

Competition Scenario in Malawi



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Acronyms

ACP	Anti-competitive (?) Practices
ADMARC	Agricultural Development and Marketing Corporation
CA	Competition Authority
CAMA	Consumer Association of Malawi
C-CIER	Centre for Competition, Investment & Economic Regulation
CFTA	Competition and Fair Trading Act
COMESA	Common Market for Eastern and Southern Africa
CPA	Consumer Protection Act
CUTS	Consumer Unity Trust Society
ESCOM	Electricity Supply Commission of Malawi
GDP	Gross Domestic Product
GNP	Gross National Product
HDI	Human Development Index
ITIP	The Integrated Trade and Industry Policy
MACRA	Malawi Communications Regulatory Authority
MDC	Malawi Development Corporation
MEGS	Malawi Economic Growth Strategy
MERA	Malawi Energy Regulatory Authority
MFI	Micro-Finance Institutions
MIPA	Malawi Investment Promotion Agency
MK	Malawi <i>Kwacha</i>
MPRS	Malawi Poverty Reduction Strategy
MSEs	Micro and Small Enterprises
MSMEs	Micro, Small and Medium Enterprises
MTPSD	Ministry of Trade and Private Sector Development
NBS	New Building Society
NECO	National Electricity Council
NER	Net Enrolment Ratio
NGO	Non-governmental Organisation
NSO	National Statistical Office
RBM	Reserve Bank of Malawi
SADC	Southern Africa Development Council
SAP	Structural Adjustment Program
SME	Small and Medium Enterprises
UNCTAD	United Nations Council for Trade and Development
US\$	United States Dollar

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1 Introduction

Poverty-reducing growth requires a healthy private sector competition between firms, among other requirements. To enable consumers access to high quality goods with lowest possible prices, there is need for a competitive market that allows the entry of new firms, allows good firms to thrive, and also that sub-standard firms fail and exit. Competition forces producers of goods and services to be efficient and to produce goods and services that consumers need, at the lowest possible prices.

While competition can lead to innovation and more efficient use of resources, it can also lead to the emergence of anti-competitive practices (ACPs) if firms are not ready for competition. They can form cartels or collude. In some cases, they form associations under the guise of developing the sector. These end up whittling down competition through market sharing or price-fixing.

Effective competition can also be undermined by Government legislation, regulation, and administrative procedures or requirements. These can be used to limit competition by actually barring entry or raising the cost of market entry. In some cases, well-meaning economic reforms in the form of trade liberalisation and privatisation can reduce competition, if not accompanied by appropriate competition and consumer protection policies and legislation.

Cartel-like behaviour amongst buyers of goods and services can also hurt poor producers. Employers in certain sectors can gang up and fix wages. Wage labour, in such cases, loses out as it pays below the market price of their services. Likewise, buyers of farm produce can collude and determine produce prices. Farmers are forced to accept low prices for their produce due to little or no bargaining power, given absent or limited markets for their produce.

Lack of competition generates direct and significant costs to the economy as a whole and to consumers, entrepreneurs, workers, and recipients of government services. The poor are harmed the most, because of their constrained household options and budgets. In economies marked by lack of competition, be it due to the economic structure or poverty or both, an active promotion of competition and consumer protection is required. While trade and industry and other related policies address some aspects of the problem, explicit competition policy and law are required to address the problem squarely. Explicit competition policy and law preserve and promote competition for efficient allocation of resources, best possible choice of quality, lowest prices and adequate supplies to consumers. Consumer protection policy and law ensure that consumers have remedies against firms who misuse their dominant position, monopolies who skim the highest possible profits and suppliers who may be forced to cheat, to beat competition. Private sector led poverty reduction requires both effective competition policy and law as well as consumer protection policy and law, because profit maximising is rarely poverty reducing.

Malawi used to have a private sector-led poverty reduction strategy. It is currently developing another private sector-led poverty reduction strategy. Again, Malawi has competition policy

and law as well as consumer protection policy and law. Malawi has a policy that covers both competition and consumer protection. Malawi has laws in its statutes that address both competition and consumer protection. These have been in place for at least three years. Whether these have been effective in addressing the competition and consumer protection problems is the subject of this study.

This study is part of a regional project formulated by Consumer Unity Trust Society's Centre for Competition, Investment and Economic Regulation (CUTS C-CIER) called 'Capacity Building on Competition Policy in Select Countries of Eastern and Southern Africa'. The study is being executed in Botswana, Ethiopia, Malawi, Mauritius, Mozambique, Namibia, and Uganda. The project is in response to a need by various stakeholders to take up activities that would ensure a level-playing field for competition and economic development. The felt need came in the wake of trade liberalisation, deregulation and privatisation, and regional integration.

The major objective of the study is to build capacity in select countries and assist them in formulating, implementing and/or enforcing competition policy and law at the national and regional levels, through the engagement of multiple stakeholders by first supporting a situation analysis study and then using the results of the study to catalyse discussion and debate among stakeholders on ways of addressing specific competition related concerns. This study report is meant to stimulate the discussions and debate in Malawi.

This study report has benefited from a preliminary country report which was presented to the first National Reference Group and comments on the report from that meeting as well as regional peer group members and CUTS itself. The report has also benefited from the only study done on competition in Malawi entitled "Why is a Competition Law Necessary in Malawi" by CUTS C-CIER and Consumer Association of Malawi (CAMA). It has also used findings of a desk study conducted by Mr Steve Dunga and Mr Betchani Tchereni, trade officers in the Ministry of Trade and Private Sector Development (MTPSD). Of those that responded, 52 percent were from Lilongwe. Further, 68 percent were respondents in entities that have first hand information on anti-competitive practices in terms of practising them or being directly affected by the anti-competitive practices of fellow players. There was no respondent from the agriculture sector /rural areas, mainly because the survey was urban based. The table below presents the distribution of the respondents by each sector. The responses from these are considered to represent the views of stakeholders.

The study report has seven sections excluding this introduction. It starts by presenting a brief general background of Malawi. The background is followed by a presentation of the socio-economic policies that have some bearing on competition. Following the policies are legal and institutional frameworks governing competition and consumer protection. An analysis of the market in terms of structure, levels of competition, competitiveness of firms, entry barriers and market concentration follows. The section incorporates findings from the questionnaire and also discusses competition and regulation regimes in the select sectors. Some analysis of the privatisation programme and how it has impacted on competition follows the section on nature of markets. The report discusses regional integration before concluding.

Distribution of Respondents by sector

Sector	Number	Percent
Professional services	14	28
Distribution	11	22
Manufacturing	7	14
Financial services	6	12
All other services	4	8
Transport	3	6
Utilities	2	4
Communications	2	4
Construction	1	2
Total	50	100

2 General Background

Malawi is a small country covering 119,140 square kilometres, 20 percent of which comprise lakes and rivers. It occupies the southern part of the East African Rift Valley and is surrounded by Mozambique, Zambia, and Tanzania. The topography is immensely varied, from the Rift Valley floor almost at sea level to mountains rising to 3,000 metres. Most of the land is under smallholdings; maize being the main staple crop, and tobacco, the main cash crop. Other common food crops include cassava, rice, and groundnuts. Specially grown cash crops include tea, coffee and sugar. Lake fisheries are an important source of protein.

In 2005, the total estimated population was 12 million and total fertility rate was 6.1. The population is young; 44 percent is below 15 years, 54 percent is below 20 years and only eight percent is over 64 years. The national population density is high, averaging 104 persons per square kilometre but ranges between 86 persons and 200 persons. Close to 90 percent of the population is rural-based where it has access to customary land for their settlement and farming. Roughly 12 percent of the labour force is employed in the formal sector, 46 percent of which are in agriculture and fishing, 15 percent in manufacturing, 14 percent in community and personal services. Of those in formal employment, some 20 percent work in the public sector.

Malawi became a British Protectorate in 1891, politically independent in 1964, and a republic in 1966. Central government dominates public administration but the traditional leadership plays a vital link between public administrators and communities. The local government is very weak despite a strong drive to decentralise. From 1964 to 1994, Malawi was practically under one-party rule whose president was given absolute powers in 1971. Following a referendum in 1993, the country adopted a multi-party system of government and this was followed by general elections in May 1994. A democratically elected Government with a multi-party parliament followed the elections. So far, there have been three presidential and parliamentary multi-party

elections in 1994, 1999, and 2004. There has been one multi-party local government elections in 2000 and after the elected councillors mandate run out in 2004, Government dissolved the local assemblies in 2005 thereby making local assemblies run as central government entities.

By 1995, a new republican constitution was adopted granting the internationally recognised bill of rights and separation of powers among the three organs of the state; the executive, the legislature and the judiciary. Administration of justice is done under traditional leadership, High Court and the Supreme Court of Appeal. An industrial relations court, with original jurisdiction over labour disputes and such issues relating to employment, is provided for and was established in 1999. Other constitutional bodies provided for and in operation include the Human Rights Commission, Law Commission, Anti-Corruption Bureau and the Office of the Ombudsman.

Socio-economic profile

Malawi is classified as a least-developed country (LDC). It is poor by both international and regional standards as evidenced by its socio-economic indicators. See Table 1. With a per capita GDP of US\$166 and HDI of 0.387 in 2001, Malawi has been ranked seventh and fourteenth from the bottom, respectively. It has high food insecurity, adult illiteracy, infant mortality, child mortality, maternal mortality and HIV/AIDS prevalence in adults. The situation is likely to have worsened considering that the economic performance has not improved over the past four years. According to the latest economic report, the economy grew by an average of 1.3 percent since 2000 dragged down by the small-scale agriculture, which grew only in two of the five years and averaged 1.5 percent per annum over the same period.

