



Malawi is a landlocked, highly indebted LDC located in Southern Africa. Established in 1891, the British protectorate of Nyasaland became the independent nation of Malawi in July, 1964. After three decades of one-party rule, the country held multiple party elections in 1994 under a provisional constitution, which took full effect the following year.

### Economy

The economy is predominately agricultural, with about 81.2 percent of the population living in rural areas. The economy depends on substantial inflows of economic assistance from the IMF, the World Bank, and bilateral donor governments. The Government of Malawi (GoM) faces strong challenges, e.g., to spur exports, to improve educational and health facilities, to face up to environmental problems of deforestation and erosion, and to deal with the rapidly growing burden of disease, including that of HIV/AIDS.

Malawi's land resource is at serious risk of degradation as a result of population pressure and poor farming methods. Agriculture remains the backbone of the economy, employing 85 percent of the working population. However, about 90 percent of these workers are engaged in subsistence farming. Tobacco is responsible for some 60 percent of export earnings, with sugar, tea and coffee contributing about 5 percent each. Exports of uranium deposits in the north of Malawi started in mid-2009 and will run at 1,500 tonnes a year for at least ten years, generating an annual income of some U \$100mn, about 5 percent of Malawi's GDP and 20 percent of foreign exchange earnings.<sup>1</sup>

Further, the economic performance of Malawi has remained quite unsatisfactory in the past number of years. Relative stability and growth have been experienced but only to a limited extent. The major reasons for this are numerous and include high level of inflation, fiscal imbalance, external shocks, depreciation of Kwacha (Malawi currency), high interest rates, etc.

| PROFILE   |   |
|---|---|
| Population:   | 15.3 million***                         |
| GDP (Current US\$):   | 5.7 billion***                          |
| Per Capita Income: (Current US\$)   | 340 (Atlas method)***<br>580 (at PPP)** |
| Surface Area:   | 118.5 thousand sq. km                   |
| Life Expectancy:  | 54.2 years**                            |
| Literacy (%):   | 73.69% (of ages 15 and above)**         |
| HDI Rank:   | 171***                                  |
| Sources:<br>- World Development Indicators Database, WorldBank, 2004<br>- Human Development Report Statistics, UNDP, 2011<br>(**) For the year 2009 (UNISCO)<br>(***) For the year 2011 |   |

### Competition Evolution and Environment

The elimination of trade restrictions through the liberalisation programme has led to a surge in imports, often of cheap and substandard goods. Importation of expired goods like drugs, canned food, powdered milk and tires as well as re-labeling and repacking of such goods pose health and safety threats to the consumers and the economy at large. These developments have raised complaints of unfair competition mainly due to either comparative inefficiency of domestic firms or dumping by foreign sellers.

The Malawian economy portrays some structures that characterise imperfect markets. Most goods in Malawi are produced and distributed under monopoly, monopolistic competition and oligopolistic conditions. Notwithstanding, the market structure remains imperfect and there are a lot of restrictive practices as in certain instances businessmen collude to avoid competition.

Malawi is also liberalising and privatising some sectors, which aims at creating an environment in which public

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1 The Foreign and Commonwealth Office Malawi Country Profile

enterprises will ultimately be converted into private commercial entities. This is done under the expectation that competition will be enhanced. One such sector affected by reforms is the power sector. There is an apprehension that in some sectors where privatisation is taking place, private monopolies may simply replace public monopolies.

In facing these challenges, Malawi undertook a number of policy reforms. In the 1990s, Malawi Government adopted a policy of economic liberalisation and formulated a competition policy. The competition policy for Malawi was approved in 1997 with a broad policy objective to promote economic efficiency and protect consumer interests, comprising of three broad strategies namely lowering barriers to entry; reducing RBPs; and protecting the consumer.

The policy focused on four specific areas, namely:

- first, on uncompetitive business behaviour (price fixing, collusive tendering or customer allocation and tied sales) aimed at eliminating or reducing competition;
- second, unfair business practices aimed at taking unfair advantage of consumers. Examples of these unfair business practices 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 services;
  - supply 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;
- third, on market structures which permit abuse by a dominant enterprise; and
- fourth on Government legislation, which may impact on the free market.

The policy called for the enactment of a law that would make unfair business behaviour an offence and also protect the consumer by making a manufacturer or importer liable for defective or sub-standard products or services. It also called for the establishment of a trade remedial system where civil and criminal suits for the purpose of recovery of damages suffered as a result of an uncompetitive or RBP could be dealt with.

