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State of implementation of the United Nations
Convention against Corruption

Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Malawi

1. Introduction: overview of the legal and institutional framework of Malawi in the context of implementation of the United Nations Convention against Corruption

Malawi signed the United Nations Convention against Corruption on 21 September 2004 and ratified it on 4 December 2007.

The implementation by Malawi of chapters III and IV of the Convention was reviewed in the fourth year of the first review cycle, and the executive summary of that review was issued on 28 September 2016 (CAC/COSP/IRG/I/4/1/Add.46).

Binding international agreements entered into before the date of commencement of the Constitution are binding on Malawi unless otherwise provided by an Act of the Parliament (sect. 211 (2) of the Constitution).

Relevant implementing legislation includes, principally, the Constitution, the Corrupt Practices Act, Penal Code the Access to Information Act, the Public Service Act, the Parliamentary and Presidential Elections Act, the Political Parties Act, the Public Procurement and Disposal of Assets Act, the Public Finance Management Act, the Public Audit Act, the Public Accountants and Auditors Act, the Public Officers' (Declaration of Assets, Liabilities and Business Interests) Act, the Financial Crimes Act, the Financial Services Act and the Mutual Assistance in Criminal Matters Act.

Entities involved in preventing and countering corruption include the Anti-Corruption Bureau, the Malawi Police Service, the Civil Service Commission, the Attorney General's Chambers, the Directorate of Public Prosecutions, the Judicial Service Commission, the Public Procurement and Disposal of Assets Authority, the Ministry of Finance, the Financial Intelligence Authority, the Office of the Director of Public Officers' Declarations, the Public Appointments Committee of the National Assembly, the Department of Human Resource Management and Development and the Human Rights Commission.

2. Chapter II: preventive measures

2.1. Observations on the implementation of the articles under review

Preventive anti-corruption policies and practices; preventive anti-corruption body or bodies (arts. 5 and 6)

Malawi launched its first national anti-corruption strategy in 2009. The strategy was aimed at implementing theme six, of the Malawi Growth and Development Strategy 2006 – 2011 on Improved governance. In 2019, Malawi launched its second national anti-corruption strategy, covering the period 2019–2024. The second strategy is focused on improving the quality and accessibility of public services, promoting the rule of law by strengthening the ability of law enforcement agencies to investigate and prosecute corruption and recover illicit assets, and promoting a culture of integrity and accountability. It has 12 pillars that champion the fight against corruption, namely, the executive, legislature, judiciary, civil society, faith-based organisations, academia, youth, women, local government, media, private sector and traditional leaders.

The second national anti-corruption strategy was drafted following extensive consultations with various stakeholders including civil society groups, an expert advisory group and international partners. It was developed through an evidence-based process that included a review of best practices from other jurisdictions, studies and a survey on the state of corruption in Malawi, and an analysis of challenges and needs of Malawian society. The strategy is implemented in accordance with an action plan and a monitoring and evaluation framework. Under the strategy, institutional integrity committees have been established in various government ministries, departments and agencies.

Apart from the second national anti-corruption strategy, section 13 of the Constitution requires the Government to introduce measures to guarantee accountability, transparency and integrity. In accordance with this obligation, the Government has enacted the Corrupt Practices Act in 1995. The Act establishes the Anti-Corruption Bureau, which is responsible for the prevention of corruption in public and private bodies. Under this mandate, the Bureau analyses corrupt practices and the development and promotion of anti-corruption policies, including the national anti-corruption strategy (sect. 10 of the Act). The Bureau is also responsible for monitoring the institutional integrity committees, conducting institutional assessments, vetting single source procurements and managing domestic and international anti-corruption partnerships (sects. 10 and 37 (11) of the Public Procurement and Disposal of Assets Act). The Corrupt Practices Act mandates the Public Education Department of the Bureau to disseminate information on the negative impacts of corruption and to foster public support in the fight against corruption (sect. 10). With regard to the periodic review of legal instruments the Malawi Law Commission is responsible for reviewing laws on the basis of gaps identified through court rulings, thematic conferences (such as the National Anti-Corruption Dialogue) and submissions by public bodies such as the Anti-Corruption Bureau (sect. 6 of the Law Commission Act). Furthermore, several legislative initiatives have been carried out, including a review of the Corrupt Practices Act in 2004, 2019 and 2022 and the drafting of the Whistle-blower Protection Act in 2022.

The Anti-Corruption Bureau receives and investigates any complaints concerning alleged breaches of the Corrupt Practices Act (sect. 10 of the Act). In addition, subject to the directions of the Director of Public Prosecutions, the Bureau is mandated to prosecute any offence set out in the Act (sect. 10). The Director of the Bureau may require public officials and other persons to provide statements and furnish documents that may be necessary for such investigations, and access books, records, returns and other documents relevant to the work of any public or private bodies (sect. 11 of the Act). Section 4 (3) of the Act establishes that the Bureau exercises its functions and powers independently. The appointment of the Director of the Bureau is through an open, transparent and meritorious interview process following publication of the vacancy and subject to confirmation by the Public Appointments Committee of Parliament (sect 6A). Removal on specified grounds is by the President, with the confirmation of the Public Appointments Committee, on the basis of relevant findings of a Presidential committee of inquiry, whose composition is specified in the Act (sect. 6B). Further, the Deputy Director of the Bureau is appointed by the President subject to confirmation by the Public Appointments Committee of Parliament (sect. 76 of the Act). The Bureau is funded by the Government and may be supported by external donations. Although there has been increase in the budget allocated to anti-corruption bodies in the past three years, there is a need for continuous investment in the adequacy of resources for bodies involved in the fight against corruption.