Table 1: Socio-economic indicators

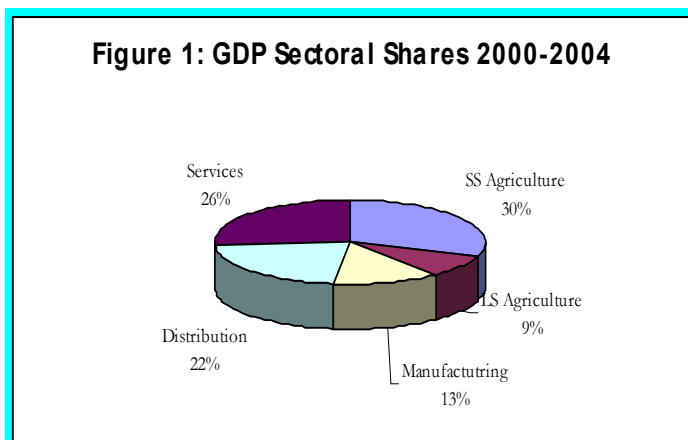
Indicator	Value	Year
GDP Per Capita (US\$)	166	2001
Population in millions	11.6	2001
Population below poverty line (%)	65.3	1998
Adult literacy (%)	61	2001
Male	75	2001
Female	48	2001
Primary NER (%)	101	2000-01
Life Expectancy at birth (years)	38.5	2001
Population expected to live up to 40 years (% of cohort)	41.4	2000-5
Population with access to essential drugs (%)	44	1999
Population with access to safe water (%)	57	2000
Population with access to sanitation facilities (%)	76	2000
Proportion of under-five children stunted (%)	49	1995-2001
Infant mortality rate (number per 1,000 live births)	114	2001
Under-5 mortality rate (number per 1,000 live births)	183	2001
Maternal mortality rate (number per 100,000 live births)	1100	1985-2001
HIV/AIDS prevalence rate (% of the 14-49 age group)	15	2001

Source: UNDP Human Development Report 2003

The country has a weak economic structure and requires a structural transformation if it is to support sustainable poverty reduction. The economy is still dominated by small scale and subsistence agriculture even after over two decades of Structural Adjustment Programmes (SAPs)¹. See Figure 1. The low and seasonal income available to the population implies a small market, and therefore limited scope for increased number of large-scale import substituting manufacturing companies. The size of the economy is suited for small and medium enterprises. This is why employment opportunities in the formal sector are very limited.

¹ It is estimated that as many as 56 percent of the farming households are pure subsistence farmers; they produce for own consumption.

What is clear from this economic structure is that farmers, traders, and intermediaries dominate the private sector. There is likelihood that some manufacturing sub-sectors are dominated by monopolies or oligopolies, which limits the scope for competition. However, there is potential for competition in production and marketing, trading and possibly in associated services like transport and private services.



Source: MEPD, Economic Report (Various)

3 Selected Policies Affecting Competition

There are a number of Government policies that have a bearing on competition in Malawi. Most of the policies have been developed under the movement of economic liberalisation. Malawi followed economic reforms that replaced controlled economic management with freed markets, open borders for goods and services, and non-protective tariffs. The speed of the reforms was quick and this 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 speedily. With time and increased imports manufacturing firms started to reduce their production levels while others slowly died under the intense pressure from competition. This is evidenced by a drop in the contribution of manufacturing in GDP from a high 18 percent in 1988 to an average of 13.3 percent for the 1991-1994 period to an average of 11.7 percent for the 2000-2004 period.

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 these practices disadvantaged the consumer. Government made some efforts to protect the local industry from unfair competition and consumers from being unfairly taken advantage of by introducing some policies. As will be seen in the discussions of the major policies, not all of them were effective in promoting competition or protecting the consumer. Poor policy analysis and lack of implementation were the major reasons why the policies did not achieve their objectives.

Development Policy

There are currently two development policy documents that have some bearing on competition in Malawi. These include the Malawi Poverty Reduction Strategy (MPRS) and the Malawi Economic Growth Strategy (MEGS). The MPRS was launched in 2002 and deals casually with competition. It recognises the private sector as the driving force for growth, with Government, NGOs and donors as mere facilitators of the growth in terms of

creating an enabling environment for pro-poor growth, supporting poor-friendly industries including micro, small, and medium enterprises (MSMEs).

Besides this, the MPRS states that the Government intends to broaden the industrial base by focussing on the development of export-oriented, high value-added and high technology industries; develop new and competitive industry clusters through integration of key industries, suppliers, supporting industries, critical supporting business services, requisite infrastructure and institutions; accelerate regional development, especially the Zambia-Malawi-Mozambique growth triangle; and integrate MSMEs into industrial development by strengthening their competitiveness through improved access to finance, markets, infrastructure, information, results of research, and development and training, among other strategies. Had all of the above been achieved it could have, in all likelihood, impacted positively on competition. Unfortunately, the MPRS was not implemented as was expected.

According to the MPRS, competition was to be promoted in the micro-finance sector. The MPRS stated that the Government was to expand competition and efficiency in the credit market by commercialising and privatising all Government-controlled micro-finance institutions (MFIs). As can be seen, competition was only confined to the MSMEs. The MPRS also did not mention promotion of competition among large-scale manufacturing enterprises.

Competition in the financial sector was meant to be increased by eliminating the interlocking ownership linkages between the two dominant commercial banks through full privatisation, and encouraging new entrants into the system. Apart from competition, this was meant to expand coverage and innovative lending by financial institutions. The interlocking ownership was eliminated with the sale of Commercial Bank of Malawi. With the entry of a number of commercial banks, privatisation indeed brought in more competition into the financial sector than ever before.

The MPRS recognises that the reforms in the telecommunication sector (the separation of postal services from telecommunications and incorporating them as commercial statutory corporations) did not achieve the desired goal of facilitating growth and diversification. It, however, falls short of proposing measures to deal with the identified problem.

MEGS was a reaction to MPRS's apparent glossing over of the role of 'big business' in the much-needed pro-poor growth. MEGS dealt with competition issues more clearly. One of the strategies advocated 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 this strategy were to:

- (i) establish the Competition Commission by July 2003;
- (ii) enact the Consumer Protection Law by July 2003; and
- (iii) formulate a Trade Remedies Law by July 2004.

MEGS was developed when the Malawi Competition Policy and its related legislation were already in place. That is why MEGS called for the establishment of the Commission provided for in the law. Again, consumer protection is covered by the competition policy, but the legislation on competition excluded consumer protection, hence the call for a consumer protection law. The second and third actions were combined in a law that provided for consumer protection and trade remedies with a consumer protection council as the vehicle for both. Some action has been taken towards the establishment of the competition commission. Members of the Commission were appointed in early 2005 but the commission's full-time secretariat is yet to be set up. None of these actions can, on their own, increase competition or protect consumers.

Industry and Trade Policy

The Integrated Trade and Industry Policy (ITIP) predate the MPRS and MEGS by over four years. Nonetheless, it covers competition and consumer protection, apart from almost all issues necessary for the development of trade and industry sectors. For example, it covers information base for policy-making, improved quality of infrastructure (transportation, utilities, industrial facilities), human resources development (training and labour relations), technology capability, trade and industry financing, competition policy, investment promotion, private sector development and collaboration with the private sector.

Under utilities, the policy earmarks two important monopolies for private sector participation. The ITIP states that the Government recognises the need to promote competition as a way of increasing efficiency of service delivery in telecommunications and advocates private sector participation in the provision of electricity. Consequently, encouragement of the private sector participation in telecommunications and in the provision of electricity is seen as one way of increasing competition in the utilities sector and indeed an important step in the promotion of both trade and industry.

The ITIP recognises that a non-competitive environment is one of the factors that hinders private sector development and acknowledges that a competition policy counters restrictive business and unfair trading practices. It argues that competition policy coupled with a good investment promotion policy create an environment conducive for investment, which eventually leads to increased consumer welfare.

The ITIP supports the use of import procurement using multilateral trade agreements, preferential trade agreements, and regional as well as bilateral trade arrangements where goods and services are procured at zero or reduced import tariffs in order to increase competition. The ITIP recognises that globalisation is both good and bad for competition. Globalisation could be bad if exporters into Malawi use unfair practices that are not detected and dealt with in Malawi. The ITIP also recognises the challenges posed to the economy by the fast growing informal cross-border trade. While appreciating the significant impact that trade makes on the domestic market in terms of providing goods at affordable prices, the ITIP recognises that unfair foreign trade squeezes the market of locally manufactured goods. The policy, therefore, advocates the use of countervailing duties and anti-dumping measures and safeguards to protect domestic manufacturers, producers, and traders.

In industry, the policy reports of high concentration levels of ownership and states that this has some negative impact on competition. Companies belonging to the same owners are not

bound to compete with each other, but to collude. Finally, the ITIP recognises that the Government has already taken some action meant to encourage the Small and Medium Enterprises (SME) sector. These include the establishment and operationalisation of the Government Preferential Purchase Programme. As will be seen, this has been legislated in the Public Procurement Act. The Government has also established an SME Fund and has formulated the SME policy

Investment Policy

Malawi's investment promotion policies and legislation were developed and adopted in the early 1990s. By 1992, the Malawi Investment Promotion Agency was set up and in operation. It was set up to implement the policy and law. The policy and law were designed to attract foreign as well as domestic investment by offering fiscal as well as administrative incentives. The fiscal incentives were even more generous for those producing to export. As already indicated, the availability of more players in the industry breeds competition that turns to be beneficial for, specifically, consumers and to the economy, in general. The slow progress in addressing business registration administrative procedures and allegations of corruption, on top of the barriers posed by the country's land-locked ness, saw this policy achieving very little in terms of fostering competition. The ITIP proposes that the policy and law be revised to reflect the current situation.

Government Procurement Policy

There is no black and white Government procurement policy *per se*. What is available is public procurement legislation with its regulations. The Public Procurement Act presents the principles and objectives of public procurement while the regulations provide the implementation details. The goal of the public procurement legislation is to achieve maximum value for public money. Since the Government (central, local, parastatal, parliament and judiciary) is the single-most purchaser of goods and services in the country, it has the biggest potential of fostering competition among its suppliers of goods and services. The legislation's defining principle is the procurement of goods and services by tendering. Unless dictated by circumstances, three competitive bids are required. It prohibits fraudulent practices, like bid-rigging that may deprive the Government from enjoying the benefits of free and open competition.

