FIRST ROUND MUTUAL EVALUATIONS - POST EVALUATION PROGRESS REPORT OF MALAWI

Covering the period August 2016 – July 2017

ESAAMLG (2017), First Round Mutual Evaluation - Post Evaluation Progress Report of MALAWI on Anti-Money Laundering and Counter-Terrorist Financing Measures.

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A. Introduction

1. This 8th detailed review of the post evaluation progress of Malawi was conducted by Review Group 'A' comprising of experts from Angola, Botswana, Namibia, Uganda and Zimbabwe at the 33rd ESAAMLG Task Force of Senior Officials meeting. During the report to the Evaluations and Compliance Working Group (ECG), the Reviewers and the Malawi authorities disagreed on some of the findings which led to the discussion on Malawi's report being deferred to the 34th Task Force of Seniors Officials meeting.

2. The Malawi Authorities were then guided by the ESAAMLG Secretariat not to concentrate on the 9th Progress Report which was submitted, but to instead to present the areas of concern which they had with the April 2017 Reviewers report so that these could be the focus of the discussion during the September 2017 meeting as had been agreed at the Task Force meeting in April 2017. The Authorities submitted written submissions to the Reviewers in this regard.

3. Malawi was evaluated by World Bank in 2008. The onsite visit took place from 25 February- 11 March 2008 and the MER was adopted by the ESAAMLG Council of Ministers in August 2008. The tables below summarize the Ratings obtained by Malawi with regard to the FATF Core and Key Recommendations and Non-Core and Non-Key Recommendations:

Table 1: Ratings of compliance with Core and Key Recommendations

Core Recommendation	1	5	10	13	SR - II	SR - IV
Rating	LC	PC	LC	PC	PC	LC

Key Recommendation	3	23	26	35	36	40	SR-I	SR-III	SR-V
Rating	LC	PC	PC	LC	LC	PC	PC	NC	PC

Table 2: Ratings of compliance with Non-core and Non-Key Recommendations

Non- core & Non-key recommendations	2	4	6	7	8	9	11	12	14	15	16	17	18	19	20	21
Rating	LC	C	PC	LC	NC	PC	PC	NC	LC	PC	NC	PC	PC	C	C	PC

	22	24	25	27	28	29	30	31	32	33	34	37	38	39	VI	VII	VIII	IX
	N/A	NC	NC	PC	C	PC	NC	LC	NC	PC	PC	C	LC	PC	NC	LC	NC	PC

B. Overview of Progress made by Malawi

4. Malawi has amended its legal framework in an endeavor to comply with the assessors' recommendations.

5. However, according to the Reviewers' last report in September 2016, Malawi still had deficiencies on Recommendations 8, 9, 11, 12, 15, 17, 24, 27,30,32, 33, 34, 39 and 40, and Special Recommendations II, III, V and VI. At that stage Malawi still had not passed the amendments to its Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act under the proposed Financial Crimes Bill which the authorities had said would address most of the deficiencies which were still outstanding. Amendments to the above Act were initiated in 2008 and were taking a long time to be passed. Based on the concerns which the Task Force of Senior Officials had with the delays by the authorities to pass the Bill, it 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 which had been identified by the assessors during Malawi's mutual evaluation, including the delay in passing the Bill which would address most of the deficiencies. The Mission took place at the end of October 2016 and the report was presented to the Task Force of Senior Officials' during its April 2017 meeting.

6. During the period under review Malawi passed the Financial Crimes Bill into law on the 8th of February 2017 and after being assented to by the President on the 14th of February, a Notice commencing the Act was gazette on the 17th of February 2017. For all intents and purposes the now Financial Crimes Act (Act No 14 of 2017) (FCA) is the new AML/CFT/CFP law of Malawi.

7. Immediately after the commencement of the FCA, the Minister of Finance issued the Suppression of Terrorist Financing and Proliferation Regulations.

8. The new introduced measures now address most of the deficiencies identified in Malawi's MER which were still outstanding.

9. It should be pointed out that the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Regulations, 2011 (AML/CFT Regulations, 2011) were saved by virtue of Section 141(3) of the FCA, and are still in force until repealed and replaced.

10. 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 – 1.1 CRIMINALISATION OF ML & TF, PROVISIONAL MEASURES (FORFEITURE/CONFISCATION AND FREEZING OF ASSETS)

1.1 Criminalisation of ML (R. 1, 2 & 32)

11. Since FCA is a complete new law, the Reviewers had to make sure that it covers all elements that the repealed law covered.

