commission should deal with under the Act.

C. Competition policy in reform: Current issues

7. In October 2020, the Government, under the Ministry of Trade, initiated a two-year project on the enhancement of competition and consumer protection regulation, which is expected to bring about major institutional and legislative reforms of the competition and consumer protection laws in Malawi.

II. Legal framework

A. Competition and Fair Trading Act

8. The Act was enacted to encourage competition in the economy by prohibiting anticompetitive trade practices, namely vertical and horizontal anticompetitive agreements and abuse of a dominant position, as well as through merger control. It contains provisions on unfair trade practices and on consumer protection, along with the objectives enumerated above. The Act applies to all economic activities within or having an effect within Malawi and does not draw a distinction between regulated and non-regulated sectors. With regard to substantive competition law issues, section 32 enumerates anticompetitive trade practices.

9. Under section 53 of the Competition and Fair Trading Act, the competition and fair trading regulations were adopted in 2006, to operationalize the provisions of the Act and to enable and facilitate its enforcement.

B. Anticompetitive agreements

1. Per se prohibited agreements

10. The Competition and Fair Trading Act provides for the prohibition of agreements between companies in rival or potentially rival activities in the market (section 33 (3)). Section 44 (2) states that the Act 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 provisions reflect that of per se prohibition, with a wide-ranging and exhaustive list of prohibited conduct.

11. Prohibition of a concerted refusal to supply goods by competitors and prohibition of a collective denial of access to an arrangement or association (section 33 (3) (f) and (g)) are not typical per se prohibitions. Rather, the former resembles a theory of harm under abuse of dominance commonly known as refusal to deal, either unilaterally or under combined dominance as presented in this section. The latter also has the same pattern, to the effect that a dominant firm or firms under combined dominance may deny a third party access to an essential facility; such access is crucial to competition in select markets. However, the prohibited practices are not defined to provide better and further details of the types of conduct that would constitute prohibited conduct and technically ease the establishment of the aspects to be proven for the prohibition to stand. Although price fixing can be construed to be prohibited per se, the prohibition is put into jeopardy by the inclusion of per se prohibited conduct in section 32 of the Act and the omission thereof from the list of per se prohibitions in section 44 (2). The Act does not include a detailed procedure for the handling of per se prohibited agreements (trade agreements, as provided in the Act) in terms of orders of the Competition and Fair Trading Commission. These are anomalies worth noting and related rectification should be considered by the Commission.

2. Agreements prohibited by the rule of reason

12. Such agreements are usually vertical arrangements, but some horizontal agreements that do not fall under the per se prohibited category may be included. This analogy usually provides for a broad array of agreements to be considered under the rule of reason approach. The Competition and Fair Trading Act provides for notifications of rule of reason agreements in section 44 (1) and regulations 3–7, thereby restricting conduct that qualifies for such a consideration. The provision lacks a threshold of potential effects in a particular market according to which agreeing parties are prohibited, thus giving wide room for agreements that should be notified. Numerical thresholds such as those in section 28 of Botswana Competition Act No. 4 of 2018 or section 8 of United Republic of Tanzania Fair Competition Act No. 8 of 2003 may be helpful in establishing the effects, which would make it easier for the provision to be complied with, compared with other more flexible approaches that require in-depth understanding of competition, which may be limited in developing countries. The Competition and Fair Trading Act also does not provide for a block exemption for activities

in key sectors, including price setting for cash crops in agricultural markets. These are anomalies worth noting and related rectification should be considered by the Commission.

C. Abuse of dominance

13. Section 41 of the Competition and Fair Trading Act deals with abuse of dominance. The regulations are silent on the matter. Section 41 (1) provides a general prohibition on the abuse of dominance and section 41 (2) states that any person who contravenes the provisions of the former commits an offence, which is sanctioned under section 51. These provisions are consistent with international best practices. However, generally, abuse of dominance is scantily provided for, as the Act does not provide for market definition or the level of market share that a firm must attain to be considered dominant. As an alternative to the market share threshold, the Competition and Fair Trading Commission may consider the possibility of adopting guidelines on how it assesses market power, that is, the types of factors to consider.