The legislation uses thresholds to determine the tendering processes required. The Director of Public Procurement is empowered to procure goods and services beyond a certain threshold. The law prohibits artificial dividing of procurement in order to have procurement lots valued at below the threshold. The legislation provides very few exceptions to the rule of three competitive bidders. Apart from the few exceptions, the legislation provides for the promotion of local suppliers. Section 28 states that:

“(1) It is the policy of the Government to provide maximum opportunities for small- and medium-sized enterprises to participate as suppliers, contractors, consultants and subcontractors in public procurement.

(2) Heads of procuring entities are responsible for effectively implementing the small and medium-sized enterprise promotion programme within their activities, ... and take all reasonable action to increase participation in procurement by those enterprises”

The public procurement legislation, which is a translation of public procurement policy, written or otherwise, promotes competition in the country and ensures efficient utilisation of public resources. It is only the preferential treatment given to local suppliers that may, at times, turn out to be an un-competitive practice if there is no competition among the local suppliers or if their bids are consistently higher than the open and fair bids.

Labour Policy

There is no written labour policy in Malawi. There are, however, pieces of legislation that are considered to be a translation of unwritten labour policy. In relation to competition, the labour legislation provides for open employment, where vacant positions are advertised. Employees are also allowed to bargain for their terms and conditions of employment collectively as trade or institution-specific workers union members. For foreign investors, they are allowed to employ a certain category and number of employees from outside the country. The ITIP encourages employers to train their employees to improve efficiency.

Micro and Small- enterprises Policy

The Micro and Small- enterprises (MSEs) Policy was promulgated to address potential as well as the actual obstacles MSEs face in areas of fiscal policy and regulation; money and banking; trade and industry policy and regulations; quality and standards; registration and licensing; management of their records; and access to raw materials, markets, information and technology. The proliferation of successful MSEs is good for competition and eventually, consumer welfare. MSEs also face competition from medium and large enterprises. That is why these enterprises also require government assistance through affirmative government procurement programmes. This policy, read together with the ITIP and the Public Procurement Act gives the impression that the Government Procurement Scheme for MSEs is operational, for those duly registered.

Co-operatives Policy

The co-operative sector is not a significant player in the private sector. However, it is a potential contributor to competition and consumer protection. Co-operatives are known to establish wholesale and retail shops which offer goods to its members and the general public at competitive prices. Co-operatives can also play an important role in mitigating private-sector-growth constraints like capital, credit facilities and technical skills by pooling resources together, apart from increasing bargaining power when dealing with other players in the market. The co-operatives policy was designed to enhance participation of the poor in the socio-economic development process through co-operatives and to encourage co-operatives to diversify their investments in all sectors of the economy, especially industrial co-operatives that are expected to contribute towards the goal of broadening the country's industrial base. This is what was picked by the MPRS. In other words, most of the ideals of the co-operatives policy were picked up by the MPRS. It is unfortunate that the policy was not implemented.

Micro-finance Policy

The micro-finance policy was developed with the aim of supporting enterprises that have problems in accessing credit in the formal financial market. These are mainly the MSEs, co-operatives and, in some cases, medium scale enterprises. Although the micro-finance policy does not relate to competition or consumer protection directly, it fosters competition through its funding of healthy co-operatives and MSEs. Flourishing MSEs and co-operatives

imply increased competition, and therefore improved consumer welfare. As long as micro-finance achieves its objectives, the probability of promoting competition is high.

Competition and Consumer Policies

The competition policy for Malawi was approved in 1997. Its broad policy objective is to promote economic efficiency and protect consumers' interests. It has three broad strategies: namely lowering barriers to entry; reducing restrictive business practices; and protecting the consumer. According to the policy, there are four focus areas: un-competitive business behaviour (fixing, collusive tendering or customer allocation, and tied sales) aimed at eliminating or reducing competition; unfair business practices aimed at taking unfair advantage of consumers; market structures that permit abuse by a dominant enterprise; and Government legislation that affect the freedom in the market.

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 policy calls for the enactment of a law that would make unfair business behaviour an offence and protects the consumer from the manufacturer or importer offering defective or sub-standard products or services by making them liable. It also calls for the establishment of a trade remedies system where civil and criminal suits for the purpose of recovery of damages suffered consequent to un-competitive or restrictive business practices could be dealt with. Specifically, the policy calls for the:

- (a) creation of an autonomous Competition Commission whose role will be to administer Restrictive Business Practices legislation and consumer protection legislation; and
- (b) establishment of a specialised tribunal to resolve contentious issues in certain specific fields subject to judicial review on matters of law.

The Government did indeed enact laws that provided for the promotion of competition and protection of the consumer. It also provided for institutions that would make the law take effect. These are the subjects of discussion in the subsequent section.

4 Legal and Institutional Frameworks

4.1 Legal Framework for Competition

The Competition and Fair Trading Act (CFTA), which was assented to by the President on December 30, 1998 and gazetted on December 31, 1998, was developed immediately after cabinet approval of the Malawi Competition Policy in 1997.

Evolution and Foundation of and Philosophy behind the Competition Law²

Before the liberalisation era, the power of dominant firms, monopolies and oligopolies were kept in check by extensive price controls and other government policies. With economic liberalisation, the Government left the markets free to set prices to enhance efficiency and competitiveness. As the economy continued to move progressively towards increased liberalisation, certain undesirable but basic business practices cropped up taking advantage of the 'hands-off' approach at the expense of both economic efficiency and consumer welfare—targets of economic liberalisation. Typically undesirable and consumer-welfare-reducing business practises that took advantage of the liberalisation, included price-fixing, tied-sales, speculative hoarding, market sharing and collusive tendering. Anti-competitive practices included temporary under-pricing to fend off competition; seeking import protection against competing imports; buying up competitor enterprises; and unfair advertisements against new entrants' products.

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

Objectives, Scope and Coverage

The objectives of the competition law are clearly spelt out in its preamble. Quoting directly, the Act is

'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'.

The CFTA dwells much on institutional issues related to the Competition and Fair Trading Commission. It provides for the establishment of the Commission including its Secretariat, its operations, funding, as well as its management and accountability. It also details areas as well as anti-competitive trade practices the commission would be concerned and deal with.

The CFTA prohibits all anti-competitive trade practices defined as

² The history, evolution and philosophy behind the competition law are found in the background of the Malawi Competition Policy. What is presented here is only a summary.

'any category of agreements, decisions, and concerted practices which are likely to result in the prevention, restriction, or discretion of competition to an appreciable extent in Malawi or in any substantial part of it'.

CFTA does not deal adequately with dumping (cross-border abuses) and unfair competition posed by informal traders³. Informal traders need to be dealt with because mushrooming informal trading signals the malfunctioning of formal trading systems. This is possibly due to high import duties imposed on formal traders, which give rise to appreciably high cross-border price differentials, which in turn are exploited by informal traders using various methods, including tax evasion or import under-valuation. Further, CFTA does not have extra-territorial jurisdiction and is linked to any agreement or arrangement, be it bilateral, regional, or multilateral. Furthermore, the CFTA does not relate itself to any legislation that would deal with consumer protection despite the fact that competition and consumer protection are related as demonstrated by their being under one policy and consumer protection being one of the objectives of the CFTA⁴.

Anti-competitive Practices

CFTA lists the following as anti-competitive practices:

- (a) *Predatory behaviour towards competitors including the use of cost pricing to damage, hinder or eliminate competition;*
- (b) *Discriminatory pricing and discrimination, in terms and conditions, in the supply or purchase of goods and services, including by means of pricing policies in transactions between affiliated enterprises which overcharge or undercharge for goods or services purchased or supplied as compared with prices for similar or comparable transactions outside the affiliated enterprises;*
- (c) *Making the supply of particular goods and services dependent upon the acceptance of restrictions or manufacture of competing or other goods or the provision of competing or other services;*
- (d) *Making the supply of particular goods and services dependent upon the purchase of other goods or services from the supplier to the consignee;*
- (e) *Imposing restrictions where or to whom or in what form or quantities goods supplied or other goods may be sold or exported;*
- (f) *Resale price maintenance; and*
- (g) *Trade agreements fixing prices between persons engaged in the business of selling goods and services, which agreements hinder or prevent the sale or supply or purchase of goods and services between persons, or limit or restrict the terms and conditions of sale or supply or purchase between persons engaged in the sale of purchased goods or services.*

Regarding trade agreements (collusions), the CFTA prohibits the following practices:

- (a) *Colluding in the case of monopolies of two or more manufacturers, wholesalers, retailers, contractors or suppliers of services, in setting uniform prices in order to eliminate competition;*
- (b) *Collusive tendering and bid-rigging*
- (c) *Market or customer allocation agreements;*
- (d) *Allocation by quota as to sales and production;*
- (e) *Collective action to enforce arrangements;*
- (f) *Concerted refusals to supply goods or services to potential purchasers; or*
- (g) *Collective denials of access to an arrangement or association that is crucial to competition.*

³ Formal traders sometimes purchase from informal traders to avoid paying custom duties.

⁴ It is possible that this relationship was deliberately left out because it was known that Government would enact a law on consumer protection. However, the link needed to be provided for the CFTA.

Prohibited Unfair Trading Practices

The Act prohibits hoarding and other acts that are meant to bring about price increase. The Act also prohibits misleading advertisements, the sale of goods and services using false information, the sale of unsafe or sub-standard products that can cause injury to health or physical harm. It also prohibits pyramid and bait selling, conduct of promotion competitions with no intention to give the prizes and claim of payment for unsolicited gifts.

Other prohibited unfair trading practices related to supply of goods and services include:

- i. Making any warranty 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 goods are of a particular 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.*

Control of Trade Associations

Trade associations are also known to propagate anti-competitive practices and CFTA prohibits such practices. These include exclusion of potential members and recommendations of prices and related terms to its members or affiliates. In other words, the Act requires that association members charge freely without being influenced by the association. Typical examples of such prohibited practices are goods and public transport related associations (internal freight transport operators, minibuses, taxis).