In terms of international cooperation, Malawi participates in programmes and training conducted by among others the Southern African Development Community, the African Union, the Commonwealth Africa Anti-Corruption Centre and the United Nations Office on Drugs and Crime.

Public sector; codes of conduct for public officials; measures relating to the judiciary and prosecution services (arts. 7, 8 and 11)

The Constitution establishes the Civil Service Commission, which has the power to appoint candidates to the civil service and exercise disciplinary control over public office holders (sects. 186 and 187). Depending on the staff grade of the persons being appointed, other bodies such as management departments within different ministries are also involved in the recruitment process.

The Public Service Act sets out the general criteria for the selection of civil servants, including ability, knowledge, skill and aptitude (sect. 4). The recruitment process is based on free and fair competition to ensure that all citizens have an equal opportunity

to join the civil service (sect. 4). The appointment of persons to positions above the rank of under-secretary is done by the President of Malawi (sect. 6). The Act protects fair and equal treatment of public officers regardless of their sex, age, ethnicity or political, tribal or religious affiliation (sect. 7). Public officers must receive equal compensation for work of equal value and their performance evaluation must be conducted in an objective manner (sect. 8).

The Public Service Act establishes the Department of Human Resource Management and Development, which is responsible for the implementation of the provisions of the Act, the evaluation of public service-related needs, the maintenance of public service systems and the development of codes of ethics and other internal regulations (sect. 19).

The Office of the President and Cabinet developed the Public Service Management Policy (2018–2022) to guide the Government in the efficient and effective delivery of public services and the effective implementation of domestic policies and programmes. In line with the Corrupt Practices Act and other relevant pieces of legislation, the Policy promotes accountability, transparency, objectivity, impartiality and integrity. The Policy provides that the Government must commit to undertaking good governance strategies, such as the institutionalization of meritocracy in civil service appointments and the promotion of anti-corruption efforts and citizen engagement.

Regulation 168 of the Malawi Public Service Regulations contains rules on rotation for civil servants. The Regulations also list the various types of misconduct for which a civil servant could be disciplined, including negligence, unauthorized absence and the use of private information for personal gain (Regulation 1:201). There are some additional integrity measures in place for several specific categories of officials (such as those involved in procurement). In addition, Malawi has specified positions of public servants vulnerable to corruption, and has reinforced integrity measures for them (Public Officers (Declaration of Assets, Liabilities and Business Interests) Act.

On the basis of the Public Service Regulations, the Malawi Public Service Code of Ethics and Conduct sets out ethical standards for civil servants. The Code is designed to promote responsible and responsive public service and effective public administration. The Code applies to all permanent, part-time, temporary and contractual employees of the public service, establishes the core values expected of civil servants, such as accountability, honesty, impartiality and integrity, and provides guidance on political neutrality, personal behaviour, responsibilities towards the public and the use of public resources. The Code also sets out rules on the acceptance of gifts and conflicts of interest, including the obligation for civil servants to avoid any interests or activities that may compromise their public duties. Violations of the Public Service Code of Ethics and Conduct are punishable as misconduct under Regulation 1:201 of the Public Service Regulations. Additional ethical standards apply to elected officials under the Electoral Code of Conduct for Political Parties and Candidates.

The Public Service Regulations impose an obligation on civil servants to, inter alia, abstain from engaging in an occupation or business that may conflict with their public duties, avoid disclosing or using confidential information for personal gain, refrain from holding interest in public contracts under their supervision and abstain from accepting gifts (Regulation. 1:201). The Corrupt Practices Act (sect. 25D) and the Public Procurement and Disposal of Assets Act (sect. 22) establish a legal obligation for public officials to disclose conflicts of interest, while the Public Officers' (Declaration of Assets, Liabilities and Business Interests) Act requires listed public officers to declare their assets, liabilities and business interests, as described in more detail under article 52 (5) of the Convention.

Electoral legislation includes the Constitution, the Parliamentary and Presidential Elections Act, the Electoral Commission Act, the Political Parties Act, the Electoral Code of Conduct for Political Parties and Candidates and additional provisions adopted by local government. The Constitution prescribes eligibility criteria for the

offices of the President, the Vice-President and members of the Parliament, which include the absence of undischarged bankruptcies and previous convictions involving dishonesty, moral turpitude or violation of electoral laws, and legal capacity (sects. 51 and 80). Similar eligibility criteria apply to ministers and deputy ministers (sect. 94).

The Parliamentary and Presidential Elections Act (sect. 66) and the Political Parties Act (sect. 27) permit political parties and independent candidates to receive voluntary contributions from individuals, non-governmental organizations and private organizations in or outside Malawi. Anonymous donations are prohibited and the financial records of political parties that receive private funding must be audited by a certified public accountant (sect. 27 (2) of the Political Parties Act). Donations of more than 2,000,000 Malawi Kwacha (approx. US\$2,000) for organizations and 1,000,000 Malawi Kwacha (approx. US\$1,000) for individuals must be declared within 90 days to the registrar of political parties (sect. 27 (2)). Although members of the public may access information on reported donations through requests for information pursuant to the Access to Information Act, there is no established mechanism under the Political Parties Act for such information to be published. Moreover, there is a lack of robust monitoring of the sources of funding and a risk of misuse of public resources.

Under section 25D of the Corrupt Practices Act, public officers must report conflicts of interest to the responsible authorities in the relevant institution and abstain from participating in any matters related to the contracts in question. Failure to report is subject to criminal prosecution under section 25D (2) of the Act. The current framework governing conflicts of interest does not provide clear and substantive guidance on how conflicts of interest should be managed by the responsible authorities. The Malawi Public Service Code prohibits the acceptance of gifts and hospitality in circumstances that may compromise the integrity of the public officer and the public service. However, specific rules on the acceptance of gifts are not centralized, with different institutions having their own policies that do not always provide sufficient guidance on the circumstances under which the acceptance of gifts may or may not be permissible.