12. The deficiencies relating to the offence of ML have now been fully addressed by the Financial Crimes Act (FCA). S. 42 now provides for all the physical and material elements of a ML offence as required under Art. 3(1)(b) & (c) of the

Vienna Convention and Art. 6(1) of the Palermo Convention. The definition of property provided in s. 2 of the FCA is wide enough to cover all property involved in a ML offence, regardless of value. In terms of s. 42(2), it is not a requirement that a person be convicted of the predicate offence when proving that property is proceeds of crime. Self- laundering is provided for in s. 42(1) of the FCA as it criminalises laundering of one's proceeds of crime. Ancillary offences are criminalised in s. 42(1)(d) of FCA and almost all of them in terms of R. 1.7 are covered.

13. The offence of ML in terms of s. 42(1) applies to natural persons who knowingly commit the offence. The same section also provides for the intentional elements of the offence of ML to be inferred from objective factual circumstances (c. 2.1 & 2.2 met).

14. Legal persons are also liable for ML in terms of s. 42(1) (c. 2.3 met). Part VI provides for parallel civil proceedings on legal persons subject to criminal liability. The sanctions provided in s. 42(3) for a natural person convicted for the offence of ML are dissuasive and (based on the discretion that the court has to impose a lesser sentence than the prescribed life imprisonment if the circumstances so justifies)[1] proportionate.

Progress

Sufficient progress noted.

1.2 Criminalizing of terrorist financing (SR. II)

SR II.1 – Criminalisation of TF

15. 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.

[1] The Malawian authorities produced case law to this effect: CRIMINAL CAUSE NUMBER 28 OF 2013, REPUBLIC vs CAROLINE SAVALA; CRIMINAL CASE NO. 26 OF 2013, THE REPUBLIC vs ANGELLA KATENGEZA & CRIMINAL CAUSE NO 02 OF 2014, THE REPUBLIC vs OSWARD LUTEPO

16. During the face-to-face meeting in April 2017 and again in Malawi's written submissions to the Reviewers' April 2017 report, the authorities contended that the term 'funds" and "property" is used interchangeably in the FCA and that the term "property" as defined in Sec 2 of the FCA and in the Financial Crimes (Suppression of Terrorist Financing and Proliferation) Regulations 2017[2] has the exact same meaning as the term "funds" in the 40+9 FATF Recommendations.

17. During the current face-to-face meeting 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 as to the meaning of the word "funds".

18. It is 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.

- ***Insufficient progress noted in respect of SRII.1***

SR. II.2 - Predicate offence for ML

19. Now covered in terms of s. 2(10) which for the purposes of the FCA, considers any offence to be a predicate offence. – Sufficient progress noted in this sub criteria

SR. II.3 – Extra-territorial jurisdiction for the offence of TF

20. S. 43(2) of the FCA adequately provides for extra-territorial jurisdiction for TF offences - Sufficient progress noted in this sub criteria

SR. II.4 – Intentional element of the offence of TF to be drawn from objective factual circumstances & Sanctions

[2] Definition of property in the Regulations reads as follows *"property has the same meaning ascribed to it under the Act and includes electronically or digitally evidenced title or interest, bank credits, money orders, shares, securities and letter of credit or cash."*

21. Ss. 43 (1) & 47 adequately provide for the intention to commit the offence of TF to be inferred from objective factual circumstances. – sufficient progress noted

22. Ss. 43, 44 & 47 provide for dissuasive, proportionate and probably effective sanctions.

- Sufficient progress noted in this sub criteria.

Overall progress noted in respect of SR II

Due to the deficiency in respect of only the one sub criteria (namely SRII.1) reviewers can unfortunately not note SRII with sufficient progress

2.4 Freezing of funds used for terrorist financing (SR III)

SR. III.1 – Freezing of funds or assets of persons designated in accordance with S/RES/1267(1999)

23. Although, s. 62 provides both reporting institutions and the appropriate supervisor with powers to restrain or freeze funds or property belonging to a terrorist or organization, but there appears to be a deficiency in terms of scope of application as powers of a supervisor to restrain or freeze would not apply to a terrorist organization, such powers only rest with the reporting institution.

24. Firstly, it should be noted that Section 2 of the FCA contains definitions for both "terrorist" and "terrorist organization".

Then, it should be noted that:

- Section 62(1) authorizes a reporting institution that has reason to believe or suspects that funds or property it is holding belongs to a terrorist individual or organization, to freeze such funds or property, and make a report the fact to the FIU within 24 hours.