Control of Mergers and Acquisitions

The Act prohibits mergers and acquisitions or takeovers that are likely to result in substantial lessening of competition in any market. The competition authority is mandated to scrutinise any intended merger or acquisition such that no merger or acquisition can legally be effected without its express approval.

Control of Dominant Market Players

The Act makes it an offence for any market player with a dominant position to eliminate or damage a competitor, prevent entry or deter or prevent competitors from operating in the market. The Act empowers the Commission to continuously monitor and objectively assess dominant players to ensure that they do not limit competition in the market.

4.2 Legal Framework for Consumer Protection⁵

The Consumer Protection Act (CPA) is the legal framework for consumer protection. Apart from providing for the establishment of the Consumer Protection Council – a subject for the next section – the Act provides for channels consumers can use for trade remedies arising from unfair trading practices. Above all, the Act provides for consumer rights with the following entitlements:

- (a) Protection of their economic, health and safety;
- (b) Consumer education;
- (c) Fair and non-discriminatory treatment;
- (d) Compensation for damages;

⁵ The discussion is based on the Consumer Protection Bill of 7th February, 2003. The Act was passed and assented to in the same year.

- (e) Freedom and right to join consumer associations or unions; and
- (f) Competent protection of their consumer rights, among others.

The Government is obligated to provide the competent protection while suppliers and traders are obligated to offer safe, appropriate, and quality products. They are also required to produce business licences on request, refrain from indulging in unfair trading practices and co-operate with authorities in protecting the consumer. A fine of half a million *Kwacha* is stipulated for those convicted of unfair trading practices. Consumers are also obligated to take precautionary measures including acquiring consumer education.

The Act prohibits pyramid selling or baiting and also nullifies any contract that implicitly abuses consumer rights⁶. Where contracts are required, the Act requires suppliers and traders to furnish the contract before the purchase and should be presented in simple readable official language, and where the contract is to be entered locally, the same should be translated into local language, explained to an illiterate, blind, mute, and any similarly physically challenged consumer in a language s/he understands. The Act mandates the Council to regulate standard form agreements and cancel or alter a contract if it disadvantages a consumer.⁷

Going through the Act, it is clear that consumer rights are well covered such that if implemented fully, there would be few cases of consumer abuses, especially if the consumer is well educated on issues relating to consumer protection. The hitherto powerful (traders and suppliers), who have for a long time taken advantage of the illiterate and seemingly powerless consumer, would not be excited to see the Act implemented to the letter. No wonder there is lot of dragging of heels in setting up competition and consumer protection bodies.

4.3 Institutional Set-up for Competition and Consumer Protection

The Competition and Fair Trading Commission is the institution provided for by the CFTA for the promotion of competition in Malawi. The Consumer Protection Council is the institution as under the Consumer Protection Act meant for the protection of the consumer from unfair and uncompetitive trading prices. Both the Commission and Council are corporate bodies with perpetual succession and a common seal and are capable of suing and to be likewise sued in their respective corporate names. While members of the Commission are nominated by the responsible minister and appointed by the President, the minister appoints the Council members. However, the minister is responsible for both bodies in terms of their remuneration and related matters and they both report to the minister. MTPSD is currently responsible for both competition and consumer protection and by implication, the Minister for MTPSD is in charge of the two bodies. The composition of these two bodies is similar in nature, although Council membership is more diverse. Some professions and civil society bodies are represented in both bodies and two ex-officio members are common in both bodies. The Council has a more diversified civil society representation than the Commission. See Table 2.

⁶ Section 8 subsection 3, provides a list of contractual clauses that are not allowable in buyer-seller contracts.

⁷ The Act stipulates what constitutes an unfair consumer contracts in section 27 subsection 3.

Table 2: Composition of the Competition Commission and Consumer Protection Council

1	One person representing business interests	A representative from Malawi Confederation of Chambers of Commerce and Industry
2	Another person representing business interests	A representative from the Law Society of Malawi
3	A lawyer	A representative from an economic body in Malawi
4	An economist	A representative of a trade union in Malawi
5	An accountant	A representative from a consumer body in Malawi
6	One person representing consumer interests	A representative from a Women's organisation
7	Another person representing consumer interests	<i>Ex-officio</i>
	<i>Ex-officio</i>	Secretary for Commerce and Industry or his representative
8	Secretary for Commerce and Industry or his representative	Director General of Malawi Bureau of Standards or his designated representative
9	General Manager of Malawi Bureau of Standards or his representative	Chief Executive of the Pharmacy, Medicines and Poisons Board or his designated representative
10	Secretary to the Treasury or his representative	Secretary for Justice or his designated representative
11		Secretary for Local Government or his designated representative

Functions of the Competition Commission are to:

1. Carry out investigations in relation to the conduct of business so as to determine whether any enterprise is carrying on anti-competitive trade practices or unfair trading practices and the extent of such, if any;
2. Carry out investigations on its own initiative or at the request of any person who may be adversely affected by a proposed merger;
3. 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;
4. Provide persons engaged in business with information regarding their rights and duties under the CFTA;
5. Undertake studies and make available public reports regarding the operation of the CFTA
6. Co-operate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purposes of ensuring compliance with the provisions of the CFTA; and
7. Advise the Minister on such matters relating to the operation of CFTA as it thinks fit or as may be requested by the Minister

The Competition Commission has **powers** to:

1. Summon and examine witnesses;
2. Call for and examine documents;
3. Administer oaths;
4. Require that any document submitted to the commission be verified by affidavit; s and
5. Adjourn any investigation from time to time.

Functions of the Consumer Protection Council are to:

1. 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;
2. Carry out investigations or inspections on its own initiative or at the request of any person regarding matters relating to consumer issues;
3. Identify price mechanisms in Malawi to determine whether the prices are justifiable;
4. Monitor the frequency and magnitude of price increases;
5. Liaise and consult with relevant stakeholders in order to understand what is happening in the economy;
6. 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;
7. Formulate and submit to the Minister, policy and legislative proposals in the interest of consumers, consider and examine, and where 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 laws;
8. 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;
9. Carry out, promote or participate in consumer education programmes and activities;
10. Regulate the operations of consumer organisations so that they operate in a transparent manner and effectively throughout the country;
11. Create or facilitate the establishment of conflict resolution mechanisms on consumer issues;
12. Advocate for the effective implementation of the CPA and any other written law affecting consumers;
13. Maintain a complaints register;
14. Disseminate consumer information to the public;
15. Collaborate with other institutions to ensure that the quality of technology, goods and services imported into the country comply with the Malawi Standards; and
16. Recommend to Government, where appropriate, minimum standards for basic or essential needs.

The Consumer Protection Council has **powers** to:

1. Request an advertiser to withdraw an advertisement which contravenes the provisions of the CPA
2. Publish reports of the complaints the Council has dealt with
3. Caution suppliers or traders who contravene the provisions of the CPA

Judging from the above, the Council is more of an advocacy than a trade remedies body. Its powers are limited compared to those of the Commission although it has a longer list of functions. While both can investigate, the level of investigations by the Council is limited in that it cannot summon witnesses and call for and examine documents. Its price monitoring role, especially the determination of whether prices are justifiable, will be limited if documents are not called for. The provision that the Council should refer its cases to a 'competent authority' mimics that of the original Anti-Corruption Bureau. The Council could end up being a barking but toothless bulldog similar to the original Anti-Corruption

Bureau. All said and done, a barking dog is better than none whatsoever, because it acts as deterrent for a less determined robber.

What is important, though, is not whether this body would possibly just bark, but bite as well. With a legacy of dragging its heels on all fronts, the question is whether these bodies will be operational at all, since both ‘barking’ and ‘biting’ require some energy. As indicated above, legal frameworks establishing the Commission and Council were enacted some years ago. It was only in 2005 that the Government appointed the commissioners⁸ and after one year, there is still no full-time Secretariat. The Government it is yet to fund the Commission to enable it set up a full time secretariat.⁹ That said, the interim secretariat had, for the Commissioners, three mergers and acquisitions to be dealt with. One of them, the merger of Mobil Oil and Caltex Oil, has been stopped. This is encouraging enough, considering that the Commission has no full time secretariat.

If the seven years that the Government has taken to appoint the Commissioners and plan to fund it are taken as standard then the Council has a long way to go. The major problem cited by the Government is inadequate revenue to support all these ‘important’ institutions. The truth of the matter is that resources are never adequate – it is the priorities that matter. Though positive, economic liberalisation, privatisation, regional integration and globalisation impact negatively on the consumer. These reforms were prioritised. By implication, priority was given to the manufacturer, supplier, trader, and entrepreneur. It is now time to prioritise the welfare of the consumer, who has been sidelined for many years. Without competition and consumer protection bodies, consumers’ welfare will continue to be affected, negatively.

As can be seen, the Commission and Council resemble one another in terms of type, composition, and to some extent, functions. They differ markedly in their powers. Both are not yet operational, although there are now some moves to operationalise the Commission. Strangely, despite all similarities and the fact that the development of the policies and laws involved the same secretariat and stakeholders, the two Acts do not relate to each other, explicitly. Had the foundations of the two legislations been harmonious, then the establishment of one institution (to address competition and consumer issues) could have been an explored, instead of having two separate institutions that suffer from paucity of resources, and hence are ineffective.

4.4 Stakeholder Knowledge of Legal and Institutional Frameworks

Knowledge of the Legal Framework

According to the results of the fieldwork, few stakeholders know that the Government has already put rules and regulations to deal with ACPs. Asked whether there are any rules,

⁸ The names and affiliations of the non-ex-officio commissioners are Mr. Loyd Mahara of Limbe Leaf Tobacco Company (Chair), Ms Rose Mkandawire of Toyota Malawi, Ms Alice Konyani of BP Malawi, Mr. John Mhone of Unilever South East Africa, Mr. Percy Ligoya of Economics Association of Malawi, Mr. Collins Magalasi of Malawi Economic Justice Network and Ms Jane Pamdule of the Consumer Association of Malawi.