Specifically, the policy called for:

- creation of an autonomous Competition and Fair Trading Commission whose role would be to administer restrictive business practices legislation and consumer protection legislation; and
- establishment of a specialised tribunal to resolve contentious issues in certain specific fields subject to judicial review on matters of law.

## **Competition Law and Policy**

The Government's effort is evident from the resultant enactment of the Competition and Fair Trading Act (1998), which was brought into legal force on January 28, 2000, and the Consumer Protection Act (2003). The Competition and Fair Trading Act (CFTA) has the following principal objectives:

- promoting competition and enhancing efficiency in Malawi's economy;
- regulating and monitoring monopolies and concentrating economic power, addressing the interest and needs of consumers and identifying price mechanism, M&As and restrictive trade practices, such as collusion and price fixing and determining whether the quality and prices of goods and services are justifiable; and
- promoting or participating in consumer education programmes and activities and disseminating consumer information to the public.

CFTA aims at encouraging competition in the economy by prohibiting anticompetitive trade practices; providing for the establishment of the Competition and Fair Trading Commission; regulating and monitoring monopolies and dominant firms; protecting consumer welfare; strengthening the efficiency of production and distribution of goods and services; securing the best possible conditions for the freedom of trade; and facilitating the expansion of the base of entrepreneurship among others.

### ***The Competition Commission and its Competencies***

The functions of the Competition Commission include:

- carrying out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;
- taking 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 any enterprise; and
- providing information for the guidance of consumers regarding their rights under this Act.

The powers of the Commission include:

- to summon and examine witness;
- to call for and examine documents; and
- to administer oaths.

The Act also enumerates what constitutes anticompetitive trade practices, and these include:

- (a) making the supply of goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods or the provision of competing or other services;
- (b) imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;
- (c) resale price maintenance; and

### Box 1: Merger in the Petroleum Sector

On 13 October 2005, Total Malawi Limited lodged an application for authorisation of a takeover of Mobil Malawi Limited (Malawi) by Total Malawi Limited (Total) with the Malawi Fair Trading Commission. Total and Mobil were subsidiaries of Total Outre-mer S.A and Mobil Holdings (Europe and Africa) Limited, respectively. It was an international merger, of which the two parties to the transaction having a subsidiary in Malawi. The Malawi Fair Trading Commission evaluated the merger application and also conducted its own investigations. The relevant market was defined as the importation, supply and distribution of petroleum products in Malawi. The combined final market share of the merged entity of Total and Mobil in Malawi would be 32 per cent. Therefore, the merged market share of Total and Mobil would not act as a barrier to entry into the market for other operators. The Board of the Malawi Competition Commission authorised, on economic efficiency grounds, the takeover of Mobil Malawi Limited by Total Malawi Limited.

The case is a perfect example to advocate enforcement of competition law in least developed countries. It was an international merger having direct impact on Malawi's economy, and without the enforcement of the competition law, Malawi would not have been able to analyse the effects of this merger on the domestic market.

Source: [http://unctad.org/en/docs/trbpcnf6d5rev1\\_en.pdf](http://unctad.org/en/docs/trbpcnf6d5rev1_en.pdf)

- (d) predatory behavior towards competitors including the use of cost pricing to damage, hinder or eliminate competition.

#### Anticompetitive Business Practices

There has not been any comprehensive study on anticompetitive practices in Malawi. However, the problem of anticompetitive practices appears to be quite pervasive. The anticompetitive practices are being carried out in the following manner:

##### Cartels

Cartels operate openly in many sectors, and are suspected of operating undercover in many more. Cartels that seem to have sprung up in response to price liberalisation on the Governments' part are a major problem. In 2012, the Malawi Competition and Fair Trade Commission made attempts to disentangle an existing price-fixing cartel in the transport sector. Such are, in effect, attempts by the cartel members to appropriate the benefit of price decontrol in the form of monopoly rents instead of allowing them to accrue to the public in the form of competitive prices.

#### Restrictive Business Practices (RBPs)

Most RBPs are well hidden in Malawi. However, one instance of RBP that has been detected is in the services sector. In the mid-90s, the Malawi Government encouraged the formation of associations in the services sector including the professions (legal, education, building, etc.). This was to promote development of the relevant services and to safeguard standards. However, the activities of the associations tend to include those that are clearly RBPs to the detriment of consumer welfare and sometimes even the promotion of the services. Typically minimum charges are prescribed and sometimes market sharing arrangements are also made. There is also a potential predatory and exclusionary behaviour.