- Section 62(2) authorizes a supervisory authority that has reason to believe or suspects that a reporting institution holds an account or property on behalf of a terrorist, to issue a written directive, within 48 hours, to the reporting institution requiring it to restrain or freeze any account or other property held by it on behalf of the terrorist.

The Authorities in the face-to-face meeting in April 2017 agreed with the reviewers reading and understanding of Sec 62 and indicated that it is an accidental omission or typing error. They suggested that Reviewers should look at the Regulations, which includes both the "terrorist" and "terrorist organization". Reviewers were not referred to a specific regulation/s though, but had a look at Regulation 11 in this regard

25. However, in their written submission to the Reviewers April 2017 Report, the Authorities indicated Section 62 referred to in the report does not indeed address this Recommendation. The correct reference should be Regulation 11 of the Financial Crimes (Suppression of Terrorist financing and Proliferation) Regulations, 2017. The Authorities contended that the TF Regulations speaks to the TF regime, while Section 62 is a remnant of the old Act in which the country attempted to remedy their shortcomings.

26. The reviewers advised that Section 62 in its current state may cause confusions and create legal uncertainty, and suggest that Section 62 be amended by removing references to "terrorist and "terrorist organization", and maybe replace it with the word "designated person".

27. Reviewers had a look at Regulation 11, which says 11(1)"*A designation or a consolidated list circulated by or through the Authority shall be deemed to immediately authorise a reporting institution or any other institution which holds the property of a designated person to freeze, until further notice, the property whether……* It is worth noting that this regulation also refers to the singular as it only speaks of a "designated person". *"Designated person"* is defined as follows in Reg. 2 *"means a person designated pursuant to these Regulations or the applicable United Nations Security Council Resolutions adopted under Chapter VII of the United Nations Charter"*. The UNSCRs specifically designates persons and entities and goods.

28. The Authorities produced and referred to Section 2 of General Interpretation Act, Chapter 1:01 of the Laws of Malawi in which the word person has been defined as:

"person" includes any company or association or body of persons corporate or incorporate"

29. With the above explanation the Reviewers can note sufficient progress in respect of this SR III.1.

SR. III.2 – Freezing of funds or assets of persons designated in accordance with S/RES/1373(2001)

29. Regulations 10 and 11, adequately provide for the restraining or freezing of terrorist funds or assets of persons designated in terms of S/RES/1373 and for such action to be taken immediately by the reporting institution.

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

30. 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.

31. The Authorities in the face-to-face meeting indicated that the timelines will be provided as guidelines to the National Counter Terrorism Committee.

- Insufficient progress noted in respect of this sub criteria until such guidelines are provided.

SR. III.4 – Application of criteria III.1 – 111. 3 to funds or assets wholly or jointly owned by designated persons

32. Requirements of Regulation 11(1)(b) covers property wholly or jointly owned or controlled, directly or indirectly by designated persons. As stated in paragraphs 15-19, above, the description/definition of "property" in the FCA & Regulations meets the definition of "property" and "funds" provided for in the AML/CFT Methodology 2004.

SR. III.5 – Effective systems to communicate freezing actions taken

33. Effective systems to communicate actions taken under the freezing mechanisms to the financial sector immediately upon being taken are adequately provided under Regulation 9(2). – sufficient progress noted

SR. III.6 – Guidance to FIs holding targeted funds or other assets on their obligations

34. Regulation 12(2) provides clear guidance to reporting institutions that may be holding targeted funds or other assets on the action to take under the freezing mechanisms. – sufficient progress noted.

SR. III.7 – Effective and publicly known procedures for considering de-listing requests and unfreezing of funds or other assets of de-listed persons

35. Regulation 19-21 adequately provides for procedures for delisting requests and for unfreezing of funds and other assets of de-listed persons in a timely manner (within 24 hours of the deletion). – sufficient progress noted

SR. III.8 – Effective and publicly known procedures for unfreezing of funds of persons mistakenly affected by a freezing mechanism

36. Regulation 16 adequately provides procedures for unfreezing of funds or assets frozen on mistaken identity of a person who, or entity which is not designated, in a timely manner (not later than 15 working days for domestic listing and immediately receiving a response from the UN Sanctions Committee). - sufficient progress noted

SR. III.9 – Appropriate procedures for authorising access to funds frozen pursuant to S/RES/1267(1999)

37. Regulation 14 provides procedures to access frozen funds pursuant to S/RES/1267 that have been determined to be necessary for basic expenses and the Regulation meets the requirements of S/RES/1452 (2002). - sufficient progress noted