⁹ Although MTPSD indicated that the funding of the Commission was included in the ministry’s budget estimates for the 2005/6 financial year, there is no sign of a funded Secretariat even after eight months of implementation. In fact, it seems that the setting up of the Secretariat is not in the cards this 2005/6 financial year.

regulations and laws to check ACPs, 26 percent said ‘no’ as 44 percent said ‘don’t know’. It should be recalled that this was eight years after the legislation was already formulated through what was considered a participatory process¹⁰. This speaks a lot about the effect of non-implementation or lack of proper popularisation of the legislation. Even for those who indicated that they know there are rules, not all were able to correctly cite the two Acts, CFTA and CPA. In fact, 57 percent mentioned the two. One mentioned the Energy Act while another one cited the Anti-Counterfeit Bill.

When those who indicated that there are rules, regulations and laws to check ACP were requested to state whether some serious action is taken when the rules are violated, 47 percent said ‘yes’ always or sometimes and a similar proportion said ‘no’. The expectation was that almost all of the respondents would have said ‘no’ because there had been no institutional set up since the law was passed for such an action to take place. Strangely, when asked whether the existing rules, regulations and laws are sufficient to check ACPs, two-thirds said ‘no’. It is strange because 43% of those indicated that that did not know the ‘rules, regulations and laws’ while the rest mentioned irrelevant ‘rules, regulations and laws’.

As to the agency that provides justice to consumers, CAMA scored highly. In fact, two-thirds of the responses on the question of consumer protection mentioned CAMA. Even the MTPSD had only one response. National Electricity Council (NECO) had three responses. Others with one response include Malawi Bureau of Standards, Malawi Economic Justice Network and Road Transport Operators Association.

Objectives and Scope of Needed Legal Framework

The majority of the stakeholders (80 percent) think that a comprehensive law should be enacted to focus on efficiency and consumer welfare (72.5 percent). Others (22.5 percent) think the law should take into account other socio-economic issues. The stakeholders further said that the law should cover all types of enterprises and persons and all areas of commercial activity (85 percent) and exempt no type of enterprise or unit (92 percent). Further, 70 percent said the law should provide for the monitoring of dominant firms to avoid abuse of their power. This is in line with their agreement that dominant firms breed efficiency but their activities must be monitored to prevent abuse of their market power; 58 percent strongly agreeing and 24 percent just agreeing. Asked whether Malawi has state-owned monopolies, 80 percent said yes. Further, 60 percent said these monopolies indulge in ACPs.

On review of mergers and acquisitions to check substantial lessening of competition, 45 percent of the stakeholders said that there should be provisions in the law for reviewing all mergers and acquisitions while 40 percent said only bigger deals should be reviewed. These responses should be viewed on the background that 56 percent of the respondents did not know that whether there are provisions in the legislation to determine the merits of mergers and acquisitions.

The majority of the respondents (80 percent) even suggested that the law should provide for extra-territorial jurisdiction to deal with practices that originate from outside the country.

¹⁰ It is possible that the respondents chosen by the visited organisations did not know while others in the organisation could have been in the know.

Two-thirds of the respondents also said that the law should deal with abuse of intellectual property rights by companies with them.

However, when asked whether they would suggest a total ban on ACPs, there was some variation although those who wanted a total ban were many, by comparison. See Table 3. This ties with the stakeholders' views that business people either focus on profit only (56 percent) or profit, but sometimes they balance between consumer welfare and profit (30 percent).

Table 3: Views on Whether to Ban ACPs

	Frequency	Percent
Yes for all	16	40
Yes for some	9	22.5
Yes but exempted for efficiency gains	6	15
No, only if it harms public interest	7	17.5
DK	2	5
Total	40	100

The majority (62.5 percent) could not say whether or not the law should have provisions for leniency programme and whistle-blower protection. Only 20 percent said 'yes' as 17.5 percent said 'no'. As to whether there should be exemption on public interest grounds (e.g., technological advancement, protecting interest of SMEs or socially

advantaged groups, employment), 46 percent said 'yes' while 24 percent said 'no'. To protect the provision from abuse, 40 percent proposed that well-defined guidelines should be laid while 24 percent said 'no'. The rest could not tell. When the respondents were also asked whether the law should criminalise violations of the law, 44 percent could not say anything as 22 percent said it should in some cases and 10 percent said it should not.

Regarding the right to private action, 67.5 percent said the law should provide for the same, but when asked what they would do if they encountered any ACP, 56 percent said they would seek help from consumer forums while 26 percent said they would seek help from legislation.

The Competition Authority and its Scope

As already seen, the CFTA had provided for a Competition Commission as an autonomous body. When asked what kind of implementation mechanism the competition authority should have, 57.5 percent said that it should be an autonomous competition policy while 35 percent said an agency under relevant government ministry or department. There were varied views on the kind of power the authority should have. Two-fifths (40 percent) said the authority should have both investigative and adjudicative powers while 37.5 percent said that the authority should have investigative powers only with adjudicative powers vested with courts. Others (17.5 percent) proposed that the authority should not have either powers but the courts. As to whether the competition authority should deal with both unfair trade practices and consumer protection, 90 percent said 'yes'.

Considering that some sectors, for example electricity and telecommunications, could have sectoral regulators, respondents were asked to define the scope of the competition authority in terms of its coverage of sectors with sectoral regulators. Table 4 presents the responses to the question ‘should there be specialised sectoral regulators for electricity, telecommunications etc., or the CA should handle such issues?’

Table 4: Competition Authority or Sectoral Regulators

Option	n=40
Yes for some with CA having power over them	40.0
Yes for some with CA coordinating with them	15.0
Yes for many of them with CA having power over them	15.0
Yes for many of them with CA coordinating with them	22.5
Others	7.5

Regarding the involvement of other stakeholders in the functions of the competition authority, 90 percent said the authority should involve them through a consultative committee (75 percent) or by occasional hearing (17 percent).

5 Market Structure *vis-à-vis* Competition in Malawi

5.1 General Market Structure

The size of the Malawi economy does not present lots of prospects for competition. The GDP at market prices in US dollars averaged US\$1.8bn in the period 2000-2004 and ranged from a low of US\$1.6bn in 2003 to a high of US\$2.0bn in 2002. This is clearly demonstrated by the less than US\$200 per capita levels of both GDP and GNP. See Table 5.

Table 5: Size of the Domestic Market

Year	Nominal GDP (MKm)	Nominal GDP (US\$m)	Nominal GDP Per capita (MK)	Nominal GDP Per capita (US\$)	Nominal GNP Per capita (MK)	Nominal GNP Per capita (US\$)
2000	103,815.0	1,743.5	10,278.7	172.6	10,168.8	170.8
2001	123,704.1	1,713.4	11,894.6	164.7	11,673.2	161.7
2002	148,119.1	1,983.0	13,973.5	187.1	13,709.9	183.5
2003	171,917.8	1,654.8	15,772.3	151.8	15,472.4	148.9
2004	206,708.0	1,898.1	18,964.0	174.1	18,567.6	170.5
Average	150,852.8	1,798.5	14,176.6	170.1	13,918.4	167.1

Source: RBM (2005). Financial and Economic Review Volume 37 Number 1 2005

As already indicated under the general background, the structure of the economy does not provide much scope for across the board competition. See Table 6. When trying to assess the level of competition in a sector, the number of players can be used as a first measure. In case of the Malawi economy, the number of players varies, sector by sector¹¹. For example, sectors with a good number of players include agriculture (small and large scale), internal freight and passenger transport, construction, distribution, private, social and community services. Sectors with limited numbers of players include manufacturing,

¹¹ This section also benefited from a desk study undertaken by Messrs Steve Dunga and Betchani Tcherani of the Ministry of Trade and Private Sector Development.

financial, and professional services. Some like electricity, water and telecommunications are run by Government utility monopolies. As expected, there is only one player, the Government, under producers of government services.

However, it is not always the case that competition flourishes in sectors or sub-sectors with a large number of players. In Malawi, associations and cartels effectively smoulder competition, since members fix prices together rather than subject themselves to competition.

Table 6: Structure of the Economy 2000-2004

	(Sectoral Shares in GDP)				
	2000	2001	2002	2003	2004
Agriculture	39.1	38.2	38.5	39.8	39.1
Small scale	30.9	30.7	30.0	32.3	30.5
Large scale	8.2	7.5	8.4	7.5	8.6
Mining and quarrying	1.4	1.6	1.0	1.1	0.9
Manufacturing	12.9	11.6	11.4	11.2	11.4
Electricity and water	1.4	1.4	1.5	1.4	1.5
Construction	2.2	2.2	2.4	2.6	2.8
Distribution	21.0	22.1	22.1	21.0	21.4
Transport and communication	4.2	4.3	4.9	5.2	5.3
Financial and professional services	8.0	8.1	8.5	8.6	8.9
Ownership of dwellings	1.4	1.5	1.5	1.5	1.5
Private, Social and community services	2.1	2.2	2.2	2.2	2.2
Producers of government services	9.2	9.7	9.4	9.0	8.8
Unallocable finance charges	-3.0	-2.9	-3.3	-3.6	-3.7
GDP at Factor cost	100	100	100	100	100

Source: Ministry of Economic Planning and Development, Annual Economic Report 2005

Structure of the Market

The private sector in Malawi was characterised by dominant public corporations and foreign-owned companies. The direct contribution of indigenous Malawians in the private sector has been minimal. Privatisation was introduced to reduce public corporations' presence in the private sector. At the same time, some efforts have been made to increase the participation of indigenous Malawians in the purchase of some of the privatised assets. The manufacturing sector is dominated by agro-processing and the production of agriculture supporting inputs. The manufacturing sector is, by and large, under-developed with limited competition, diversification, and inter- and intra-industry linkages. While its orientation is import-substitution, it is heavily dependent on imported raw materials and intermediaries. This makes the sector a net user of foreign exchange.