14. Section 32 of the Act notes certain conduct that is universally qualified as abuse of dominance and subsequently subjected to authorization, contrary to conventional prohibitions that are treated on their stand-alone demerits as abusive conduct and not necessarily as agreements. The Act is thus silent as to what constitutes a dominant position and the types of conduct to be considered as abuse and therefore prohibited. It is recommended that the Act clearly provide for the definition of a dominant position, maintaining the existing prohibitions as a rule. This general rule can then be followed by a non-exhaustive list of examples of abusive behaviour, based on best practices, such as those provided in section 16 (2) of Zambia Competition and Consumer Protection Act No. 24 of 2010.

Monitoring concentration of economic power

15. Section 42 of the Competition and Fair Trading Act provides for this function. The provision does not state how monitoring should be done since the Competition and Fair Trading Commission is not statutorily empowered to either prescribe or fix prices in the market. This provision is enforced through constant market surveillance and the conduct of market studies. These issues can be dealt with indirectly through investigation and advocacy, using the core competition provisions in the Act. Based on the foregoing, despite being provided for in the Act, this function has not been distinctly executed since the establishment of the Commission. This is a good reason to omit it from the Act, since it is not a common feature in competition law, in particular in the manner in which it has been prescribed.

D. Mergers and acquisitions

16. Section 2 of the Competition and Fair Trading Act defines a merger and covers both horizontal and vertical types. It does not, however, include joint ventures resulting in greenfield investment and the general provision on the definition of a merger in 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 anticompetitive effects. This shortcoming should be rectified for the betterment of competition enforcement with regard to mergers and acquisitions in Malawi.

17. Since the inception of the Act, Malawi has had a voluntary notification system, 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 Competition and Fair Trading Commission. Section 35 (1) of the Act provides for the control of mergers, invoking the substantial lessening of competition test, which has not been defined. Similarly, section 38 (2) of the Act provides that the Commission shall not authorize a merger or takeover unless on balance the advantages in Malawi outweigh the disadvantages. The foregoing is considered the prohibition of a merger. In Malawi, a merger therefore appears to be prohibited if it substantially lessens competition and/or unless on balance the merger results in advantages that outweigh the disadvantages in Malawi. This is a

shortcoming that should be rectified, preferably by following the substantial lessening of competition criteria for the betterment of competition enforcement with regard to mergers and acquisitions in Malawi.

18. Section 35 (2) of the Act states that no merger or takeover made in contravention to section 35 (1) “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”.

19. According to key stakeholders interviewed (see the annex in the peer review report), the Commission has dealt with a few mergers ex post following a determination of adverse effects on competition. Further, the only remedy that the Commission has exercised to date is the imposition of ex post conditions on such transactions in a bid to curb the identified adverse effects. Considering section 35 (2) of the Act, it is recommended that a provision on remedies be incorporated, to provide for the imposition of ex post remedies on mergers.

20. Section 36 of the Act states that any person may apply to the Commission for an order authorizing them to effect a merger or takeover. Section 39 states that the Commission shall, within 45 days of the receipt of an application or the date on which the applicants provide the information requested, make an order to approve or reject the application or approve it with conditions and publish the decision in the gazette not later than 14 days after it has been made.

21. The assessment of these provisions shows that the Act does not establish binding statutory requirements and deadlines for ex ante notifications to the public of an application for authorization of a merger. However, it is mandatory for the public to be informed after a merger has been decided upon. Such an omission may cause undue difficulties for members of the public who would otherwise have their interests considered during a review of an application under section 38 of the Act. They are therefore left with only one option for redress, through an appeal under section 48 of the Act. An appeal is technically more litigious and its pursuit more resource intensive for the public, compared with an ex ante petition that can be submitted to the Commission in a non-legal manner.