SR. III.10 – Appropriate procedures through which a person whose funds have been frozen can challenge the measure in court

39. Regulation 8(6) & 14 (5) provides for aggrieved parties with decisions taken in terms of the Regulation to appeal to the courts. - sufficient progress noted

SR. III.11 – Application of criteria 3.1 – 3.4 and criterion 3.6 to freezing, seizing and confiscation of terrorist related funds in the context other than described in c. III.1-III.10

38. Application of confiscation and provisional measures consistent with c. 3.1 – 3.4 and 3.6 to terrorist related funds, other than in the context described in c. III.1 – III.10, is provided for in ss. 55, 56 and 58 of the FCA. The sections relate to seizing of currency and bearer negotiable instruments at ports of entry and exit (s. 55 and 56) as well as seizing of terrorist cash (s. 58). - sufficient progress noted

39. The FIA has power to obtain search warrants (s. 59). Competent authorities have powers to obtain property tracing, tracking and monitoring orders (s. 60) of the FCA. Terrorist funds may also be subject to preservation and subsequent confiscation orders in terms of ss. 65, 72 and 77 of the FCA.

- Sufficient progress noted.

40. Section 80 of the FCA allows for the voiding of actions which are contractual or otherwise which would prejudice the Authorities ability to recover the property that is subject of a confiscation order.

- Sufficient progress noted

SR. III.12 – Protection of rights of bona fide third parties

41. The protection of the rights of bona fide third parties is provided in Regulation 11(7).
- Sufficient progress noted

SR. III.13 – Effective monitoring of compliance with laws governing obligations under SR. 111 and imposing of sanctions for non-compliance

42. Ss. 35 – 39 of the FCA provides supervisory powers to gazette supervisory authorities to monitor compliance of reporting entities with obligations relating to SR III. S. 34 of the FCA provides for administrative sanctions for non-compliance and ss. 20(3), 22(6) and 23(6), regulation 9(3), and 12(8), (9) provide for criminal sanctions for non-compliance with the obligations related to implementation of SR. III by reporting entities.

43. The supervisory powers of the FIA are provided for in Section 35, while the definition of 'supervisory authority" in Section 2 includes the Reserve Bank of Malawi and the Registrar of Financial Institutions.

Overall Progress with regard to SR III

Overall progress in this regard has been good, but cannot be said to be sufficient in the true sense of the word. There remain deficiencies in respect of sub criteria SR III.3, while sub-criteria SR III 1, 2, 4, 5-14 has been complied with.

BUILDING BLOCK IV – REGULATION AND SUPERVISION

R 17.4 Range of sanctions to be broad and proportionate to the severity of a situation (PC)

44. The assessors recommended revision of the sanction provisions to allow more discretion and a broader range of sanctions for compliance violations, especially for minor offences that could be resolved by issuing an administrative order. Section 34 of the FCA now provides for this requirement.

– Sufficient progress noted.

BUILDING BLOCK V – INTERNATIONAL COOPERATION

V. 1 International Conventions (R. 35, SR. 1)[rated LC]

45. Malawi was required to ratify the six remaining conventions which are annexes to the International Convention of the Suppression of Financing of Terrorism.

Malawi has made significant progress in addressing this deficiency as it has ratified five of these conventions.

46. During the Victoria Falls meeting in 2016, the Authorities indicated that the Ministry of Foreign Affairs is following up on this with the relevant depository body. At the face-to-face meeting they indicated that the follow up has not been done yet. – This recommendation will not be noted for purposes of progress, as sufficient progress was already noted in the 2016 Victoria Falls report.

V.2 Mutual legal Assistance (SR. V - rated PC)

47. The authorities had been required to designate a Central Authority to facilitate MLA requests. The authorities argued that the Attorney-General had always been the central authority for this purpose. They were asked to provide the relevant law to proof this. The Reviewers confirm that Section 22 of the Mutual Assistance in Criminal Matters Act provides the Attorney General as the Central Authority for MLA. Desk officers have been appointed by each LEA to improve MLA processes between the AG's Office and LEAs.

V.3 Sharing of confiscated assets with other jurisdictions [R 38 (LC)] & maintaining of comprehensive MLA statistics [R32 (NC)]

48. The assessors had recommended that the authorities enter into agreements for coordination of asset sharing and establish mechanisms for sharing of confiscated assets.