Nature of Competition in the Market

There are very few competitive markets in Malawi, if at all. As already stated, the size of the economy limits the production capacity of players and by implication, the number of players. Small-scale farmers compete when selling their produce. However, they face markets that are not perfect. For example, tobacco growers face limited number of buyers who collude during the tobacco auction. Likewise, cotton growers compete with each other when selling their cotton but they face a cartel of buyers who fix prices for the farmers. It is only in the markets for less important crops where farmers meet competitive markets.

Markets for manufactured goods are, to a large extent, competitive. Trade liberalisation has ensured that monopolies or oligopolies face up to competition from imports. Competition is present in markets of consumer goods, edible oils, skin care, beauty products and household goods (durable and non-durable). There are few manufactured goods that face limited competition in Malawi. Limited competition exists in markets for sugar, opaque

beer, and soft drinks. Franchising make markets for motor vehicles and their genuine parts less competitive. The financial market, which used to have limited competition, has some competition due to financial sector reforms with the entry of some retail banks, the transformation of non-retail banking financial institutions into retail banks, and the privatisation of some financial institutions, including the two dominant commercial banks.

The transport services market is potentially a competitive market. However, minibus, taxi and transport operators' associations have muzzled competition. Association members agree on rates and fares. Non-members generally follow seeing the advantages of using the 'market leaders' rates. Although the respective associations fix the transport rates/fares, they are generally negotiable within some limits.

Some markets have no competition at all. Monopolies still run the local air travel, electricity and water. The entry of two mobile phone operators introduced limited competition in telecommunication sectors. In all these three sectors, high economic rents and inefficiencies abound. The Government is working towards introducing competition in these sectors through increased private sector participation, as will be seen later.

Level of Competitiveness of the Local Firms

Anecdotal evidence shows that most of the local firms are un-competitive. This is evidenced by the shrinking contribution of the manufacturing sector to GDP. Apart from scaling down, some manufacturing outfits have closed down following the introduction of trade liberalisation. Local firms point at unfair competition (dumping) from imports while analysts point at local firms' failure to adjust to competition due to obsolete technologies and outdated management styles. A fair assessment of the level of competitiveness of local firms would cite high transport costs, high-import content of raw materials (also due to the high transport cost), low labour, (limited skills training) and capital productivity (use of obsolete technology) as the main causes. Trade liberalisation has, of course, led to the blossoming of the distribution sector and informal trade. It seems local firms have not taken advantage of the trade liberalisation to source their raw materials cheaply or even improve their technologies.

Existing or Potential Entry Barriers

For all practical purposes, there is free entry and exit for enterprises. In terms of legislation, there are no barriers to entry for most goods consumed by the population. There are few barriers to entry in Malawi. In some cases, some enterprises have been granted exclusive concessions, among them sugar and beer manufacturing. These were granted to attract investors and then protect their 'massive' investments. In most others it is simple 'red tape' despite the enactment of the Malawi Investment Promotion Act and the establishment of the Malawi Investment Promotion Agency, which were meant to streamline business registration, among others. Further, allegations of corrupt practices among civil servants and politicians have also acted as barriers to entry. The highest barrier to entry, though, has been economic mismanagement (evidenced by unsustainable domestic borrowing). This has resulted in an unstable business environment characterised by high costs of conducting business (inflation and interest rates).

Apart from these artificial barriers, there are natural barriers to entry, especially for foreign investors. These include the distance (time factor) and cost to foreign markets, limited

availability of semi-skilled personnel and the pervasive poverty (epitomised by a small market). There are also potential barriers to entry in some financial sector where minimum capital requirements bar potential players to enter. A recent case is that of foreign exchange bureaux. The minimum requirements have been revised upward substantially. Many existing bureaux operators are likely to fail to renew their licences. Further, the Reserve Bank of Malawi has requested bureaux operators to form an association. This, despite its noble intentions, will have the negative impact of stifling competition among them – where currently, there is some health competition.. There are fears that the increased minimum requirements will just breed informal bureaux.

There are legal barriers to entry in the utility sectors. Competition is not allowed in water and electricity. Bureaucratic barriers exist in telecommunications where the MACRA is charged with the responsibility of scrutinising entrants. So far, a third mobile phone operator that applied for a licence some time ago is yet to be given that licence to enable it to operate.

Market Concentration¹²

There are a number of sectors where market concentration exists in Malawi. The clearest example is the sugar-manufacturing sector. Illovo Sugar owns both Nchalo and Dwangwa plants. There is one owner each in water, electricity, rail, and water transport sectors. Government owns parastatals operating water and electricity services. Government privatised the parastatal that operated water and transport services to two separate companies. There is also considerable market concentration in the beer and soft drink manufacturing industries. Southern Bottlers Limited owns plants for beer (Carlsberg brand and a local beer called Kuche-Kuche) and soft drinks (Coca cola, Fanta, and Sprite and fruity flavours like Cocopina, Cherry plum, Ginger ale, and Soda water). Bowler Limited owns the two opaque beer-manufacturing companies. In fact, Bowler Limited acquired a competing company.

There are only two main operators in the telecommunication market; namely Celtel Limited (a private mobile phone operator) and Malawi Telecommunications Limited (a public fixed line operator and co-owner of Telekom Networks Malawi Limited, a second mobile phone operator). A few dominant players dominate the hospitality market. Sunbird Limited owns a hotel chain of six hotels and inns. Of late, the market saw the entry of new owners running equally good, if not better, services in the major cities as well as lakeside resort areas. This has, somehow, reduced concentration. In general, concentration is highest in markets run or previously run by state-owned corporations where monopolies are assumed to be best suited.

5.2 Views of Respondents on Competition and Anti-competitive Practices

Anti-competitive Practices in Malawi

When asked to rate the prevalence of ACPs in the market, eight percent said they are hugely prevalent while 44 percent said they are significantly prevalent and 32 percent said they are moderately prevalent. Only six percent said they are insignificant. On the effect of these ACP on consumers, at least 74 percent said that consumers are significantly affected. In

¹² It has been difficult to calculate indices because of lack of data in most of the sectors.

fact, the highest proportion (40 percent) said the practices hugely affect consumers. Only four percent said that consumers are insignificantly affected.

The ACP most prevalent in the market is collective price fixing. Over half of the respondents (52 percent) mentioned this. This was followed by bid-rigging (10 percent) and entry barrier (10 percent). When all the responses for the three options are put together, collective price fixing is still the largest prevalent ACP. Entry barrier is the fifth most prevalent ACP with market sharing, price discrimination and exclusive dealing, in that order, following collective price fixing. Bid rigging, which featured as the second top most prevalent ACP, becomes sixth when all options are combined. See Table 7.

When asked about the sector most affected by ACPs, the trading sector (distribution) was the one most frequently mentioned. Others mentioned general trading, but tobacco trading was by far the most frequently mentioned type of trading that was affected by ACPs. The second sector most affected by ACPs was manufacturing followed by services. When the responses for the three options are aggregated, the pattern does not change. However, the proportion of respondents mentioning manufacturing and services increased. See Table 8.

On the level ACPs are prevalent, it seems that stakeholders were clear that price discrimination is prevalent at the local level while collective price fixing

Table 7: ACPs prevalent in the markets

ACPs	Top most ACPs	All ACPs
	<i>n=50</i>	<i>n=139</i>
Collective Price Fixing	52	23.7
Market Sharing	6	12.9
Price Discrimination	6	12.2
Exclusive Dealing	6	11.5
Entry Barrier	10	10.1
Bid Rigging	10	8.6
Resale Price Maintenance	4	8.6
Predatory Pricing	2	5.0
Concerted Refusal to Deal	0	2.2
Under Pricing	4	2.2
Tied Selling	0	1.4
Small Size Argument	0	0.7
Dumping	0	0.7
	100	100

Table 8: Sectors Affected by ACPs

Sector	<i>n=46</i>	<i>n=106</i>
Distribution	30.4	27.4
Manufacturing	13.0	17.0
Private, social and community services	8.7	12.3
Construction	6.5	6.6
Transport and communication	2.2	6.6
Agriculture	6.5	5.7
Financial and professional services	6.5	4.7
Some groups	8.7	4.7
All sectors	6.5	4.7
Government services	6.5	3.8
Utilities	0.0	3.8
Some groups in some areas	4.3	2.8
	100	100

is prevalent at the national level. It is also clear that entry barrier is prevalent at the national level. However, the stakeholders seem to suggest that the prevalence of ACPs at the two levels is not mutually exclusive. For example, collective price-fixing and entry barrier are said to be prevalent at both local and national levels. See Table 9. Asked whether the ACPs originate from outside the country, 54 percent said 'yes' while 22 percent said 'no'. The rest did not know where ACPs originate.

It is not clear whether the stakeholders' suffered from biases. Cursory analysis indicate that a certain bias existed. For example, respondents from the professional services sector mentioned collective price fixing and price discrimination as the top ACPs. It is suspected that these responses were purely professional. However, stakeholders from the distribution sectors mentioned concerted refusal to deal, resale price maintenance and exclusive dealing as the top ACPs, which reflect from their experience. Again, those from financial services had collective price fixing and exclusive dealing as top two ACPs while those from other services sectors mentioned entry barriers and collective price discrimination. Stakeholders from the transport sector mentioned mostly price discrimination and exclusive dealing.

Table 9: ACP Prevalence by Level

ACP	Local level n=106	National level n=129
Price Discrimination	15.1	10.1
Collective Price Fixing	14.2	24.0
Bid Rigging	13.2	5.4
Entry Barrier	13.2	13.2
Market Sharing	8.5	9.3
Predatory Pricing	8.5	8.5
Exclusive Dealing	7.5	12.4
Resale Price Maintenance	6.6	7.8
Tied Selling	5.7	1.6
Concerted Refusal to Deal	3.8	3.9
Under Pricing	2.8	3.1
Small Size Argument/dumping	0.9	0.8
	100	100

The analysis is indeed cursory and it is possible that their personal experiences as consumers could have biased their responses rather than their work experience. To get around this, the sectors in which ACPs are most prevalent were compared against the stakeholders' sectors. It was found that the responses were not necessarily biased. For example, manufacturing as the most affected sector with ACPs was mentioned by 23.5 percent of the respondents from manufacturing sector. A similar proportion (24 percent) was found in distribution. Otherwise, all other stakeholders mentioned sectors other than those

they operate in. This implies that the responses were not necessarily biased.