The report centre of the Anti-Corruption Bureau receives reports of alleged acts of corruption from any person, including civil servants and individuals. The Corrupt Practices Act establishes a legal measure permitting any person to inform the Bureau or the police of alleged or suspected corrupt practices, prohibits the disclosure of their identity in criminal proceedings and establishes penalties for the victimization of whistle-blowers (sect. 51A). Public officers are obligated to report undue advantages within 48 hours of their occurrence (sect. 36).

The Constitution protects the independence of the judiciary and establishes the jurisdiction of relevant judicial bodies (sects. 9 and 103). The Constitution also establishes the Judicial Service Commission, which is responsible for the disciplinary supervision of judges and the nomination of candidates for judicial office (sect. 118). The Chief Justice is appointed by the President of Malawi and confirmed by the National Assembly (sect. 111). All other judges are appointed by the President on the recommendation of the Judicial Service Commission, while magistrates and other judicial officers are appointed by the Chief Justice on the recommendation of the Judicial Service Commission (sect. 111). Members of the Commission are appointed by the President (sect. 117) without recourse to an independent selection process. Subject to an affirmative vote by the National Assembly, the President, in consultation with the Commission, can remove judges from office for incompetence in the performance of their duties or misbehaviour (sect. 119). The Courts Act and the Code of Conduct for Judicial Officers set out the rights, duties and privileges of judges.

The prosecutorial power lies in the office of the Director of Public Prosecutions who can delegate the power to prosecute to other officials. The Director is responsible for the initiation and withdrawal of criminal proceedings and criminal appeals (sect. 99 of the Constitution). The Director is appointed by the President and confirmed by the

Public Appointments Committee, subject to the requirements of competence and independence (sect. 101), and may be removed from office on the sole decision of the President without any assessment by an independent body (sect 102). The Director exercises his or her functions independently, subject only to the general or special directions of the Attorney General (sect. 101). Criminal proceedings can also be initiated by other officials, upon delegation by the Director (sect. 100). There is a code of conduct for public prosecutors.

Public procurement and management of public finances (art. 9)

The management of public finances and procurement is governed by the Public Finance Management Act and the Public Procurement and Disposal of Assets Act. The Public Procurement and Disposal of Assets Act, together with the Public Procurement Regulations, Desk Instructions for Public Procurement and standard bidding documents, establish a legal framework for public procurement in Malawi. The Public Procurement and Disposal of Assets Act prescribes that public procurement must be conducted through an open tender procedure, except in the case of national defence or national security insofar as such procurement is determined to be of a sensitive nature (sect. 37). Restricted tendering may be used for procurements involving a limited number of suppliers (sect. 37). Single sourcing and high value procurements must be vetted by the Anti-Corruption Bureau (sect. 37). The Act provides for international competitive bidding for procurement in which national suppliers cannot provide the required goods (sect. 37).

Contract award criteria must be stipulated in the bidding documents used during the procurement process (sect. 31 of the Public Procurement and Disposal of Assets Act). The Act prescribes a minimum bidding period of 30 days for domestic procurement (sect. 42). Bidders must be registered with the Registrar of Companies and have professional, financial and other resources to provide the required services (sects. 52 and 53). Bidders must also abstain from corrupt and fraudulent practices, such as collusion with other bidders (sect. 55). Furthermore, the Act imposes penalties such as exclusion from public procurement for tender misconduct (sect. 56). Procuring authorities must publish notices of their intention to award contracts for procurement with a value above a certain threshold in two widely circulated newspapers and on one or more authorities' websites (sect. 48). The system of public procurement is largely paper based and information about contract awards is not available in digital format. The Public Procurement and Disposal of Assets Authority has initiated the creation of an open contracting database containing information on contract amounts and contractor details.

The Public Procurement and Disposal of Assets Act imposes an obligation on civil servants to keep tender-related information confidential (sect. 34). Members of procuring authorities must disclose any direct or indirect pecuniary interest related to a public procurement and abstain from participating in decision-making related to the procurement concerned (sect. 22). Failure to disclose a conflict of interest is an offence punishable by a fine or imprisonment (sect. 22). The provisions of the Public Procurement and Disposal of Assets Act concerning procurement integrity and bidder conduct are enforced through bidder debarment (sect 56) and there have been a number of concluded cases of criminal investigations and prosecutions.

Tenderers who have suffered loss or damages related to the procurement process may submit an application for review to the procuring entity. Applications are reviewed by a three-member ad hoc committee formed from an established standing review committee (sect. 60 of the Public Procurement and Disposal of Assets Act). Complaints must be reviewed within 14 days of submission of the application (sect. 60). Following the review of a complaint, the reviewing entity can annul or revise an unlawful decision, report procuring officials to the relevant oversight bodies or compel procuring authorities to provide compensation to the applicant (sect. 60).

The Minister of Finance is responsible for the preparation of the annual budget, the adoption of internal controls and guidelines for the use of public funds and the

implementation of economic and fiscal policy (sect. 7 of the Public Finance Management Act). The annual estimates are approved by the Cabinet and adopted by the National Assembly (sect. 33 of the Act). Public budget consultations are held by the Ministry of Finance. Public funds cannot be used unless the relevant expenses have been authorized by an appropriation act or other statute (sect. 35 of the Act). To ensure financial transparency and accountability, controlling officers must submit quarterly reports containing a summary of financial transactions to the Secretary to the Treasury through an integrated financial management system (sect. 106 of the Act). The Secretary to the Treasury must prepare and submit to the Auditor General an annual report containing consolidated financial statements for the public funds and accounts referred to in the Public Finance Management Act and other laws (sect. 107 of the Act).

