



**FIRST ROUND MUTUAL EVALUATIONS - POST EVALUATION PROGRESS
REPORT OF MALAWI**

Covering the period August 2017 – July 2018

REPUBLIC OF MALAWI

A. Introduction

1. This 11th detailed review was conducted by Review Group comprising of experts from Angola, Botswana, Namibia, Uganda and Zimbabwe.
2. Malawi was evaluated by the World Bank in March 2008 and the Mutual Evaluation Report (MER) was adopted by the ESAAMLG Council of Ministers in August 2008. Since then the country has made efforts to address the deficiencies noted in its laws, systems and structures as recommended in the MER.
3. This report only focus on the outstanding action items, as well as the progress on goals set in the HLM Report.

B. Overview of Progress made by Malawi

4. Malawi has amended its legal framework in an endeavor to comply with the assessors' recommendations and made commendable progress.
5. In broad terms the authorities of Malawi have made a lot of progress in addressing the deficiencies which were identified by the assessors at the time of the assessment. In 2011, Malawi issued the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Regulations, 2011 (AML/CFT Regulations, 2011). The AML/CFT Regulations, 2011 addressed most of the gaps identified by the assessors on Core and Key and Non-Core and Non-Key Recommendations following the enactment of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (AML/CFT Act) in 2006. The AML/CFT Act has been under further review and amendments which have been effected through the enactment of a new Financial Crimes Act in February 2017¹. Immediately after the commencement of the Act the Minister of Finance issued the Suppression of Terrorist Financing and

¹ Notice commencing the Act was published in the Government Gazette on 17 February 2017

Proliferation Regulations. The AML/CFT Regulations, 2011 which had been reviewed to make them more relevant in alignment with the old AML/CFT Act were saved by virtue of Section 141(3) of the new FCA, and are still in force. The passing of these new measures effectively addressed almost all the deficiencies which were outstanding, only leaving a few unaddressed.

6. In December 2013, Malawi ratified five conventions (Convention on the Physical Protection of Nuclear Material, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on Continental Shelf, Convention on the Marking of Plastic Explosives for the Purpose of Detection, Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation) which are annexes to the International Convention of the Suppression of the Financing of Terrorism of 1999. The last remaining convention has also since been ratified, meaning the authorities have now ratified all the Protocols/Conventions which are Annexes to the TF Convention.
7. In September 2013, the Customs and Excise Regulations were amended to include declaration of currency and goods provisions in line with the requirements of section 38 of the AML/CFT Act. This now require travelers entering and exiting Malawi to declare currency, precious stones, precious metals, bearer negotiable instruments and goods above the threshold of US\$5,000.
8. In August 2013, the FIU moved its offices from the Reserve Bank of Malawi to its own premises. This has ensured certain improvements on its security to include manning of the premises by the police, a CCTV monitoring system as well as limited access to the offices.
9. From October 2014, the FIU introduced new revised STR forms for various financial institutions. The form now requires the FIs to provide relevant information which is sector specific.

10. Effective from December 2014, the Government of Malawi appointed a substantive Director to the Malawi FIU. The appointment was eventually confirmed by the Malawi Parliament's Public Appointments Committee in March 2015. The appointment was a great achievement for Malawi since there had been Acting Directors heading the FIU, since its establishment in 2007.
11. From 2014, Malawi has seen a steady rise in the investigation and prosecution of ML cases, with 88 cases involving a ML component being investigated (compared to 42 in 2014), 53 of the cases prosecuted and 5 cases completed with the accused persons being convicted and deterring sentences coupled with confiscation orders being imposed by the courts in 2015, alone.
12. The Malawian authorities successfully carried out a NRA and the report was approved by the Government in May 2015. After the adoption of the NRA, the Malawi FIU was tasked to make the relevant stakeholders aware of the NRA findings, and to monitor the progress in the implementation of the NRA action plans.
13. The FIU has evaluated the feedback it is providing by meeting various stakeholders including: holding meetings with the RBM, CEOs of banks, Compliance Officers of FIs, heads of agencies, law enforcement agencies and a sensitization meeting with the Association of Bankers. From March 2015, the FIU has been providing feedback to the banks on quarterly trends of the sector's filing of STRs and LCTRs and has also provided sanitized cases to the banking sector.
14. The banks, following their training on risk assessment by the FIU, RBM and IMF in June 2014, started reviewing their risk assessment tools and frameworks from July 2014.
15. The Malawi FIU, has entered into various MoUs with counterpart FIUs².
16. Prior to the enactment of the FCA, the Task Force of Senior Officials concerned with the delays by the authorities to pass the Financial Crimes Bill,