5.3 Market Structure and Competition in Selected Sectors

This sub-section presents sector-specific legal and administrative frameworks *vis-à-vis* competition in pharmaceuticals, financial, power and telecommunication sectors. This follows literature reviews and key informant interviews.

Pharmaceuticals

The Pharmacy, Medicines and Poisons Act of 1988 governs the pharmaceuticals sector. The Act provides for the establishment of the Pharmacy, Medicines and Poisons Board of Malawi to regulate the sector. In particular, the Board is empowered to register and de-register any entity operating a pharmacy business in Malawi. This includes manufacturing and trading. No pharmacy business is registered unless managed by a registered pharmacist¹³ under various classes of licences. A product licence is required for the selling, supplying, exporting or importing, procuring, (for sale, supply and exportation) and manufacturing (for sale, supply and exportation) of any medicinal products.

¹³ Pharmacists include professional pharmacists, pharmacy technologists and pharmacy technicians.

Apart from a product licence, a pharmaceutical manufacturer is required to have a manufacturer's licence. Likewise, apart from product licence, a pharmaceutical wholesaler requires a wholesale dealer's licence just as a retailer requires a dispensing licence. An application for a product licence is required to have a description of the medicinal products on which basis the Board checks the product's safety, efficacy, and quality. The Board requires an application for a manufacturer's licence to detail the proposed operations, premises, equipment, qualification of supervisors and arrangements made for safe keeping of the products and records. Similarly, an application for a wholesale dealer's licence has to describe the premises for the storage of the medicinal products, equipment for storing the products, equipment and facilities for distributing the products, qualification of the supervisor and arrangements for safekeeping of the products and records

One would be tempted to conclude that legislation restricts entry into the sector. However, evidence shows that entry is not restricted. MIPA and the Board continue to receive enquiries and application on pharmaceutical business, respectively. According to the latest register, there are three manufacturers; Pharmanova Limited operating from Blantyre, SADM Pharmaceuticals Limited operating from Lilongwe, and Kentam Pharmacy operating from Mzuzu. Importation of pharmaceuticals covers for most of the gap in manufacturing. There are twenty-one (21) registered pharmaceutical wholesalers, twenty-one (21) registered retail pharmacies, and twenty-eight (28) medicine (for persons, animals and plants) stores. Most of these are located in the urban and semi-urban areas. Rural areas are starved of retail pharmacies and drug stores. In terms of competition, the pharmaceutical sector is competitive. It does not have an association and this has helped keep the competition. The ACP mentioned in the sector was violation of registered trademarks and copyrights. It was reported that manufacturers produce counterfeit products of Malawi manufacturers, which qualifies as unfair trading practice.

Financial Sector

There are three pieces of legislation that govern the financial sector namely the Reserve Bank of Malawi Act, Banking Act and, to some extent, the Capital Market Development Act. The Reserve Bank of Malawi – the country's central bank – regulates the market. It registers financial institutions dealing with retail banking, foreign exchange trade, leasing and financing, trade financing, pension funds management, insurance and re-insurance. Following the liberalisation of the financial sector in the early 1990s, and lately the privatisation of the two commercial banks owned by three public conglomerates (ADMARC, MDC and Press Corporation Limited), the financial sector witnessed the entry of new players into the market. According to the latest National Statistical Office's business information register, there are 20 businesses involved in financial intermediation, the central bank inclusive¹⁴. Out of these, there were

Bank	Share (%)
National Bank of Malawi	40.1
Stanbic Bank of Malawi	23.7
First Merchant Bank	11.3
NBS Bank	11.0
Nedbank Malawi Limited	3.5
Malawi Savings Bank	2.9
Indebank Malawi	2.8
Loita Bank of Malawi	2.2
Finance Bank of Malawi	1.2
Leasing and Finance Company	1.1
All	100

Source: Reserve Bank of Malawi

¹⁴ Again, one financial institution offering retail banking has closed recently following Government scrutiny of its activities.

ten commercial banks with different market shares in terms of deposits as of June 25, 2005. See Table 11.

The key barrier in the sector is possibly the capital requirement. However, this is considered necessary for confidence building and stability of the sector. The sector has witnessed the introduction of new products to the advantage of consumers. The main hindrance in the sector has been the crowding out of the private sector due to the Government's heavy borrowing. This has started to change in recent years after the new Government adopted tight fiscal and monetary policies. This has resulted in the consistent reduction of the bank rate and, to some extent, the liquidity reserve ratio. Although the sector is more competitive than before, it can still benefit from the entry of large players. Apparently, dominant and established players still lead the market and sometimes collude and engage in predatory pricing. Lack of competition is manifested by wide deposit and lending rates spread.

The Government has also recognised that the Capital Market Development Act is out of date. A number of bills to make the Act up-to-date have been developed. These include Securities, Insurance, Anti-Money Laundering, and Combating Financing of Terrorism bills. These are yet to be tabled and passed. These will not necessarily reduce entry requirements, but will increase the number of products in the financial market.

Power

The Energy Act and the amended Electricity Act govern operations of the power sector. A state-owned monopoly generates, transmits, and distributes electricity in the country. This was provided for in the Electricity Act. The Energy Act, in tandem with the move to liberalise the sector, has provided for private sector participation in the sector. The National Electricity Council, set up under the Electricity Act, was to regulate the participation of other players in the electricity sub-sector. With the enactment of the Energy Regulation Act, the scene was set for private sector participation in the power sector. The 2002 Malawi Energy Policy White Paper and 2003 Power Sector Reform Strategy for Malawi articulate the envisaged role of the private sector.

The Energy Regulation Act provides for the establishment of the regulatory body to replace the National Electricity Council called Malawi Energy Regulatory Authority (MERA). This will oversee the reforms in the sector apart from playing the oversight role, once the sector is reformed. According to the two documents and key informants interviewed, the first step will be the unbundling of the market structure into its natural three segments of generation, transmission, and distribution. Reforms in the Electricity Supply Commission of Malawi (ESCOM) started with employment of change managers; establishment of three business units of generation, transmission and distribution; and asset evaluation, and the development of financial systems for each business unit. Currently, the systems are in place such that the three segments sell to each other. The second phase will be to actually separate the ownership of these three business units. The financial and operational separation will facilitate this ownership separation, since some history would have been established as to the assets, financial accounting systems, and costs and sales for each. Once these are separated, private sector participation is envisaged as follows:

Generation: A public company will own and operate the generation. However, independent power producers will be allowed to develop and own generation capacity. Co-generation by major industrial plants will also be encouraged. MERA will be responsible to facilitate the private sector participation.

Transmission: Government will own the assets, but will give a long concession to a private company to run the operations. The public company generating power and the independent power producers will sell their power to the private company running the distribution network. Natural monopoly will be maintained in this segment.

Distribution: Government will retain the ownership of the distribution network, but will transfer the management to at least three distribution entities, possibly on regional lines, under long-term concessions of no more than 20 years. The independent power producers will be allowed to develop and operate their own distribution networks in distinctive geographical locations under exclusive geographical licence and also enter power-purchasing agreements with the distribution company covering their areas to enable them supply through their networks. In the short-term, one distribution company has been envisaged.

The reforms in this sector are progressing too slowly. According to the reforms implementation schedule in the strategy paper, all the short-term reforms were supposed to have been completed by December 2004. However, ESCOM is still intact; the business units have not separated in terms of ownership and operations. The Privatisation Commission has put this on high priority since 2004.

Telecommunications

The Communications Act is the legal instrument governing the telecommunication sector. The Malawi Communications Regulatory Authority (MACRA) regulates the sector. According to the NSO's Business Information Register, there are 22 operators in this sector. However, there are three main players. A public company, Malawi Telecommunications Limited, operates a fixed-line network covering the entire country. There are two mobile phone operators. The first is Telekom Networks, owned by a foreign company and Malawi Telecommunications Limited. The second is Celtel Limited. So far, these two are competing and each tries to introduce innovative products for the good of their customers.

However, the sector would benefit from more players. The key to competition in the sector is the privatisation of the Malawi Telecommunications Limited. The privatisation of this public enterprise began in 2001 and was finally concluded in February 2006 after a number of controversies and court injunctions. It is hoped that efficiency and competition in the short to medium term will ensue in the fixed line sub-sector. Further, it is hoped that MACRA will issue a licence to a third mobile phone operator that had applied at least two years ago.

5.4 The Privatisation Programme and Competition

One of the objectives of the privatisation programme is to increase competition and reduce monopoly. The idea is that some public enterprises are monopolies in their sector because of protection afforded to them by legislation, Government policy, or their sheer dominant position. Privatisation can enhance competition in many ways. The first is that a monopoly

can be broken down and be sold in bits that would compete with each other. An example would be the privatisation of Malawi Dairy Industries and Cold Storage Limited units. These are currently competing with each other in the market. The Privatisation Commission made sure that these units were sold to different buyers to enhance competition. The second involves cutting off protective legislation and policies surrounding a public monopoly before its privatisation. This exposes the sector and the privatised monopoly to competition. This is what is planned in the telephone, water, and electricity sub-sectors where public enterprises dominate. Privatisation and restructuring of a number of Government financial institutions, including the Commercial Bank of Malawi, the Malawi Savings Bank, Indebank Limited, Finance Company of Malawi and New Building Society, have increased competition in the financial sector.

However, not all privatised monopolies lead to increased competition. The privatisation of the entities in the sugar-processing sub-sector may have improved efficiency but has created a monopoly sugar company with no clear competition, even from imports. This is also true of the Malawi Railways (1994) Limited and the Malawi Lake Services. Government presence may have assisted in terms of moderating price increases. Currently, there is no mechanism to moderate price increases. In general, though, the privatisation programme has increased efficiency and improved competition, both of which have positive effect on consumer welfare.