22. With regard to 45 days as the allowable turnaround time for the clearance of merger authorizations, based on the experience of the peer reviewer in the region, this period is relatively short. In the United Republic of Tanzania, for example, section 11 of the Fair Competition Act provides that a full cycle of merger examination will constitute 134 days, divided into 14, 30 and 90 days, depending on the different stages of the review. This provision may put the Commission in a situation that results in long delays to the notifying parties to a merger. The parties have a legitimate interest in having the merger control procedure take the shortest time possible. According to the Commission staff interviewed, in practice, the 45-day period is construed as working days, with the term therefore extended to approximately 90 days. This interpretation is contrary to the provision in the Act. The Commission should consider increasing the number of days to a reasonable level based on its experience and that of peers, including the Competition Commission of the Common Market for Eastern and Southern Africa, which has a long-standing engagement in merger control.

23. The Act does not provide for exemption clauses for mergers, a provision that allows for a prohibited merger to proceed for a specified duration, usually less than one year. The exemption clause is applied if it is established that the benefits accruing from implementing such a merger outweigh the detriments. This is a serious omission and the Commission should consider including such a provision in future amendments.

24. These shortcomings should be rectified for the betterment of competition enforcement with regard to mergers and acquisitions in Malawi.

25. Section 26 of the Act imposes a levy to be appropriated for the general operations of the Commission. This provision allows for the collection of merger assessment fees by the Commission as provided in regulation 11, read together with its fourth schedule, and as elaborated in guideline 6.16 of the merger assessment guidelines issued in 2015. The latter do not have legal effect and are not binding on the intended subjects. Irrespective of this non-binding nature, there is a restraint to the effect that a merger shall not be considered without

the payment of the fee. This restraint should be, at a minimum, added to the competition and fair trading regulations. Further, the merger notification fee is currently 0.05 per cent of the combined annual turnover or combined value of assets of the merging parties, which are not restricted to Malawi. This means that the Commission may consider the global turnover in the event of a merging entity with global operations. This may place the Commission at risk of being subjected to grievances by stakeholders based on the manner in which fees are calculated, particularly with regard to holding companies, which involve the assets and/or turnover of unrelated businesses, the inclusion of which may result in exorbitant fees.

26. Section 36 of the Act appears to be an omnibus provision as it does not clearly provide which among the merging parties, namely, the acquiring or the target firm, is responsible for notifying the Commission of the intended merger. Due to this voluntary notification regime, failure to notify a notifiable merger is not an offence. Notably missing are provisions for the unwinding or revocation of a merger. The Commission has experience in imposing ex post merger conditions for those transactions found to be in breach of the Act, yet there are no provisions to provide for a procedure to handle a breach of merger conditions that may be ordered under section 39 (2). There is no provision to sanction such a breach. Section 40 of the Act attempts to provide for this by allowing for the registration of orders under the Act for enforcement purposes and the penalty for failure to comply with such orders. Section 51 of the Act provides for penalties associated with a breach of merger provisions, namely, giving effect to a prohibited merger, giving effect to a merger before authorization and/or failure to honour conditions imposed on a merger. The penalties may be too low, to the extent that their deterrent effects will be eroded. Consideration should be given to raising the level of sanctions, in particular considering the gravity of an offence, by linking the penalty with up to 10 per cent of the annual turnover in Malawi of either or both of the merging parties. The lower limit should be reasonably above zero to avoid giving too much room for greater discretion than prudence would demand by the Commission. These are anomalies worth noting and related rectification should be considered by the Commission.

E. Consumer protection and unfair trading

27. The preamble of the Competition and Fair Trading Act mentions consumer protection, which conforms with the common knowledge that the ultimate objective of competition law and policy is the promotion and protection of consumer welfare through the control of anticompetitive practices. However, the Act does not include a dedicated section on consumer protection, although section 43 on unfair trading relates to consumer welfare and protection. Alongside the Consumer Protection Act, there is also a bill proposing amendments to the Act but this has not yet been enacted into law.