² USA, Namibia, France, United Arab Emirates, South Africa, Mauritius, Philippines, Denmark, Macedonia, Tanzania, Taiwan, Zimbabwe, Kenya and Zambia

it had recommended to the Council of Ministers that a High Level Mission be sent to Malawi to express ESAAMLG's concerns with the slow pace it was making in addressing the strategic deficiencies identified in its MER which the authorities were saying would largely be addressed by the Bill. The Mission took place at the end of October 2016 and presented its report to the Task Force of Senior Officials' meeting in April 2017. Since then to date, Malawi has been reporting back to the Task Force Plenary on the progress it is making in addressing the recommendations of the High Level Mission.

17. At their last meeting in April 2018 in Arusha, the Reviewers had noted that Malawi had not made sufficient progress on the following Core and Key Recommendations: SR II, SR III; and Non-Core and Non-Key Recommendations: 34, and 39.
18. Malawi had made progress in training its authorities and provided all the relevant statistics to the Reviewers. There is no need for Malawi to provide statistics anymore; unless required by the Reviewers for a specific reason.

C. Analysis of Progress

CORE & KEY RECOMMENDATIONS

BUILDING BLOCK 1: LEGAL FRAMEWORK – I.1 CRIMINALISATION OF ML & TF, PROVISIONAL MEASURES (FORFEITURE/CONFISCATION AND FREEZING OF ASSETS)

1.2 Criminalizing of terrorist financing (SR. II)

SR II.1 – Criminalisation of TF

19. Ss. 43, 44 & 47 of the FCA, adequately criminalises the offence of TF. The only deficiency is that the term funds used in s. 43 is not defined to know whether in terms of scope the meaning extends to what is covered under the definition of funds in the TF Convention. It also appears the terms "funds" and "property" are being used interchangeably for sections 43, and 44 and 47.

20. During the face-to-face meeting in Zanzibar September 2017, the Reviewers agreed that the content of the definitions of “property” in the FCA and the Regulations indeed covers all the elements of the definition of “funds” in the 40+9 Recommendations, but pointed out that using the words “property” and “funds” interchangeable in the law (while there is not also a definition for “funds”) creates confusion and uncertainty.
21. It was recommended that the Authorities should clearly distinguish between the term “property” and “funds”. The term “funds” should clearly be defined in the FCA or reference to the word “funds” should merely be deleted.
22. During the Task Force Meeting in April 2018 the authorities reported that Malawi has not yet clearly distinguished between the term “property” and “funds”. This will be addressed through amendment of the FCA by July 2018.
23. Under the current period of review, the authorities again submitted the distinguishing between the term “property” and “funds” has still not been done as the proposed amendments to the FCA are still being drafted and expected to be adopted in Parliament in December 2018
 - *Sufficient progress cannot be noted in respect of SR.II.1*

SR. III.3 – Procedures to give effect to actions under freezing mechanisms of other jurisdictions

24. Regulation 10 adequately provides procedures to examine and give effect to actions initiated under the freezing mechanisms of other jurisdictions. The only deficiency is that there are no timelines given for the AG to determine whether there are sufficient grounds to designate the person. The absence of such timelines may affect the prompt determination by the AG of whether reasonable grounds or a reasonable basis exist to initiate the freezing action.
25. The Authorities during the Zanzibar face-to-face meeting indicated that the timelines will be provided as guidelines to the National Counter Terrorism Committee.

26. During the Task Force Meeting in April 2018 the Authorities again reported that Malawi intends to provide for this as guidelines to the National Counter-Terrorism Panel established under the FCA Regulations 2017 on TF and Proliferation. This will be in place by July 2018.
27. Under the current period of review, the authorities again submitted that the Guidelines are still to be finalized and issued.
- *Sufficient progress cannot be noted in respect of SR111.3 until such guidelines are provided.*

NON-CORE & NON-KEY RECOMMENDATIONS

R. 34: Legal Arrangements – Access to beneficial ownership and control information [rated PC]

28. It was recommended that Malawi should set up mechanisms to register private trusts, including beneficial ownership information and have it available to the public and ensuring that information on public trusts is kept updated.
29. The authorities previously submitted that the Business Registration Act, 2012 requires ownership details to be made public. The authorities were asked to cite the provision of the Act which requires ownership details to be made public and clarify whether the same Act has provisions requiring registration of trusts and disclosure of beneficial owners and trustees.
30. In their previous progress report the Authorities reported that Malawi follows Common Law when registering private trusts. The trusts are registered at the Deeds Registry under Ministry of Lands, Housing and Urban Development. The Deeds are assigned a number signifying their coming into effect. The Department of the Registrar General then administers stamp duty.