The public has not always viewed privatisation in the light of its effect on competition. Newspaper articles in the two major dailies – Daily Times and The Nation from 1997 did not relate privatisation to competition and rarely consumer welfare. Most of the views concentrated on job losses and loss of ownership by Malawi or low participation by Malawians. This is despite an intensive media and aggressive public relations office. In fact, privatisation has rarely been in the positive light. Of all the sales, privatisation of David Whitehead and Sons (a textile manufacture) and Malawi Telecommunications Limited and the planned privatisation of ADMARC (a marketing and development public company) and urban water boards have drawn the worst criticisms. Although the criticisms vary from company to company, the bottom line has been the poverty impact of those few benefiting from these public companies and not necessarily those who fail to benefit from them who could, once privatisation takes place. So far, the proposed private sector participation in the electricity supply has not drawn any serious criticism, possibly because of its obvious inefficiency in terms of quality of supply and failure to meet an increasing demand.

6 Review of ACP Cases in Malawi

There are a multitude of anti-competitive practices in the country. This section attempts to highlight some cases as review of the earlier work undertaken by CUTS-CCIER and CAMA and in light of stakeholders views expressed through the filled questionnaires and key informant interviews with the Treasury, Public Enterprises Reform Management Unit, MTPSD, Reserve Bank of Malawi, Malawi Investment Promotion Agency, Energy Department of the Ministry of Natural Resources and Environmental Affairs, National Electricity Council, ESCOM, the Privatisation Commission and MACRA. The presentation

follows the sequence presented in Chapter 4 of the CUTS-CAMA report. Areas deemed to have a problem are not mentioned.

6.1 Cartels, Associations and Collusions

Cartels and collusions still exist in petroleum importation and retailing. Again, and as already indicated above, associations in the transport sector collusively set fares and rates. Retail banks also seem to collude or simply follow a leader or leaders in setting their deposit and lending rates as well as foreign exchange rates judging from their similar spreads. In some cases, the difference could be in either in hidden as opposed to transparent costs such the bottom line is the same.

Other cases of collusions are apparent in the purchase of produce. The tobacco, tea and cotton markets are characterised by collusive buyers. The tobacco market's chance of competition was dashed with the merger of Diamon and Stancom Tobacco Limited. This further reduced the number of players from four to three and reduced the number of major players to only two; Limbe Leaf and the amalgamated Dimon and Stancom. In the cotton market, the three major buyers grouped themselves in what is called Cotton Development Association. This association fixes the prices of cotton. The only player out of this cartel (Iponga) is too small to influence the market. In the tea auction market, the problem is simply too few buyers with the likelihood of collusive bidding.

6.2 Monopolies and Dominant Firms

There are a few monopolies in the country apart from the public enterprises considered natural monopolies in telecommunications, electricity and water. One such is Illovo Sugar Company, which processes sugar. It owns most of the sugar estates and all the processing equipment. It has insignificant competition from imports, especially in the upmarket hotels. The rail and water transport services, which were also under public monopolies, are run as private monopolies. However, the rail and water transport service providers are not dominant players as road transport competes favourably except in some water-locked areas and islands. With the opening up and the divestiture of commercial entities owned by the once omni-present conglomerates (ADMARC, MDC and Press Corporation), there are few dominant firms with unchallenged market power from imports.

One such dominant firm exists (Southern Bottlers Limited) in bottled beer brewing in urban areas, despite competition from imported beer, opaque beer and other alcoholic drinks. It is still dominant due to price and quality differences among beers and other alcoholic drinks. The same company dominates the production of franchised drinks like Coca-Cola, Fanta, and Sprite. There is some competition from some locally produced soft drinks as well as imported ones as its market share is still large because of its countrywide delivery system. No other firm has such a system. There is also a biscuit manufacturing company, Universal Industries, which dominates, although it is not immune from imported brands. Its range of biscuits in terms of brands, price and quality make this company a dominant firm. It used its dominant position to subdue its only competitor, Zokoma Biscuits Limited and eventually acquired it off.

Another sub-sector dominated by one firm is cement manufacturing. There used to be two companies – Portland Cement Company and Shayona Cement Company – but the latter closed down. Portland Cement has exploited its dominant market position to convince the Government to put a bar on cement imports. In fact, the price of its cement is kept in check by cement imports.

6.3 Restrictive Trade Practices

The one known existing restrictive practice is when manufacturers of drinks and dairies provide ‘chilling cabinets’ to retailers on condition that such cabinets are used to stock their brands only.

6.4 Anti-competitive Mergers and Acquisitions

There have been a number of anti-competitive mergers and acquisitions in the country. The Competition Commission has just stopped a planned merger of two petroleum-importing companies. Similar mergers and acquisitions used to take place previously, and went unquestioned. These included the merger of Chibuku Products and Napolo Ukana Breweries, two rivals in the opaque beer market.

Three mergers have been referred to the Competition Commission. These were not disclosed but it is assumed that one of them is the thwarted merger of Mobil Oil and Caltex.

7 Regional Trade and Competition Framework

The opening up of Malawi to imports and the introduction of free trade amongst members of regional groups like SADC and COMESA has exposed the economy to ‘imported’ ACPs. Stakeholders pointed out that some ACPs originate from outside of the country and as such the competition law and commission should be designed to deal with such ACPs, as well. Foreign companies can take advantage of the zero-rated customs duties to dump goods on the local market. While the Malawi legislation can provide for such eventualities, it is impractical to follow on these. Some regional framework is necessary to enhance competition and reduce the incidence of ACPs on imported goods and services.

COMESA is more advanced than SADC in terms of drafting a competition policy and law.¹⁵ According to the **COMESA in Brief**, the draft regional competition law and policy are intended “to harmonise existing national competition policies and avoid contradictions and provide a consistent regional economic environment.” (COMESA 2003a: 14). Malawi was one of the countries with an existing competition policy and law by the time COMESA developed its own. Further, Malawi was party to the regional negotiations that shaped the draft regional competition policy and law.

¹⁵ The discussion is based on drafts made available during the COMESA Regional Competition Policy Seminar held in Blantyre on 2nd May, 2003.

It is clear after going through the COMESA competition documents that both benefited from similar guidelines and principles. Indeed the **COMESA in Brief** states that the regional competition policy and law is consistent with OECD and UNCTAD guidelines and principles. Just as Malawi has Competition Policy, Law and Commission, COMESA has already drafted a policy and law and has provided for a regional body called the COMESA Competition Board.

What has not been seen is the link between the CFTA and the proposed COMESA Competition Law; and between the Malawi Competition Commission and the COMESA Competition Commission. There is no provision in the CFTA relating itself to the COMESA Competition Law. Further, it not clear from the national law whether some cases involving enterprises from the COMESA region can be dealt with by either Commissions or both. Similar provisions cannot compensate for the need to relate to each other.

8 Conclusions

1. This study has come at a time when the Government has taken steps to enhance competition in almost all the sectors, including those suited for natural monopolies; and established a competition commission. The study has the unique chance of acting as a baseline for the Competition Commission

2. While the small size of the economy could be taken as good reason for encouraging monopolies, the Government has tried to open it up to as many players as possible. The shrinking manufacturing sector is of concern and efforts are being made to reverse the trend as evidenced by the adoption of the Malawi Economic Growth Strategy in 2003 and current development of the Malawi Growth and Development Strategy

3. Structural adjustment, with its trademark trade liberalisation and free markets, provided a fertile environment for the growth of uncompetitive and unfair trading practices at the expense of the defenceless consumer. Price decontrols, commercialisation, privatisation and deregulation, which were meant to lead to consumer welfare gains *via* efficient gains, seem not to have always led to the desired goal in some markets.

4. Policies developed since 1994 recognise competition as a necessity for economic efficiency and consumer welfare gains. They specifically provide for the limitation of monopolistic, oligopolistic and concentrated markets. Competition and consumer protection policy and law were considered as solutions. In fact, the Government went as far as enacting legislation for the enhancement of competition and consumer protection following the adoption of the policies.

5. The enactment of the laws was not, unfortunately, followed with the establishment of institutions to make the laws effective. It took eight years to appoint the Competition Commission. One year after the appointment of the Commission its secretariat is yet to be set up and it is not clear when it will be. Again, the Government is yet to establish the Consumer Protection Council and its secretariat. This gives the impression that promoting competition and protecting the consumer are currently not the Government's priorities.

6. The Competition Commission and the Consumer Protection Council are needed to address structural deficiencies in various markets. Existence of monopolies, oligopolies, associations, concentrated markets and dominant firms requires constant monitoring. More so, more work is needed to change the structure of the economy to lessen the work of the two bodies. There is need to encourage investments in markets known to have anti-competitive practices.

7. Government's efforts to reform the utilities sectors of power, telecommunications and water through privatisation, though too slow, are commendable. These sectors have failed to support private sector development, as they have been too slow to respond to demand. Although the pharmaceutical sector is relatively competitive, Government's intentions to further liberalise it by privatising the Central Medical Stores, are welcome.

8 Further, once the two bodies are operational, there will be need to harmonise the work of sector-specific regulators with those of the two bodies. Again, harmonisation of the work of the two bodies themselves will be essential if either is to be effective. In fact, a review of their functions and powers *vis-à-vis* competition and consumer protection will be necessary to maximise their cost-effectiveness and impact. The two can benefit from harmonisation of their work, functions, and powers.

9 Malawi requires intensive capacity building. As can be seen, even established companies have limited knowledge of both CFTA and CPA. Secondly, consumers have the least knowledge about these two Acts *vis-à-vis* their consumer rights. They have not been prepared to act in the face of ACPs. Training and civic education is required if the two acts are to take effect.

10 There are a number of areas where further research is required. The critical area is on the impact of privatisation on concentration and competition. There is need to take stock of sectors where privatisation took place to determine whether indeed privatisation improved competition or was it a simple transfer of monopoly powers from the state to the private sector. Another area is market concentration. There has been no serious study on this. No study has calculated concentration indices.

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