Statutory bodies and State-owned enterprises must keep proper records of their transactions, ensure that all payments are properly authorized and maintain adequate internal control over assets in their custody (sect. 99 of the Public Finance Management Act). The Secretary to the Treasury has the power to inspect and investigate the records of any statutory body to ensure compliance with the Act (sect. 10 of the Act). Public audit is conducted by the Auditor General in accordance with section 7 of the Public Audit Act. Breaches of public finance regulations can result in the suspension or termination of the employment contract of controlling officers, as well as criminal prosecution with penalties, including fines and imprisonment (sects. 109–112 of the Public Finance Management Act). In practice, authorities continue to make efforts to implement internal control requirements and to carry out external audits.

Public reporting; participation of society (arts. 10 and 13)

The Access to Information Act sets out general rules concerning public access to information, including the duties of responsible officers and exceptions to the right to access information. The Human Rights Commission established under chapter XI of the Constitution has been designated to oversee the implementation of the Act (sect. 129 of the Constitution). The Act applies to public and private bodies that conduct activities relevant to the public interest (sects. 2 and 3 of the Act). Individuals can submit oral or written requests for information if the information in question is required for the exercise of their rights (sect. 5 of the Act). Information requests must be processed within 15 working days and information may be provided in full or in part, or the request may be denied (sect. 19 of the Act). The Access to Information Act establishes several grounds for refusal to grant access to information, including unreasonable disclosure of personal information about a third party and national security, and in the case of sensitive information and confidential commercial information (sects. 3, 29 and 30).

The Human Rights Commission has the power to review the decisions of information holders and make recommendations on whether refusals to grant information should be revised (sect. 8 of the Access to Information Act). The Commission is obligated to prepare publicly accessible guidelines on access to information under section 9 of the Act; however, no such guidelines had been published at the time of the country visit. Furthermore, public and private information holders must appoint information officers responsible for compliance with the Act (sect. 12). Every public body under the scope of the Act must keep information concerning its operations, personnel, activities and other relevant records (sect. 14). Public bodies are also obligated to make publicly available a range of information, including the names of information officers, internal manuals and policies used by public officers, and any programmes implemented using public funds (sect. 15). However, as was reported during the country visit, the obligations under the AIA, such as addressing information requests, proactive disclosure of information and designation of responsible officers, are not effectively implemented by public bodies.

Malawi has adopted the Public Service Charter to improve public service delivery through the enhanced digital accessibility of services and e-governance. In 2006, the

Public Sector Reforms Management Unit was established under the Office of the President and Cabinet to coordinate public sector reforms for the development of a modern and efficient public service. The Unit is responsible for coordinating the implementation of public sector reform-related resource mobilization and reform management across different ministries, departments and agencies. Malawi also adopted an electronic government initiative in 2004. However, the current system of public -service delivery could be improved, including by expanding the range of services that can be provided through digital channels.

The Corrupt Practices Act (sect. 51A) and the Access to Information Act (sect. 50) establish some legal measures for the protection of whistle-blowers and informers, as described above.

The Anti-Corruption Bureau has published several reports and surveys on anti-corruption efforts, including the 2005 Governance and Corruption Survey, the first and second national anti-corruption strategies and the 2019 Integrity Survey Report. The Bureau also conducts some sectoral and institutional corruption assessments, which have been published.

Civil society is actively involved in corruption prevention efforts. Pillar 6 of the second anti-corruption strategy highlights the role of civil society organizations in the prevention of and fight against corruption. Representatives of civil society organizations, faith-based organizations, the media and academia are included in the strategy's Joint Monitoring and Evaluation Committee. The Anti-Corruption Bureau is responsible for initiatives aimed at preventing corruption and for providing public education on corruption-related issues (clause 4.1.4 of the strategy). The Bureau also conducts active outreach and engages civil society organizations in its work.

Private sector (art. 12)

The Corrupt Practices Act criminalizes corrupt transactions involving private bodies (sect. 26). Other private sector offences under the Corrupt Practices Act include tender manipulation and corrupt collusion at public and private auction sales (sects. 30 and 31).

The Anti-Corruption Bureau cooperates with private sector entities, including the Malawi Confederation of Chambers of Commerce and Industry and the Institute of Chartered Accountants. The Competition and Fair Trading Commission is responsible for investigating anti-competitive practices in the private sector and developing standards of conduct for consumer protection (sect. 8 of the Competition and Fair Trading Act).

The Companies Act imposes an obligation on all private entities to keep proper accounting records and prescribes rules concerning accounting standards and bookkeeping (sect. 180). Private entities are obligated to prepare annual returns and circulate profit and loss accounts and balance sheets to shareholders (sects. 181 and 182). Accounting records must provide a true and fair view of the state of the company's affairs and enable explanation of its operations and transactions (sect. 180). Breaches of accounting and record-keeping obligations under the Companies Act are punishable by a fine or imprisonment for a term of six months (sects. 180 and 186). However, the specific accounting practices referred to in article 12, paragraph 3, of the Convention are not specifically covered under these sections. Accounting records must be kept for a period of seven years (sect. 180). There are no specific provisions requiring private enterprises to maintain internal auditing controls aimed at preventing and detecting acts of corruption.

The Public Accountants and Auditors Act establishes the Malawi Accountants Board, which, inter alia, maintains the register of chartered accountants, promotes cooperation in relation to accounting standards and advises the Institute of Chartered Accountants on examinations and training for accountants (sect. 16 of the Act). In the context of supervision, the Board accredits professional accountancy bodies and trainers and

oversees the regulatory and professional development activities of professional accountancy bodies (sect. 16).