III. Institutional issues: Enforcement structures and practices

A. Competition policy institutions

28. Section 4 of the Competition and Fair Trading Act establishes the Competition and Fair Trading Commission as an independent institution. Section 5 provides that the Commission shall be constituted of 10 members nominated by the minister and appointed by the President and that a notice in writing is required to designate a representative of an ex officio member. Any member other than the three ex officio members may be appointed as chair. Section 6 of the Act provides that the members other than the three ex officio members shall serve for a tenure of three years and be eligible for reappointment for another three-year term. The Act does not provide for the competitive selection of members of the Commission and the process preceding the nomination and appointment of the seven members other than the three ex officio members. The Act does not determine where the power to remove a member lies nor the related process. Further, the three-year duration of an appointment is generally deemed too short for a part-time commissioner to learn and master the subject, to be able to serve in the expected manner. The Act is silent on staggering the membership of the Commission, considering this short duration. The three ex officio members are not bound by the three-year tenure and can be changed in a manner that is not prescribed in the

appointment machinery under the minister and the President. Given the quasi-judicial nature of the Commission with regard to competition and the observance of due process, changes of designated members may pose a dilemma in competition cases based on right-to-be-heard requirements, in the event that a member is changed in the middle of the hearing of a lengthy case.

29. The chair is appointed by the Commission and the process or procedure to be followed can vary as it is not prescribed in the Act. Literal interpretation of section 5 of the Act suggests that it is the members who appoint the chair, notwithstanding the status quo that all 10 members are appointed by the President, having been nominated by the minister. Ideally, the chair should have more powers compared with the members and a different approach should be provided for in the Act. Without prejudice to the status quo, the ideal situation would be for the minister to appoint members following an independent competitive process that produces a list of qualified candidates from which the minister can make appointments. The President may appoint the chair following an independent competitive process that produces a list of qualified candidates. On the other hand, the power to remove members should be vested in the President alone. Without minimizing the power of the minister to make appointments, the suggested changes can ensure greater transparency and the recruitment of suitable persons to the Commission, compared with the current system. The terms may be extended to five–seven years, staggered among the members to ensure that institutional memory is sustained in the Commission and carried over to successive Boards of Commissioners. The power to remove members should also be statutorily provided for and regularly reviewed, to provide for greater versatility in decision-making by the Commission.

30. Section 14 of the Act provides for the establishment of committees. The provision provides for the means to ensure that the functions of the Commission are carried out with the required ease and smoothness. However, the Act lacks a delegation provision that carves out functions such as those related to the adjudication of competition matters, that is, anticompetitive agreements, the misuse of market power and the regulation of mergers, such as provided for in section 74 of the Fair Competition Act of the United Republic of Tanzania. It follows, therefore, that in Malawi, under the provision of section 14, the Commission is entitled to limitlessly delegate its functions, including the responsibility to make decisions on competition matters, even to persons not members of the Commission. This situation requires urgent rectification.

Powers and decisions of the Commission

31. Section 4 of the Competition and Fair Trading Act establishes the Competition and Fair Trading Commission as an independent institution to be treated as not part of the ministry and that can be a rightful 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 may be sued as a body corporate during adjudication competition cases. The Act establishes an appeal procedure (section 48). The status of the Commission at the appellate level is not provided for, but at minimum it shall be that of a necessary party in an appeal case. Clarity on the status of the Commission at the appellate level is required in the Act. There is no express provision in the Act to determine cases, other than in section 39 on mergers, which provides for decisions by way of orders, and in section 8 (2) (c), under which 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. However, decisions of the Commission are expressly covered under appeals in section 48. There is a need to make express provision for all competition matters, including agreements currently omitted. Section 4 can be interpreted 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 and that the provision gives statutory independence, in particular in decision-making, yet this independence is silently withdrawn by section 12 (1) on ministerial directives. The corollary is that the minister may give the Commission general directions, not necessarily related to policy, as to how the Commission is to carry out its duties under this part of the Act. These are anomalies that require investigation as a matter of priority.