#### Abuse of Dominance

Malawi's domestic activity is characterised by high market concentration with a tendency towards monopoly or oligopoly particularly in the plantation agriculture, manufacturing, financial and other services. The ownership of assets in manufacturing is concentrated in the hands of a few domestic and foreign investors. So are the dominant domestic investors. A few domestic investors have historically been state-owned companies charged to invest by statute. Their dominance has not substantially changed despite subjecting their investments to a divestiture programme under the Privatisation Act.

The enactment of Privatisation Act did not ensure complete competition in the economy as three major corporations: Agricultural Development and Marketing Corporation

### Box 2: Exclusive Dealing Arrangement and Resale Price Maintenance by Portland Cement Company Limited (PCC)

PCC was found accused of misusing the market power. PCC restricted the distribution system of cement to selected individuals and the number of distributors in any given area was also deliberately restricted. Agents purchased cement at ex-factory prices and PCC recommended selling price to them as well as to other distributors. Responding to the situation, the Competition Commission asked PCC to substantially increase the number and spread of its agents in both the geographic and ethnic dimensions to ensure equitable access to this product of national importance. The Commission also advocated for determination of prices of cement on the market be left to market forces. The Commission requested PCC to amend the Standard Agency Agreement and furnish to the Commission a copy of the amended version of the Agreement for verifications

Source: - RSA Competition Conference, September 2009

(ADMARC), Malawi Development Corporation (MDC) and Press Corporation Limited (PCL) were not (immediately) privatised. As a result, the new private firms found it difficult to compete with the trio that was already enjoying economies of scale and some Government subvention.

Another development is that the state-owned monopolies simply ended up being private monopolies following public reforms. For example, the state-owned Petroleum Control Commission (PCC) that relinquished its monopoly on petroleum imports was replaced by a cartel-inspired Petroleum Importing Company. This is essentially a joint company that a few petroleum importers formed to be charged with the importation of fuel – the very activity PCC was undertaking.

Apparently, due to lack of competition law, the privatisation programme was badly designed and implemented to the extent that in most cases it was virtually the transfer of the Government monopoly to private monopoly. It is, of course, imperative to consider the role that certain monopolies play in the provision of goods and services, and efficiency. However, the enforcement of a competition law becomes even more important to keep the private interest in check for the protection of consumers and other business players.

#### ***Unfair Trade Practices***

There are a number of UTPs in Malawi. These include misleading advertisements, hoarding, and selling of counterfeit goods. These can be observed in the pharmaceutical and maize staple markets, although recently anecdotal evidence has also shown that hoarding is becoming a common practice since the 2010-2012 motor vehicle fuel crisis period. The Consumer Protection Bill though not yet passed shows some Government effort to curb such unfair trade practices that are detrimental to consumer welfare as misleading adverts and counterfeit goods.

#### **Sectoral Regulation**

Presently, the regulatory framework has successfully achieved:

- establishment of the National Electricity Council in October 1998;
- changing the functions of the Petroleum Control Commission from importing fuel to controlling and regulating the fuel sub-sector in May 2000;
- establishment of the Malawi Communication Regulatory Authority (MACRA) in May 1999;
- licensing and operation of a few cellular phone service provider in 1999; and,
- splitting of the former Malawi Posts and Telecommunications Corporation (MPTC) into the Malawi Posts Corporation (MPC) and Malawi Telecommunications Limited (MTL) as separate businesses in May 2000.

MACRA under the Ministry of Information, Posts and Telecommunications regulates the telecommunication sector in Malawi. In line with the need to open up the sector, a Communications Bill was processed by the Parliament and includes the establishment of criteria and a formal procedure for tendering and issue of telecommunication licences, as well as establishing a regulatory body to oversee them. However, MTL is still the sole operator of basic services in Malawi's telecommunication market and its privatisation, which had been put on hold after some irregularities were discovered in its sale, was finally privatised in 2005 to Press Corporation Limited, Malawi's largest business conglomerate.