49. During the face-to-face meeting the Authorities indicated that the FCA (that only came into operation on 17 Feb 2017) now establishes the Confiscated Fund. They had to wait for the establishment of this Fund before they could implement the assessors' recommendations. This is a reasonable explanation and the Reviewers see no need to pursue this matter any further as there was a **LC** rating in the first place. This matter will not be taken into account for purposes of progress monitoring.

50. The assessors also recommended setting up of a database for MLA requests. The Authorities on previous occasions reported that Ministry of Justice has a Desk Officer who handles and keeps statistics on international requests received and made. In addition to this, all law enforcement agencies have contact persons on international requests who work together with Ministry of Justice as a central point. In the current PEIP this report has been repeated. However, as from page 23 of the PEIP the progress noted by the authorities are noted as follows:

"We will be working with Technical Assistance providers from ICAR and DFID to help us establish a database that will house all relevant information on ML. the Database will be housed in the FIU but other agencies will have connectivity to the same. This project is still in its very early stages. Currently we are yet to sign an agreement with ICAR and DFID on this."
For instance, refer to Table below for statistics to confirm this.

Table 1: INTERNATIONAL REQUESTS

REQUESTS	**'09**	**'10**	**'11**	**'12**	**'13**	**'14**
Received	1	1	1	1	0	8
Made	1	0	1	1	0	9

51. It is not clear to the Reviewers whether an electronic MLA database is in existence or not. Furthermore, the statistics submitted by the Authorities only show the number of requests made and the number of requests received, other information on how many of the requests were acceded to or refused, average time of either responding or receiving the responses, and possibly the quality of the responses is not being indicated.

52. The assessor's recommendation is that an MLA database should be established; which had been done albeit a manual one. The Authorities are in the process of establishing an electronic database. This recommendation had been complied with,

– Sufficient progress noted

V.3 Other Forms of International cooperation and exchange of information (R. 40, SR.V)[rated PC]

53. Assessors recommended that authorities should establish guidelines and processes on handling of information received from international counterparts, and maintaining statistics in relation to international requests (made and received).

54. As far as the Reviewers are concerned there is a process in place for handling information from international counterparts. Furthermore, it is apparent that MLA statistics are being collected and kept.

- Sufficient progress is noted.

NON-CORE & NON-KEY RECOMMENDATIONS

R.9: Third Parties and Introducers [rated PC]

55. Malawi was required to amend the law to fully provide for what financial institutions should do to ensure that they only utilize third parties from countries that observe FATF standards and that the financial institution is ultimately responsible for CDD.

56. Section 17, read with Reg. 20(1)(e) and Reg. 20(1)(f) adequately provides for requirements of Rec 9.

- Sufficient progress is noted.

R.11: Complex, unusually large transaction or unusual patterns of transactions [rated PC]

57. The assessors had recommended that the authorities should implement the requirements relating to R. 11 to all financial institutions, not only banks, and that the record keeping requirement should be consistent with the provisions under R. 11.

58. The authorities in their previous and current report highlighted that country adopted a phased approach to implementation of the ML Act, starting with sectors that were perceived to be high risk. In the opinion of the authorities, they needed to begin with the banking sector. Since the assessment was conducted in February 2008, a few months after the establishment of the FIU (FIU was established in August 2007), it was indeed true (at that time) that they had only covered the banking sector. However, after five years, the implementation of the Act was beyond the banks to include foreign exchange bureaus, money remitters, stockbrokers (capital market players), discount houses, asset managers, etc. In doing this, they have implemented and continue to implement the recommendation.

59. In terms of Section 27(1)(b) and 27 (2) of the ML Act, financial institutions are required to establish and maintain records of all transactions carried out by them and correspondence relating to the transactions (for a minimum period of seven (7) years) as is necessary to enable the transaction to be readily reconstructed at any time. In addition Section 34 (2)(a) stipulates that financial institutions verify the background and purpose of any complex, unusual or large transactions or pattern of transactions and record its findings in writing. Furthermore, Regulation 17 (which had not been passed by the time of the ME) requires all financial institutions to keep records in soft and hard copies and ensure that appropriate backup and recovery procedures are in place.

60. The assessors were of the opinion that the seven-year record keeping requirements of section 27 (2) do not literally apply to these findings because this provision applies only to the records required to be maintained pursuant to Section 27 (1). The Authorities disputed this reading of their statute. In this regard, the assessors commented that, due to the relative recent nature of the requirement, its effectiveness cannot be assessed. In addition, they commented, although there is a provision in Section 27 (4) that provides "any record required to be kept under this Act…shall be kept in a manner as the Minister may prescribe by regulation,"…..no regulations had been issued (at that time).