B. Separation of investigative and adjudicative powers

32. In Malawi, as in Botswana, the United Republic of Tanzania and Zimbabwe, the separation of investigative and adjudicative powers has been a challenge. Since such separation is a common occurrence, in particular in Commonwealth jurisdictions or those with adversarial systems, it was crucial for the peer review report to address the context in Malawi. The controversy is over the fact that under section 8 of the Competition and Fair Trading Act, the Competition and Fair Trading Commission is vested with powers to investigate, prosecute and determine matters that fall within its jurisdiction. In the justice system in Malawi, based on practices in Commonwealth jurisdictions, these functions should be separated to conform to principles of natural justice. However, the anomaly is to compare an establishment such as the Commission to a court of law, leading to controversy. Since the establishment of the Commission over 10 years ago, there has not been a legal challenge nor a complaint levelled against it in the conduct of its functions. None of the stakeholders interviewed raised the issue, but it is of concern to Commission staff that although it has not yet been challenged, it may be challenged in the future in a court of law.

33. In addressing the issue of the separation of powers, two systems are compared, adversarial and inquisitorial, in order to appreciate the different ways and means of dispensing justice as applied in different jurisdictions. The Commission has the power to initiate complaints and enforce compliance with the Act and may also investigate impediments to competition, a function not performed by a court of law in Malawi. The Commission should therefore not be compared to a court of law as, unlike a court, when the Commission investigates or holds a hearing on a complaint leading to a decision, it does so in its capacity as a regulator and in pursuance of its functions in administering the Act and enforcing compliance with the Act. The transfer of Commission orders provided for in section 40 of the Act is for enforcement purposes only and should not be construed to mean that the Commission is equivalent to the High Court. Given that the Commission has a competition division with the power to investigate complaints and that, during the hearing of a complaint, the Commission accords the offender an opportunity to make the case heard, the practice at the Commission is more inclined to an inquisitorial system. Hearings are part of the investigation procedure that follows a preliminary investigation and, unlike during a court trial, the Commission continues its investigations up to the hearing. The corollary is that the hearing is only a part of the investigation procedure. In establishing administrative agencies, the parliament passes enabling legislation on their purpose, name, functions and powers (in this instance, the preamble and sections 1, 8 and 10 of the Act), describes the procedures of the agency in handling issues submitted (sections 36, 37 and 38 and the regulations) and provides for the judicial review of decisions (section 48). The enabling legislation, that is, the Act, describes the rulemaking power of the agency (section 53). Generally, the Commission lacks the power to act beyond the scope of its enabling legislation (doctrine of *ultra vires*). The Act is unlikely to lead to any issues related to a breach of natural justice in so far as the separation of powers. As such, it covers the natural justice principle, as noted above. To eliminate speculation, an inquisitorial approach with regard to case-handling procedure may be adopted in the Act, to differentiate it from the commonly known adversarial practice.

C. Sanctions

34. The law provides that the lack of compliance is criminal in nature. Sections 24, 33, 34, 35, 41, 43, 47, 50 and 51 of the Competition and Fair Trading Act provide that any person who contravenes shall be guilty of an offence and liable to a fine or to imprisonment for a certain period. Competition violations are thus criminal in nature; the only difference to penal sanctions is that the accused in a competition case is often a legal person, that is, an enterprise, and not a natural person. Further, the Act does not provide for the procedure to be followed when a person is to be sentenced to a prison term. The matching of offences and sanctions levied under the same provision reduces difficulties in framing an offence and applying a penalty. However, for some provisions, such as under sections 33, 35 and 41, sanctions (fines and/or imprisonment) are provided for under section 51; this should be rectified for the sake of both consistence and convenience.

35. There is a possibility of a mismatch in the gravity of offences between competition-related and other offences, which may make the provisions of the Act less deterrent than expected. The minimum fine is equivalent to \$640, which is considered too low for offences such as cartels. The penalty could reach the maximum of an amount equivalent to the financial gain generated by an offence, if such an amount is greater, and to imprisonment for five years. Establishing the amount generated by an offence can be an onerous task, let alone its legal proof under litigious circumstances. Equally difficult is operationalizing imprisonment for a five-year sentence, for which a procedure has not been provided. Ideally, the Act should link the sanctioning of offences to the turnover of the guilty person to ensure that offences are accorded commensurate penalties.