The Companies Act prescribes rules concerning types of legal entities and their formation (sects. 5 and 6). The Act creates the Registrar of Companies, which is responsible for collecting company information and issuing certificates of incorporation (sects. 15 and 324). A companies registry exists; however, there is a lack of capacity and resources to monitor non-compliance. At the time of the country visit, the rules governing transparency in private sector entities were under revision to require the disclosure of beneficial ownership information for legal entities, including trusts and trustees, and the creation of a beneficial ownership registry.

The National Corporate Governance Review Committee has developed a code of best practice for corporate governance for companies and organizations registered in Malawi. Furthermore, a private sector code of ethics exists and was under revision at the time of the country visit.

There are no post-employment restrictions on the professional activities or employment of former public officials in private sector positions related to their previous functions. However, members of the public service, such as the Public Procurement and Disposal of Assets Authority, are required to maintain the confidentiality of any procurement-related information for a period of 24 months (sect. 23 of the Public Procurement and Disposal of Assets Act).

There is no specific legal provision prohibiting the tax deductibility of expenses that constitute bribes.

Measures to prevent money-laundering (art. 14)

The country's legal regime to prevent money-laundering consists mainly of the Financial Crimes Act, the Financial Services Act, the Anti-Money-Laundering Regulations of 2020 and relevant directives and other subsidiary legal instruments.

The Financial Crimes Act and the Anti-Money-Laundering Regulations of 2020 establish preventive measures and reporting obligations for financial institutions, including money or value transfer service providers and designated non-financial businesses and professions. Supervisory authorities designated by the Minister of Finance in accordance with the Act include the Financial Intelligence Authority, the Reserve Bank of Malawi and the Malawi Gaming Board. However, resource constraints limit effective supervision, including the administration of sanctions in designated non-financial businesses and professions.

Section 16 (1) of the Financial Crimes Act obliges reporting entities to identify and verify the identity of customers using reliable and independent source documents. Reporting entities are further obliged to identify and take reasonable measures to verify the identity of beneficial owners of legal persons using relevant information or data obtained from a reliable source (sect. 16 (1) and (4)). However, legal persons, trusts and other legal arrangements are not required to obtain and keep their own beneficial ownership information, nor are they required to update this information or report it to competent authorities. Pursuant to section 29 of the Financial Crimes Act and regulation 24 of the Anti-Money-Laundering Regulations of 2020, reporting entities are required to conduct ongoing due diligence, including monitoring business relationships and transactions, and to ensure that customer due diligence information that has been collected is kept up to date and relevant. All reporting entities are obliged to report suspicious transactions (sect. 23 (1) of the Act). Reporting entities must designate compliance officers in charge of internal programmes and procedures, including the risk-based approach, customer due diligence, record keeping, reporting and transaction monitoring (sect. 27 of the Act).

Authorities such as the Anti-Corruption Bureau, the Financial Intelligence Authority and the Malawi Police Service are able to cooperate and share information at the national and international levels. The National Anti-Money-Laundering and Combating the Financing of Terrorism Committee serves as a platform for

inter-agency coordination and implementation of the anti-money-laundering policy, building on the national risk assessment of money-laundering and terrorist financing. The Financial Intelligence Authority is tasked with cooperating with local and international institutions (sect. 4 of the Financial Crimes Act) and coordinating anti-money-laundering activities with other supervisory bodies (sect. 36 (7) of the Act). The authorities have entered into bilateral cooperation agreements and the Financial Intelligence Authority is a member of the Egmont Group of Financial Intelligence Units and Malawi is a member of the Eastern and Southern Africa Anti-Money Laundering Group. Malawi is a member of the Asset Recovery Inter-Agency Network for Southern Africa, the Southern Africa Regional Police Chiefs Cooperation Organization and the International Criminal Police Organization (INTERPOL).

Persons entering or leaving Malawi must declare cash or bearer negotiable instruments with a value exceeding US\$5,000 to Customs (sect. 55 of the Financial Crimes Act and sect. 27 (2) of the Exchange Control Regulations). The Financial Crimes Act criminalizes false declarations and failure to declare (sect. 55 (6)). Declarations must be sent to the Financial Intelligence Authority without delay (sect. 55 (1) of the Act), and authorities are authorized to seize and detain any cash or items suspected of being derived from an offence or intended for use in the commission of an offence (sects. 55 and 56 of the Act). However, in practice, there has been no case falsely declared and undeclared cross-border currencies and bearer negotiable instruments requiring confiscation and sanctions.

Section 28 (1) of the Financial Crimes Act, read in conjunction with regulation 20 of the Anti-Money-Laundering Regulations of 2020, require financial institutions (including money transmission service providers) to include accurate originator and beneficiary information when conducting domestic and international funds transfers, regardless of the amount, and such information must remain with the transfer. Financial institutions are required to monitor and report to the Financial Intelligence Authority funds transfers that lack the required originator or beneficiary information (regulation 20 (9)) and to maintain records and information collected in accordance with the Financial Crimes Act (sect. 28 (3)).

The Financial Intelligence Authority updated its national risk assessment, conducted in 2013, in 2018, and carries out periodic reviews of the typologies of financial crime. Malawi has drafted a national anti-money-laundering and counter-terrorist financing policy.

The framework to effectively combat money-laundering was assessed against the Financial Action Task Force recommendations and the mutual evaluation report was published in 2019. The previous mutual evaluation report was published in 2008, followed by progress reports in 2017 and 2018.