31. When registering the Deeds, information on the nature and effect of the deed, trustees, settlers and beneficiaries is recorded and the Deeds are subject to access by the general public.

S.6(3) of the Deeds of Arrangement Act 1931, reads as follows:

“(3) Upon the registration of a deed the Registrar shall cause to be inserted in the Gazette and a local newspaper a notice containing the dates of the execution and registration of the deed, the names, addresses and descriptions of the debtor and the trustee, if any, of the deed and a short statement of the nature and effect of the deed, and the Registrar shall for this purpose, require the payment of such expenses of publication as shall be necessary.”

32. Under Section 11 of the same Act, any person is entitled to search the register for purposes of inspecting, examining and making extracts from any registered deed of arrangement, without being required to make a written application
33. The law provided is very old, being amended last in 1956, that it is highly doubtful that it covers the concept of beneficial ownership. The quoted Section 6(3) does not even refer to a beneficiary, but only to the “debtor”. The provision does not require information on beneficiaries or any other natural person who exercises effective ultimate control over the trust and identity of the settlor to be obtained.
34. In the current progress report the Authorities indicated that they are making arrangements to have (Companies Act) Regulations to address the deficiency by March 2019. The Regulations are still in draft form since February 2018, but consultative meetings are on-going. In the face-to-face meeting the Authorities indicated that their current Companies Act has provisions dealing with legal arrangements to enable the Regulations relating to obtaining of BO information of trusts or any other legal arrangements.

- Sufficient progress cannot be noted.

R. 39: Extradition [rated PC]

35. Malawi was required to adopt provisions explicitly prohibiting extradition of Malawian nationals, provide for prosecution of Malawian nationals in the event of non- extradition and providing clear processes for dealing with extradition cases.
36. In the previous Progress Reports, the Authorities indicated that it is not clear why Malawian law should have these provisions. They argue that, as extradition is put in general terms; it should be able to apply even to Malawians.
37. The Extradition Act - Chapter 8:03 of the Laws of Malawi clearly provides for dealing with extradition cases in Malawi. If it is a SADC Request for Extradition, the SADC Protocol on Extradition provides guidelines on clear processes for dealing with extradition cases.
38. Authorities admits that Malawi has not adopted an explicit provision prohibiting extradition of Malawian nationals as it has obligations under various bilateral and multilateral treaties for the extradition of either Malawian or foreign nationals to the requesting state, save for a Bilateral Immunity Agreement (BIA) with the United States of America on surrender of US citizens to the International Criminal Court.
39. The Reviewers agree with the authorities as a provision explicitly prohibiting extradition of nationals was not mandatory, not even under the old Recommendations. This is why there is that general proviso to countries which have such a provision to have a provision requiring that in such an event, the country should be required to prosecute its own national, if the request relates to an offence which has dual prohibition in both jurisdictions.
40. They authorities previously confirmed that there is no provision in the extraditions laws which provides for the prosecution of Malawian nationals where the Government decides against an extradition request of another country.

41. The reviewers once again encourage Malawi to seriously consider having a provision that would enable prosecution of any national present in Malawi in the event of when extradition of the person is not possible. Absence of such a provision could have a serious effect on delivery of justice, as there is no guarantee that extradition applications will be granted in all cases. In cases where it is refused, Malawi should be able to meet its obligations under the FATF standards and international law and prosecute such a person in Malawi, provided the offence where extradition will have been denied is also recognized under Malawi's domestic laws. This is a requirement that will be considered in Malawi's upcoming Mutual Evaluation and if not addressed, will cause negative ratings for the country.

- Sufficient progress cannot be recorded.

THIRD REPORT ON MALAWI'S PROGRESS ON IMPLEMENTATION OF THE HIGH LEVEL MISSION (HLM) RECOMMENDATIONS

A. BACKGROUND

44. The ESAAMLG High Level Mission visited Malawi from 31st October to 1st November 2016 following a resolution by the ESAAMLG Task Force at its 32nd Meeting held in Victoria Falls, Zimbabwe, in August 2016. The decision was arrived at following the slow progress by Malawi in addressing anti-money laundering and combating of financing terrorism (AML/CFT) deficiencies as set out in the 2008 Mutual Evaluation Report which was adopted by the Council of Ministers in 2008.