D. Enforcement of the Act: Role of the courts

36. Section 40 of the Competition and Fair Trading Act provides for the enforcement of orders under the Act by the High Court and establishes the procedure for how orders should be transferred to the respective courts for enforcement. The experience of peers in the region shows that, beyond registration at the High Court, judges have expressed hesitancy in executing cases since it is legally inappropriate to deal with an order not made by either a court or a judge. 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 Competition and Fair Trading Commission. The Act does not expressly note the inherent judicial review powers of the High Court, which could have similar effects as those provisioned in the appeals, increasing the possibility of parallel appeals to the High Court and judicial review by the High Court, which may lead to conflicts in practice. With regard to appeals at the High Court, in practice, according to its annual reports for 2016, 2017 and 2018, the Commission won four cases and settled three, with four cases ongoing. With regard to performance, the Commission has a good track record; records show that it has not lost a case. Two cases were further appealed (secondary appeal) at the Supreme Court. This demonstrates that the complete enforcement machinery for competition has been put to the test, namely, the Commission, the High Court and the Supreme Court. With regard to judicial review, two matters have been referred to the High Court.

37. Given the nascent competition culture, lack of formal competition training in curricula and limited competition jurisprudence in Malawi, it may be difficult to ensure a competent set of skills and acumen in decision-making related to competition cases, in particular considering that there is a relatively low level of training in competition for judges and technical staff in the judiciary. The most recent training efforts for the judiciary in competition law were those of the Commission and the Competition Commission of the Common Market for Eastern and Southern Africa, with two judges colloquiums held in 2014 and 2017. Ideally, a specialized tribunal should be established to handle competition and related cases, as provided in the Malawi competition policy of 1997, as for example in the United Republic of Tanzania and Zambia.² To provide the tribunal with sufficient appeals, matters emanating from the decisions of authorities of regulated sectors should also be appealable at the tribunal. This may help in mobilizing sufficient political support for a stand-alone competition tribunal by showing that it is justifiable since there is more than a low number of appeals to be handled.

E. Other enforcement methods

38. The Competition and Fair Trading Commission and the Competition Commission of the Common Market for Eastern and Southern Africa are national and supranational institutions dealing with the enforcement of competition in Malawi. The impact of their co-existence is significant, as approximately 67 per cent of mergers in Malawi are dealt with by the Competition Commission of the Common Market for Eastern and Southern Africa.

² UNCTAD, 2012, *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* (United Nations publication, New York and Geneva).

Competition matters under sectoral regulators in Malawi are subject to the jurisdiction of the latter and the only way it can contact such regulators is through the Commission under the Competition and Fair Trading Act. However, the Act has neither recognized sectoral regulators nor defined the ways in which the two organizations should engage.

F. International best practices

39. The Competition and Fair Trading Act is only fully aligned with one of the 13 recommendations on substantive possible elements of a competition law as described in the commentaries and alternative approaches in existing legislation that are provided in the UNCTAD model law on competition. Further, 24 shortcomings relate to these recommendations and 28 recommendations are made in this regard in the peer review report.

G. Agency management, resources, caseload and priorities

1. Management

40. The Competition and Fair Trading Commission is headed by an executive director of the secretariat, with four directorates of competition, consumer affairs, legal services and corporate services, comprised of 11 sections and units. The executive director and directors form the executive management. Ideally, the executive management and heads of sections should form an extended management, a platform that allows for wider and deeper technical and operational consultations within an organization.

2. Resources

(a) Human resources

41. The Competition and Fair Trading Commission has a human resources base of 49 staff members, headed by the executive director, assisted by the directors of the four directorates. Commission records show that none of the staff has undergone competition-related training at the university level, other than a few who have undergone such training as part of degree programmes that included modules on industrial economics. Internally, comprehensive in-house staff training has not been provided. There is a high turnover of staff, in particular at the senior level, due to the non-renewal of three-year renewable contracts. Turnover is low among permanent staff. Salaries are pegged to civil service scales rather than those of sectoral regulators; the average difference between salary scales at the Commission and among sectoral regulators has been estimated at 200 per cent.