#### **Consumer Protection**

The Consumer Protection Act (CPA), 2003 contains provisions for regulating fair business practices. The consumer is given protection under this, among other things, against:

- (a) excluding liability for defective goods;
- (b) claiming payment for unsolicited goods or services;
- (c) engaging in unconscionable conduct in carrying out trade in goods or services;
- (d) engaging in pyramid selling;
- (e) engaging in bait selling;
- (f) offering gifts or prizes with no intention of supplying them; and
- (g) putting out an advertisement, which is misleading or deceptive.

The Act also provides for the establishment of a *Consumer Protection Council*. The Council is charged with the responsibility of protecting the consumer from a host of unfair trade practices. It also provides for channels consumers can take for trade remedies arising from unfair trading practices by suppliers of goods and services.

Functions of the Council can be enumerated as follows:

- to investigate any complaint received regarding consumer protection, and where appropriate, refer the complaint to a competent authority and ensure that action is taken by the competent authority to whom the complaint has been referred;
- to carry out investigations or inspections on its own initiative or at the request of any person regarding matters relating to consumer issues;
- to identify price mechanisms in Malawi to determine whether the prices are justifiable and to monitor the frequency and magnitude of price increases;
- to co-ordinate and network consumer activities and liaise with consumer associations and organisations, any competent authority and agencies within and outside Malawi to protect consumer interests;
- to formulate and submit to the Minister, policy and legislative proposals in the interest of consumers, consider and examine, and where very necessary, advise the Minister on the modification, consolidation or updating of legislation providing protection to

consumers in the areas covered under, or related to the CPA or any other written law;

- to provide advice to consumers on their rights and responsibilities under the CPA and any other written law and make available to consumers general information affecting their interests;
- to carryout, promote or participate in consumer education programmes and activities;
- to create or facilitate the establishment of conflict resolution mechanisms on consumer issues;
- to advocate for the effective implementation of the CPA and any other written law affecting consumers;
- to maintain a complaints register;
- to disseminate consumer information to the public;
- to collaborate with other institutions to ensure the quality of technology, goods and services imported into country comply with the Malawi Standards; and
- to recommend to Government, where appropriate, minimum standards for basic or essential needs.

### **Concluding Observations and Future Scenario**

Malawi has the Competition and Fair Trading (C&FT) Act, which is aimed at curbing all anticompetitive practices in the market. It also has a Consumer Protection Act aiming at protecting consumer welfare. Although these two legal instruments constitute the major components of competition policy, the problem is that the institutions that would make the legal instruments effective are still struggling for proper establishment.

There has been substantial progress towards ensuring that the Competition and Fair Trading Commission's secretariat is fully functional, but the lack of appropriate human resources and the political will behind it continue to lack significantly. Poor funding sources, including that from Malawi's Ministry of Industry, Trade and Private Sector Development for activities are also a setback in the functioning of the secretariat. An interim secretariat, thus, manages the day-to-day functionality of the Commission, although permanent contractual arrangements that would officially mandate some of the skeletal staff to motivate the desired drive for accomplishment are delayed.

The Ministry has now allocated office space to the Secretariat to commence operations, using a government-seconded staff contingent to manage activities. This staffs have also undergone a two-month on-the-job apprenticeship with the Zambian Competition Commission; a more established and inspired body, to assist in the kick-starting of the MCFTC.

Most of the laws existing in Malawi lack an enforcing mechanism. Government should, therefore, address these shortfalls to ensure an effective regulatory regime in a liberalised economy. These laws will complement the C&FT Act ensuring a level playing field in the economy; and Consumer movement in collaboration with all Stakeholders, e.g., Malawi Bureau of Standards (MBS), Ministry of Commerce & Industry should be accelerated to educate the public on anticompetitive practices and their effect on consumer welfare and economy.

The telecommunications, utilities (electricity and water) and others are known to be less efficient due to limited competition. In some of these sectors like electricity and telecommunications, there seem to be competition-friendly legislation and regulations put in place yet there is slow progress towards implementation of the necessary reforms. Even with the two bodies in operation (CFTC and CPC), more work will be needed. The market structure requires some solution in order to lessening the burden the two bodies are likely to bear.

There may be a need to harmonise sector-specific regulations with competition principles. Currently, the relationships between sector regulations and the competition regime are not yet clear. Further, the work and indeed the functions and powers of the two bodies themselves may need to be harmonised to maximise their impact and cost-effectiveness. The consumer movement needs to vigorously lobby for the establishment of the CPC so that enforcement of the Consumer Protection Act (2003) is well motivated.

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### **Suggested Reading**

CUTS: Why is a Competition Law Necessary in Malawi?