61. The authorities further insisted that the foregoing provisions adequately address the deficiencies that were noted by the assessors and therefore the country is in full compliance with Rec 11. In practice the FIU issues a directive to banks to pay special attention to certain transactions. For example in 2013, the FIU asked banks to watch out for cheques that had gone missing from the Accountant General's Office and were being cashed. Also in June 2013, financial institutions were requested to pay attention to all government payments over K10, 000,000 as there were high chances of fraud as the financial year drew to an end.

62. Authorities further pointed out that, as of June 2016, record keeping requirements were being implemented by banks, forex bureaus, real estate agents, casinos, gaming houses, accountants, insurance companies, stock brokers, lawyers, leasing and finance companies, money remitters (both local and international remittance), and mobile money providers. The only sector not implementing this is the precious stones and metals which the FIU intends to engage further during the July 2016/ June 2017 financial year; based on the minimal AML/CFT risks that the industry poses to the national financial system.

63. In addition, during the face-to-face meeting in South Africa in 2015, the authorities reported the following progress in this regard:

    a. that they are now done with outreach to the real estate sector, which had started to file STRs;

    b. they conducted training with casinos and developed industry specific STR forms; while the industry recently requested refresher training;

    c. they already reached out to the accountants, who started reporting, but they had not conducted any on-site inspections yet;

    d. they did not reach out to the precious metals and stones industry as yet, as this industry (according to the NRA results) is of low risk, and

    e. they are ready to fully engage the lawyers, as they have now received the necessary funds required to do so. Be that as it may, the lawyers have also started reporting.

64. Rec 11 requirements are now contained in Section 29 as read with Section 22 of the FCA. Regulation 17 remains in force and applicable.

65. Upon reconsideration of all the above-mentioned factors the Reviewers agree with the authorities that Rec 11 has been complied with.

- Sufficient progress is noted.

R. 12: DNFBPs (Rec. 5, 6, 8-11) [rated PC & NC]

66. The authorities were required to provide appropriate regulatory or guidance with necessary exemptions in order to make the application of CDD measures practical and implementable. The authorities have indicated that they were dealing with DNFBPs in phases according to the perceived risk.

67. During the face-to-face meeting in South Africa in 2015, the authorities reported the following progress in this regard:

a. that they were done with the real estate sector, which had started to file STRs;

b. they conducted training with casinos and developed industry specific STR forms; while the industry recently requested refresher training

c. they had already reached out to the accountants, who had started reporting already, but they had not conducted any on-site inspections as yet;

d. they had not reached out to the precious metals and stones industry as yet, as this industry (according to the NRA results) was of low risk; and

e. they were ready to fully engage the lawyers, as they had now received adequate funding to do so. Be that as it may, the lawyers had also started reporting.

68. In 2016, as per the Victoria Falls meeting report, the authorities again reported on DNFBPs such as real estate agents, auditing firms, lawyers and casinos having started to report STRs to the FIU. During the Luanda meeting in 2014, the

authorities indicated that they had been taking a phased in approach with regard to compliance by DNFBPs, based on the results of the National Risk Assessment. At the current meeting, they reported having provided training to all the DNFBPs on their obligations under the AML/CFT law and also designed sector specific STR forms. In the Real Estate sector, which is a high risk sector, they conducted on-site assessments, just to assess the AML/CFT weaknesses within the sector and to determine what the sector needs. Once this was determined, the FIU actively assisted the sector with getting compliance measures in place, e.g. they came up with a KYC form for the industry and now require all real estate agents to register with the FIU, as this industry does not have an AML/CFT regulator. Once this exercise is complete, they will move to the next sector regarded as a risk area, i.e. the lawyers.

69. In the current FCA, like in the repealed AML/CFT law, a "reporting institution" means a financial institution or a designated non-financial business or profession. As such all AML/CFT/CFP obligations apply to DNFBPs. - sufficient progress is noted.

R. 15: Internal Controls, Compliance & Audit [rated PC]

70. The following recommendations had been made by the assessors relating to R.15:

- The authorities should consider: - Initiating efforts to bring all financial institutions under compliance requirements. Specifically subjecting foreign branches and subsidiaries to Malawi's AML/CFT requirements. Determining whether if this could be done by regulation for banks.

- The statute is consistent with international standards, but banks are the only financial institutions that are complying with the ML & TF Act's requirements and they are doing so based upon the CDD Directive.

71. Having due regard for paragraphs 66 - 69 above, as well as Section 31 of the FCA, this recommendation has been complied with.