(b) Information and communications technology resources

42. The Commission has a dedicated information and communications technology department with one staff member. The basic infrastructure does not fulfil the requirements of a case-handling institution. This situation may be partly caused by financial constraints due to dependence on limited government funding. The Commission, with assistance from the European Union, is implementing a project to address inadequacy in information and communications technology systems, services and infrastructure, by implementing an effective information management system.

(c) Financial resources

43. The Commission has limited funds to carry out its broad mandate. Government funding is the main source of income and overreliance on the national treasury, combined with the powers of the minister responsible for the Commission, providing guidance and direction, may be considered a threat to the independence of Commission decisions. The Commission may consider examining section 27 of the Competition and Fair Trading Act on how it can source funds from regulated sectors. In jurisdictions such as Turkey and the United Republic of Tanzania, competition laws statutorily provide that funds shall be received from regulated sector authorities.

3. Caseload

(a) Restrictive business practices

44. Competition and Fair Trading Commission records show that annually, on average, 44 cases on restrictive business practices are handled. Most of the concluded cases are cease-and-desist orders and the Commission follows up with regard to compliance. Without prejudice to the sovereignty of Commission decisions, this approach, although progressive, may be considered disproportionate with regard to the severity of the offences (misuse of market power and anticompetitive agreements) and the harm inflicted to markets. A further issue of concern is the many cases that were initiated then dropped after a preliminary review. Most of these dismissed cases were brought by small market players threatened by bigger players in the same line of business, but the cases did not have a direct link to any prohibition in the Act. The Commission has not registered much progress in handling either misuse of market power or trade agreement-related cases since 2013, partly due to the inadequacy of the law, as well as due to the lack of required competition knowledge and skills. Given the flow and arrangement of the provisions as noted, there is a need for improvement to effectively provide for enforcement of the Act.

(b) Mergers

45. The Commission handles two categories of mergers, namely local mergers notified under the Act and cross-border mergers notified through the Competition Commission of the Common Market for Eastern and Southern Africa. Operationally, the same case officers handle restrictive practices, unfair trade practices and mergers. Commission records show that, in 2012–2020, the Commission handled 136 mergers. There is an annual average of 17 merger cases, of which the Commission handles three and the Competition Commission of the Common Market for Eastern and Southern Africa handles 14 (66.7 per cent). The latter requests the Commission to assist in the collection of information and views regarding a merger from stakeholders in the market in Malawi. The Commission assesses the merger then recommends for or against its authorization in Malawi to the Competition Commission of the Common Market for Eastern and Southern Africa. The latter decides on the merger and informs the Commission accordingly. Most mergers are approved unconditionally and a few are cleared conditionally but, to date, no merger has been prohibited.

4. Priorities

46. The priorities of the Competition and Fair Trading Commission in planning and executing its annual plans are derived from the Strategic Plan 2015–2020, aligned with the objectives of the Competition and Fair Trading Act. The strategic objectives are measured through outputs, such as those detailed in the annual reports for 2016, 2017 and 2018. The objectives are well aligned to ensure the smooth operation of the mandate of the Commission. The Commission also conducts market studies, the findings of which inform the monitoring and evaluation framework.

IV. Limits of competition policy

A. Economy-wide exemptions and special treatment

47. Section 3 (1) of the Competition and Fair Trading Act provides for non-application of the Act or exemptions for all listed economic activities within or having an effect within Malawi

B. Sector-specific exemptions and rules

48. The Competition and Fair Trading Act does not provide for sector-specific exemptions other than those in section 3. Section 54 provides that the Act shall apply to and bind the Government. It therefore follows that all sectors are bound by the Act, without any exemptions. This should be construed to be a choice that Malawi has made against the

alternative of having a concurrent jurisdiction between the competition authority and sectoral regulators. The placement of competition and regulatory authorities under one central ministry would help to ease policy decision-making and the interaction between the regulators.

V. Competition advocacy

49. Section 8 (2) of the Competition and Fair Trading Act indirectly provides for advocacy as one of the functions of the Competition and Fair Trading Commission.