2.2. Successes and good practices

- Broad participation of civil society organizations in the development and implementation of the national anti-corruption policies (art. 5, para. 1).
- The compulsory vetting procedure for single source procurements by the Anti-Corruption Bureau (art. 9, para. 1).

2.3. Challenges in implementation

It is recommended that Malawi:

- Strengthen the capacity of the Anti-Corruption Bureau by providing continuous specialized training to its staff and increasing the staff contingent according to assessed operational needs, and provide sufficient funding to the domestic anti-corruption bodies (art. 6, para. 2).
- Endeavour to enhance public sector integrity by clearly identifying positions considered especially vulnerable to corruption and adopting additional measures

for such positions, including specific rules on rotation and anti-corruption training (art. 7, para. 1 (b)).

- Endeavour to promote education and training programmes for relevant public officials that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions (art. 7, para. 1 (d)).
- Consider strengthening the political party financing system by lowering or removing the compulsory disclosure threshold for political donations and imposing additional transparency measures for donations, including the consistent publication by the registrar of political parties of political party funding (art. 7, para. 3).
- Endeavour to strengthen the existing regulatory framework governing conflicts of interest by providing clear and substantive guidance on how conflicts of interest should be managed by responsible officers and ensuring that the relevant regulations are consistently enforced; furthermore, consider harmonizing the rules on the acceptance of gifts and ensuring that they provide sufficient and uniform guidance on the circumstances under which the acceptance of gifts may or may not be permissible (art. 7, para. 4).
- Endeavour to strengthen the public procurement framework by continuing efforts to create an open contracting database containing information on contract amounts and contractor details, considering to digitalize the procurement process, expanding the scope of conflicts of interest disclosures under the Public Procurement and Disposal of Assets Act to include non-pecuniary interests, and promoting public access to procurement notices and contract awards by consistently publishing the information through digital channels; furthermore, ensure effective enforcement of the procurement integrity and bidder conduct provisions under the Public Procurement and Disposal of Assets Act (art. 9, para. 1).
- Strengthen accountability in the management of public finances by implementing an effective system of internal controls and ensuring the robust external audit of public financial documents (art. 9, para. 2 (d)).
- Strengthen the system of public access to information by ensuring that the right to information is effectively upheld and implemented by all public bodies, and issue relevant implementing guidelines on access to information under the Access to Information Act (art. 10 (a)).
- Continue efforts to enhance the delivery of public services, including through the use of digital channels (art. 10 (b)).
- Strengthen the integrity of the judiciary and prosecution services by taking steps to ensure the independence of the Judicial Service Commission in the selection of its members and by ensuring an independent and impartial process for the removal from office of the Director of Public Prosecutions; furthermore, consider adopting a code of conduct for prosecutors (art. 11, paras. 1 and 2).
- Strengthen the prevention of corruption in the private sector and to this end:
 - Consider finalizing the revision of the code of ethics for the private sector and encouraging its enforcement (art. 12, para. 2 (b)).
 - Consider adopting additional measures for preventing conflicts of interest among former public officials transitioning into the private sector by setting post-employment restrictions for such officials, including cooling-off periods, and rules on their employment by the private sector (art. 12, para. 2 (e)).
 - Consider adopting measures requiring private enterprises to have sufficient auditing controls to assist in preventing and detecting acts of corruption (art. 12, para. 2 (f)).

- Adopt specific provisions prohibiting the establishment of off-the-books accounts, the recording of non-existent expenditure and other accounting practices outlined in article 12, paragraph 3.
- Disallow the tax deductibility of expenses that constitute bribes and, in particular, ensure that bribe payments cannot be concealed under legitimate categories of expenses, such as “social and entertainment costs” or “commissions” (art. 12, para. 4).
- Finalize the revision of the rules on the transparency of private sector entities, making sure that this revision addresses the disclosure of beneficial ownership information for legal entities, including trusts and trustees, making this information easily available for competent authorities, accurate and regularly updated, allocating adequate resources to the registrar of companies to monitor non-compliance (art. 12, para. 2 (c), and art. 14, para. 1 (a)).
- Strengthen the supervision of financial institutions and designated non-financial businesses and professions using a risk-based approach, and ensure appropriate enforcement (art. 14, para. 1 (a)).
- Consider strengthening efforts to identify, seize and confiscate falsely declared and undeclared cross-border transfers in order to enhance the cross-border declaration regime (art. 14, para. 2).

3. Chapter V: asset recovery

3.1. Observations on the implementation of the articles under review

General provision; special cooperation; bilateral and multilateral agreements and arrangements (arts. 51, 56 and 59)

Malawi has a legal and institutional framework that allows the authorities to provide assistance and cooperate internationally in the area of asset recovery. In addition to provisions of the Financial Crimes Act, the Mutual Assistance in Criminal Matters Act contains provisions that enable Malawi to provide and seek mutual legal assistance in criminal matters relating to asset recovery. However, the scope of the Mutual Assistance in Criminal Matters Act is limited to Commonwealth member countries, except in the case of mutual legal assistance with respect to money-laundering and related offences under sections 118 and 120 of the Financial Crimes Act.

Malawi can provide assistance on the basis of bilateral and multilateral treaties and on condition of reciprocity in the absence of a treaty. Other mechanisms and platforms for international cooperation include the Southern Africa Regional Police Chiefs Cooperation Organization, INTERPOL, the Southern African Development Community, the Eastern and Southern Africa Anti-Money Laundering Group and the Asset Recovery Inter-Agency Network for Southern Africa.

Malawi has strengthened its legal framework on confiscation by establishing an asset forfeiture unit in the Directorate of Public Prosecutions. In 2017, the Financial Intelligence Authority set up an investigations department to focus on the proceeds of crime and conduct civil confiscation relating to money-laundering cases. The country has also established a confiscation fund account to hold funds and property forfeited, confiscated or subject to a preservation order (sect. 131 of the Financial Crimes Act). However, insufficient resources and capacity of competent authorities hamper the efficient implementation of anti-money-laundering and asset recovery measures.