45. The Mission had discussions with Malawian authorities on the following main deficiencies:

- Amendments to the Money Laundering Proceeds of Serious Crime and Terrorist Financing Act, 2006 (ML & TF Act) to address the gaps which had been identified during the 2008 Mutual Evaluation;
- Passing of Regulations to set-up a legal framework to enable implementation of the United Nations Security Council Resolutions 1267 and 1373(UNSCRs);
- Determining the progress with the Financial Crimes Bill;
- Development of programmes to facilitate AML/CFT supervision and monitoring compliance; and
- Adequately resourcing the Financial Intelligence Unit (FIU) so that it is able to carry out its core functions and AML/CFT regulatory and supervisory obligations.

B. RECOMMENDATIONS OF THE MISSION AND STATUS OF IMPLEMENTATION

46. The High Level Mission made a number of recommendations to the Task Force of Senior Officials, most of which have been addressed as follows:

Short Terms Actions (November to February 2017)

47. Malawi was to pass the Financial Crimes Bill into law and have it enforce before the end of January 2017. The same applied to passing of Regulations to enable implementation of the new Act, which would also provide a legal framework to implement the UNSCRs.

- This Recommendation by the HLM has been fully complied with.

51. Have provisions clarifying the powers of the FIA vis-à-vis those of the other supervisors relating to AML/CFT supervision and issuing of AML/CFT Guidelines supported by the establishment of appropriate domestic

coordination and cooperation mechanisms before the end of January 2017.

a) The Malawi Authorities cite the provisions of s. 5 of the FCA as now satisfying the first part of this action item. The Reviewers looked at the cited provisions and is satisfied that they meet the first part of the recommendation by the High Level Mission.

b) As for the second part of the recommendation on FIA having appropriate mechanisms to ensure domestic coordination and cooperation with other supervisory authorities, the Authorities indicated that FIA has signed a memorandum of understanding (MoU) with the Malawi Gaming Board on 2nd February 2018. The MoU is aimed at facilitating exchange of information and skills relating to AML/CFT supervision of casinos and the gaming industry in general.

c) during the previous period under review the authorities reported that they were busy negotiating with the Registrar of Financial Institutions (who is the Governor of the Reserve Bank of Malawi) on delegation of AML/CFT supervisory powers with regard to financial institutions that are licenced and registered by the Registrar of Financial Institutions and supervised by the Reserve Bank of Malawi (RBM). The delegation instrument enables the RBM to supervise, issue guidelines and directives relating to AML/CFT and coordinate with the FIA where an administrative sanction is required on a non-compliant financial institution, among others. This delegation instrument, as well as an MOU with RBM has been signed now and proof was provided in this regard.

- Recommendation by the High Level Mission been fully complied with.

52. Malawi was to form an AML/CFT Task Force comprising of all key AML/CFT stakeholders before the end of December 2016.

- This Recommendation by the HLM has been fully complied with.

Medium Term Actions (March 2017 – December 2018)

53. Ratify the UN Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation by March 2017.

54. The Authorities have submitted that Malawi deposited an instrument of ratification of this Protocol on 10th January 2014, and in its communication of 20th January 2014 the Foreign and Commonwealth Office in London indicated 9th February 2014 as the date the Protocol entered into force for the Republic of Malawi. The Authorities submitted proof hereof in the form of communication dated 2nd April 2014 from Malawi's Ministry of Foreign Affairs and International Cooperation to the Ministry of Finance (i.e. Secretary to the Treasury).

- This Recommendation by the HLM has now been fully complied with.

55. Make resources available to the FIA to enable it to implement its mandate on AML/CFT supervision, training and awareness before July 2017.

- Recommendation by the High Level Mission been fully complied with.

56. To update Malawi's NRA of 2012 before 2018.

- The Authorities have submitted that the updating of their NRA is work in progress and should be done by December 2017.
- During the face-to-face meeting, the authorities have indicated that the NRA report was completed and was awaiting approval of the Minister of Finance, Economic Planning and Development by 30th April 2018. The approval has been granted by the Minister, and proof was provided of same.
- Recommendation by the High Level Mission been fully complied with.

C. RECOMMENDATION

57. It is recommended that:

- Malawi urgently addresses the deficiencies still outstanding relating to the definition of "funds" and "property".
- Malawi addresses the deficiencies pertaining to obtaining of beneficial ownership information relating to trusts
- Malawi addresses the deficiency relating to prosecution of nationals in cases of non-extradition.
- Since the on-site visit of Malawi under the 2nd Round of MEs is due in November 2018, recommend that it exits the review process.
- Malawi exits reporting on the HLM recommendations.