A. Advocacy and regulatory policy

50. Based on section 3 of the Competition and Fair Trading Act with regard to non-application, the Competition and Fair Trading Commission has jurisdiction over all regulated sectors (network-based utilities) such as energy (including electricity, petroleum, water and gas), communications, surface and maritime transport and civil aviation. Statutorily, it is not barred from exercising its jurisdiction in the regulated sectors, although the sectoral regulators are also mandated by their respective laws to deal with competition issues.

1. Telecommunications

51. Sections 6 (2) (e) and 55 of Communications Act No. 34 of 2016 provide that the Communications Regulatory Authority shall promote efficiency and competition among entities engaged in the provision of communications services or in the supply of communications equipment, in coordination with the Competition and Fair Trading Commission.

2. Energy

52. Section 9 (2) of Energy Regulatory Act No. 2004 states that the Malawi Energy Regulatory Authority shall “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”.

53. However, neither the Communications Act nor the Energy Regulatory Act provides for how functions shall be dealt with nor how interaction with the Competition and Fair Trading Commission on competition issues should be handled, including under the existing regulations.

B. Advocacy and public education

54. The Competition and Fair Trading Commission coordinates media engagements and the production of radio and television programmes, organizes stakeholder sensitization meetings and related activities and coordinates commemorations of world competition day and world consumer rights day. The Commission has been engaged with academia, providing public lectures at universities and other tertiary institutions, as well as at secondary schools. The main challenges include the lack of technical knowledge of competition to facilitate balanced analysis and reporting and the lack of sufficient financial resources to provide training and incentives to the media to address the insufficient level of interest in Commission activities. There is a need to operationalize the policy and research departments to improve capacity in carrying out market research and related advocacy in the short term. The Commission should designate separate staff for investigations and competition advocacy, to give advocacy the prominence it requires.

VI. Recommendations

A. Recommendations for the Government

55. The budget of the Competition and Fair Trading Commission should be increased to optimal levels with comparisons with sectoral regulators, since both serve the same consumers and as the mandate of the Commission cuts across all sectors. A statutory regime should be introduced to provide for a mechanism whereby the Commission may receive funds from regulated sectors.

56. Salaries for Commission personnel should be substantially increased, for staff motivation and retention and for the effective enforcement of the law, which would be helpful to the Commission as an employer.

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

B. Proposals for amending the competition law

58. Considering the identified gaps in the Competition and Fair Trading Act and given the experiences of peers in the region such as in the United Republic of Tanzania and Zambia, which repealed their competition laws in 2003 and 2010, respectively, most of the reasons to do so are also apparent in the legal and institutional framework in Malawi. Given the volume of issues that may require either introduction or amendment in the current Act, it is recommended that the Act be repealed and replaced with a new act that addresses the gaps and other issues noted in the peer review report. Drafting of the new law should be preceded by a comprehensive study that examines the economic and legal aspects of the competition regime based on requirements in the contemporary social, economic and political contexts in Malawi. The study should form the basis for the development of a new, more comprehensive competition policy, replacing that from 1997, and a new law to replace the current Act.

C. Recommendations for the Competition and Fair Trading Commission

59. The Commission should consider introducing an inquisitorial approach to its enforcement practices, including its case determination function.

60. The Commission should focus its advocacy component on competition issues separately from consumer protection issues.

61. The Commission should use readily available opportunities such as engagement with the Government, the business community, the bar association and academia.

D. Technical assistance needs

62. Strengthen the existing information and communications department of the Competition and Fair Trading Commission, which should maintain the website, electronic documentation of proceedings, archives and a library.

63. Establish a competition law and policy course at the University of Malawi to ensure the availability of basic competition-related training.

64. Provide tailored training on competition and training of trainers to staff, commissioners, appellant bodies, academics, practising lawyers and regulated-sector staff as a routine for three–five years.

E. Policy options and follow-up action

65. The placement of competition and regulatory authorities under one central ministry would help to avoid competing and conflicting policy objectives, as well as the disconnect between competition and economic regulation on the one hand and economic regulation with the Competition Commission of the Common Market for Eastern and Southern Africa on the other hand. It would also help to ease the implementation burden of competition and regulatory authorities as economic entities that serve the same consumers in the economy of Malawi and facilitate the sharing of information and financial and other resources.