Malawi has not had any cases involving confiscation of the proceeds of foreign offences, foreign instrumentalities of crime or proceeds located abroad. Nor have there been any cases where Malawi has returned assets to another country. Malawi has never refused a request for assistance in a corruption-related case.

The Attorney General’s Chambers does not have a case management system for tracking international cooperation requests and monitoring cases; nor does the Asset

Forfeiture Unit have a data collection system for keeping track of frozen, seized or confiscated property.

Information is shared spontaneously mainly by the Financial Intelligence Authority, including through the Egmont Group and bilateral memorandums of understanding (sects. 4 (e) and 5 (g) of the Financial Crimes Act). The Police Service, the Anti-Corruption Bureau, the Directorate of Public Prosecutions and the Attorney General's Chambers may also share information spontaneously with foreign counterparts and international organizations.

Malawi is a party to several agreements containing provisions on asset recovery through international cooperation.

Prevention and detection of transfers of proceeds of crime; financial intelligence unit (arts. 52 and 58)

The Financial Crimes Act defines politically exposed persons as high-risk customers to whom additional due diligence measures must be applied. The definition includes domestic and foreign politically exposed persons, their family members and close associates. Section 16 (2) (d) of the Act requires reporting entities to take reasonable measures to determine whether a customer or beneficial owner is a politically exposed person and, where there is a high risk, to apply additional measures, including risk management procedures, management approval, verification of the source of income or wealth and ongoing due diligence.

The Financial Intelligence Authority notifies reporting entities of higher-risk customers and transactions either on the basis of information received from foreign sources or spontaneously, through its website, guidelines, advisories and direct communication, as well as the findings of the national risk assessment of money-laundering and terrorist financing, international sanctions lists and instructions from other financial intelligence units.

Section 22 (2) of the Financial Crimes Act requires reporting entities to maintain records obtained through customer due diligence and transaction reporting for a minimum period of seven years following the conclusion of a business relationship or transaction.

Under the Banking Act, shell banks¹ are not permitted in Malawi. All financial institutions are required to be licensed or registered in accordance with section 21 of the Financial Services Act. Furthermore, section 30 (2) of the Financial Crimes Act prohibits financial institutions from entering into or continuing correspondent banking relationships with shell banks and requires financial institutions to satisfy themselves that respondent financial institutions do not permit their accounts to be used by shell banks.

The Public Officers' (Declaration of Assets, Liabilities and Business Interests) Act establishes a framework for the compulsory declaration of assets, liabilities and business interests by listed public officers (defined as persons who are members or employees of the Government or statutory or public bodies). The Act also establishes disclosure-related offences, which complement the obligations contained in sections 88A and 213 of the Constitution. The Office of the Director of Public Officers' Declarations is responsible for the overall administration of the Act, including the enforcement, regulation, monitoring and verification of declarations of assets, liabilities and business interests. Among other functions, the Office is mandated to publish in the Government Gazette an annual summary of declarations filed, as well as the names of non-compliant officers, and to submit annual compliance reports to the Minister of Justice for presentation to the Parliament (sect. 11 (2) (g) of the Act). Although the transparency requirements are beginning to be implemented, overall effectiveness is hampered by the limited capacity of the Office, weak

¹ Under the Financial Crimes Act, "shell bank" means a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial group that is subject to effective consolidated supervision.

enforcement, the broad scope of officials subject to reporting obligations and the lack of electronic filing.

Among the assets to be declared pursuant to section 15 (1) (v) of the Public Officers' (Declaration of Assets, Liabilities and Business Interests) Act is any bank account, "wherever located", that is held in a public official's name or by that official jointly with any immediate family member, close associate, agent or business partner, with additional particulars including the account balance.

The Financial Intelligence Authority is responsible for, inter alia, receiving, requesting and analysing reports, disseminating financial intelligence and other relevant information to law enforcement agencies and ensuring compliance with the Financial Crimes Act (sect. 4 of the Act).

Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (arts. 53, 54 and 55)

There is no specific legal provision that would allow a foreign State to initiate civil action in the domestic courts to establish title to or ownership of property. Although the Civil Procedure (Suits by or against the Government or Public Officers) Act regulates claims by private persons against the Government, it does not provide a specific legal basis for private claims to property in the domestic courts.

Section 48 of the Financial Crimes Act empowers the court to order the compensation of victims of financial crime in accordance with section 149 of the Criminal Procedure and Evidence Code, which authorizes the court to give any order necessary for the disposal of property (including by forfeiture, confiscation or delivery to persons entitled to possession, or in any other manner). In addition, section 37 (b) of the Corrupt Practices Act authorizes the court to order convicted persons to pay to the rightful owner the value of any advantage they obtained. In accordance with the General Interpretation Act (sect. 2), these measures also apply to foreign legal persons.

Any persons (including foreign legal persons) who have an interest in property that is the subject of an application for forfeiture or confiscation may apply for the exclusion of their interest and for an order directing that the property or its value be returned or paid to them (sects. 75 and 83 of the Financial Crimes Act).

Section 127 of the Financial Crimes Act provides for assistance in the registration and enforcement of foreign preservation or confiscation orders against property believed to be located in Malawi. The provision applies whether the foreign order is based on criminal or in rem or other non-conviction-based proceedings. An order registered in accordance with section 127 has the same effect and is enforced as a domestic order, provided that the grounds for recognition set out in section 127 (3) are met. The court may issue such further orders as necessary to give effect to the foreign order and is bound by the findings of fact stated in the foreign order (sect. 127 (8)).