- Sufficient progress noted.

R. 16: DNFBPs regulation, supervision and monitoring [rated NC]

72. This recommendation was noted as sufficient progress in the previous report. See also reviewer's comments with regard to Rec 12 & 15 above.

- Sufficient progress noted.

R. 17: Sanctions [rated PC]

73. Malawi was required to revise the sanctions regime to permit more discretion and broader range of sanctions for compliance failures, especially on minor violations that could be handled by administrative sanctions. This has now been taken care of by Section 34 of the FCA.

- Sufficient progress noted.

R.24: DNFBPs regulation, supervision and monitoring [rated NC]

74. The recommendation with regard to R.24 & 25 in the MER reads as follows:

"The authorities should consider –
- Implementing a licensing process for internet casinos.
- Conducting awareness and training for its gambling operators and staff on the ML & TF Act and the implementation thereof.
- Issuing guidelines to the gambling industry in relation to the application of the ML & TF Act, including examples of how money can be laundered through a casino.
- Adopting measures to determine beneficial ownership when licensing casinos.
- Applying AML requirements with respect to occasional transactions in casinos.
- monitoring and supervising gaming licensees in relation to the requirements of the ML & TF Act.
- Having casinos cooperate with the RBM supervision department regarding the banking transactions undertaken by them.
- Developing guidelines for each of the businesses and professions to aid in the implementation of the AML/CFT measures"

75. In Malawi's progress report of 2013, the authorities had indicated that they were working on a Bill to merge the Malawi Gaming Board and National Lottery Board and as well as the licensing guidelines. The authorities indicated that this has been successfully done.

76. However, in the current PEIP the authorities reported again that Government has prepared a Bill that will merge the Malawi Gaming Board and National Lottery Board. The following was reported as progress by the Authorities:

- In this Bill, there is a provision that allows internet casinos. In anticipation of this law, licensing guidelines have been drafted ready for implementation of the new law. This law and guidelines will address bullet points 1 and 3 of Table 3 of the MER.

- Staff of the Malawi Gaming Board have attended various AML training programs organised by various Technical Assistance providers. The Board has been an active member of the National AML/CFT Committee and also attends all ESAAMLG meetings. In addition to this, the FIU has conducted training sessions together with the Malawi Gaming Board for the gambling operators, the recent ones being in June 2012 and June 2013. The operators have also been involved in the discussion of the threshold to be applied in the sector for CDD purposes, including occasional customers. This addresses bullet points 2 and 4 of Table 3 of the MER. Since 2012, the Malawi Gaming Board has been inviting the FIU to provide half-day awareness talks for the casino and gaming operators before they go into discussing other matters.

- Currently, the Reserve Bank of Malawi (RBM) has issued licenses to casinos which conduct foreign currency transactions in line with the Exchange Control Act. The RBM carries out off-site and on-site inspections of these casinos to confirm compliance with the licensing conditions as well as the ML Act. Related to this, the RBM inspections have also been carried out jointly with the Malawi Gaming Board. Apart from the joint on-site inspections, the Malawi Gaming Board conducts regular on-site inspections of the normal casino operations to check compliance with the Malawi Gaming Act and the ML Act.

77. This Bill was first referred to by the Authorities in their progress report of 2013 and now we are in 2017, and the Bill still has not been passed into law. The deficiency is still outstanding.

78. The authorities also do not disclose whether the provision in the Bill will also deal with aspects of beneficial ownership when licensing the casinos.

79. The assessors had also recommended that the authorities apply AML requirements with respect to casinos' occasional customers. In the current progress report the authorities indicate that the casino operators are holding discussions on the threshold to be applied to the sector for CDD purposes, including for occasional customers. The Authorities also did not address it in their written submissions on the Reviewers' April 2017 report. The deficiency has therefore not been addressed.

80. Although a lot has been done in terms of addressing this recommendation, unfortunately it cannot be noted as sufficient progress, until the Bill has been passed, the threshold for occasional customers has been set and proof is provided that verification of beneficial ownership is done when licensing the casinos.

- Insufficient progress noted.

R.27: Responsibility and powers of law enforcement agencies [rated PC]

81. ME Recommendation:

The authorities should consider –
- Having the FIU conduct train the trainer exercises with law enforcement agencies so that they can give training and awareness exercises internally to create greater awareness and understanding of the ML & TF Act.
- Ensuring that law enforcement agencies should maintain in a systematic manner statistics in relation to money laundering investigations, prosecutions and seizure of proceeds of crime.