Authorities in Malawi can order the confiscation of property of foreign origin through provisions on civil forfeiture and confiscation that cover proceeds of crime, tainted property and instrumentalities of crime, whether located in Malawi or elsewhere (parts VI and VII of the Financial Crimes Act). These measures can also be taken at the request of another country (sect. 120 (2) of the Act).

Part VI of the Financial Crimes Act deals with non-conviction-based asset forfeiture, while section 53 of the Act provides for confiscation where a person has died or absconded. Together with section 120 (2) of the Act, these provisions allow Malawi to provide assistance in response to requests for cooperation made on the basis of non-conviction-based proceedings. In addition, section 127 (1) of the Act provides specifically for assistance by Malawi in the enforcement of foreign preservation or confiscation orders, whether based on criminal or in rem or other non-conviction-based proceedings.

Section 127 of the Financial Crimes Act provides for assistance in the registration and enforcement of foreign preservation orders, while sections 117 and 118 of the Act provide for powers to locate and seize property suspected of being tainted property on the basis of a foreign request. At the domestic level, authorities can take provisional measures to seize and freeze property, such as preservation orders (sects. 65 and 108 of the Financial Crimes Act), restraining orders (sect. 107 of the Financial Crimes Act), seizure orders (sect. 68 of the Financial Crimes Act), freezing and seizure (sect. 23A of the Corrupt Practices Act) and anti-disposal orders (sect. 23 (1) of the Corrupt Practices Act). Authorities can also take provisional measures on the basis of a foreign request or to make or execute any foreign order or direction (sect. 120 (2) of the Financial Crimes Act).

Section 127 (4) of the Financial Crimes Act authorizes the preservation of property for confiscation on the basis of a foreign request. The Act further gives the court the power to prevent or void actions, whether contractual or otherwise, affecting tainted property subject to confiscation (sect. 82 (b)).

The Attorney General, through the Director of Public Prosecutions, is the central authority mandated to execute mutual legal assistance requests. Once a request is received, the Director assesses whether the request is in compliance with the Mutual Assistance in Criminal Matters Act, and if so, transmits it to the competent authorities for execution.

There are no formal content requirements for mutual legal assistance requests from countries that are not members of the Commonwealth.

Malawi may refuse assistance on the ground that the discretionary conditions imposed by the Minister of Justice under section 3(2) of the Mutual Assistance in Criminal Matters Act are not met or because the provision of assistance would present an excessive burden on its resources (sect. 18(3) (c) and (d) of the Act). These provisions are limited to Commonwealth member countries.

The rights of bona fide third parties are protected (sects. 48, 49, 75–77 and 83 of the Financial Crimes Act).

Return and disposal of assets (art. 57)

Sections 48 and 132 of the Financial Crimes Act and section 149 of the Criminal Procedure and Evidence Code provide a basis for the authorities to dispose of confiscated property, including for the purposes of compensating victims of financial crime and delivering property to persons, including foreign persons, claiming possession. In addition, the Attorney General may order that forfeited property or the value thereof be returned or remitted to a requesting State (sect. 127(10) of the Financial Crimes Act). However, the provision is limited to assets confiscated pursuant to the enforcement of a foreign confiscation order, and vests the Attorney General with the discretion to order the return of property or the remission of its value to the requesting State.

The aforementioned measures are subject to any order for the protection of interests of bona fide third parties in forfeited property (sects. 75, 76 and 83 of the Financial Crimes Act).

Malawi does not regulate the ordinary expenses of executing requests or provide for the deduction of reasonable expenses leading to asset recovery. No agreements on asset return have been concluded.

3.2. Challenges in implementation

It is recommended that Malawi:

- Prioritize the provision of adequate resources and capacity-building to financial crime investigators and prosecutors, including the Anti-Corruption Bureau, the Financial Intelligence Authority, the asset forfeiture unit and

supervisory authorities, in order to strengthen the implementation of anti-money-laundering and asset recovery measures (arts. 51 and 58).

- In order to afford the widest measure of cooperation, consider establishing an efficient case management system for the monitoring of requests relating to asset recovery and collecting statistics relating to frozen, seized or confiscated property (art. 51).
- Extend the scope of application of the Mutual Assistance in Criminal Matters Act in particular relating to asset recovery to countries that are not members of the Commonwealth (art. 51 and art. 55, paras. 3 and 8).
- Continue to strengthen the requirements for reporting entities to identify and appropriately manage risks relating to politically exposed persons (art. 52, para. 1).
- Continue to strengthen the system of asset declarations and its transparency and in this regard: (a) consider refining the scope of listed officials, introducing electronic filing, enhancing the oversight and enforcement powers and capacity of the Office of the Director of Public Officers' Declarations, in particular, to receive, analyse and carry out verification of the disclosures, and imposing sanctions; and (b) ensure regular and timely publishing of summary information and compliance reports, as required by the Public Officers' (Declaration of Assets, Liabilities and Business Interests) Act, and issue guidelines on sanctions (art. 52, para. 5).
- Adopt measures to permit a foreign State to initiate civil action in its courts, other than through the Attorney General, to establish title to or ownership of property acquired through the commission of corruption offences (art. 53 (a)).
- Make sure there is a procedure specifying clear legal criteria on the grounds for refusing assistance to requesting States for non-Commonwealth countries (art. 55, para. 7).
- Ensure that the framework for the return of forfeited or confiscated property to requesting States meets all requirements of paragraph 3 of article 57.
- Consider regulating the matter of expenses incurred in relation to asset recovery (art. 57, para. 4).
- Consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation on asset recovery (art. 59).