82. The authorities reported in the PEIP that law enforcement agencies have attended a number of training workshops including financial investigations "Train-the-Trainer" course in Malawi which was organised by the World Bank. This was also followed by two more other programs organised by AUSTRAC (in conjunction with the Federal Police of Australia in **2010)** and the US Treasury (in conjunction with the US Department of Justice in 2010). In **2015**, 40 LEAs were trained (MRA-8, ACB-9, MPS-12, NIB-4, DPP-5, Parks and Wildlife-2). In **2014,** 31 LEA officers

underwent training. The total for LEA officers trained since 2008 is 304. This addresses bullet point 1 in Table 3 of the MER.

83. In the current Progress Report, authorities have reported the following with regard to the manner of maintaining statistics:

- Ministry of Justice (which consolidates all statistics from LEAs and courts) and Anti-Corruption Bureau have completed development of electronic databases which were done with financial assistance from DFID and EU,
- In addition, the ACB and MRA have databases that enable them to track cases registered, investigated, and status of prosecution. They also track status of proceeds of crime confiscated such as motor vehicles, houses, money and others. Such statistics are provided by these agencies timely.
- The DPP has a database that tracks cases recorded, prosecutions done or underway, and convictions secured.
- The Malawi Police Service (MPS) keep manual statistics in a systematic manner. The FIU meets with the MPS on a quarterly basis on progress of case files and they are able to produce the statistics.

84. A lot has been done in terms of training for LEAs, including 'trainer of trainers".

85. Each LEA has a system for keeping statistics either in manual or electronic form.

- Sufficient progress is noted.

R. 32: Statistics [rated NC]

86. ME Recommendation reads as follows:

There is no systematic collection of detailed statistics in respect of:
a. Investigation, prosecution and conviction of ML cases,
b. Freezing, seizure and confiscation of proceeds of crime,
c. Mutual Legal Assistance Requests,
d. Extradition requests,
e. Other forms of international cooperation,

f. No detailed review has been conducted on the effectiveness of the AML/CFT regime in Malawi,
g. Discrepancies in FIU statistics, h. RBM inspections performed,
i. Sanctions for non-compliance,
j. Training of supervisors, or
k. MOUs in place and requests/exchange of information.

87. Over the years the Malawian Authorities produced statistics that covered almost all the concerns raised in the above-mentioned ME recommendation.

88. The only issue outstanding is the content of the MLA statistics as provided by the Authorities. According to the Secretariat the figures submitted by the authorities do not serve to confirm that they are maintaining proper MLA statistics. The figures do not assist in determining the nature of the requests, how many of the requests were acceded to and how many were refused, how long it took to respond or to receive responses on the requests, quality of the responses, etc. The authorities maintain that the ESAAMLG template does not request for such information.

89. The Reviewers direct that the authorities and the ESAAMLG Secretariat resolve this issue before the next Senior Officials meeting.

R.33: Legal Persons – Access to beneficial ownership and control information [rated PC]

90. The assessors had recommended that the authorities enhance their mechanisms for keeping the information accurate, in an updated manner; to enhance the capacity of the Registrar General's Department to verify the company information provided to the office, including that of beneficial ownership and to strengthen the enforcement mechanisms under the Companies Act. The authorities are seeking clarification on the recommendation as, according to them R. 33 under the old FATF Recs and Methodology, nor under the 2012 FATF Recs is it a requirement for the Registration Authority/Regulator of companies and other legal persons to verify company information (including beneficial ownership info) provided to the office. It is the duty of the FIs and not the Registrar/Regulator to verify such information.

91. It certainly has never been a requirement under the old or new FATF Recs that a Registrar/Regulator of Companies and other legal persons verify information provided to its offices. At most R33 requires (as per the old Methodology) ……*that countries take measures to prevent the unlawful use of legal persons in relation to money laundering and terrorist financing by ensuring that their commercial, corporate and other laws require adequate transparency concerning the beneficial ownership and control of legal persons. Examples of mechanisms that countries could use in seeking to ensure that there is adequate transparency may include:*

1. *A system of central registration (or up front disclosure system) where a national registry records the required ownership and control details for all companies and other legal persons registered in that country. The relevant information could be either publicly available or only available to competent authorities. Changes in ownership and control information would need to be kept up to date.*

92. It was reported by the Authorities before that the Office of the Registrar General has been automated, which enables quick access to beneficial ownership information. This is commendable progress.

- Sufficient progress is noted.

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

93. 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.

94. 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.

95. In the current PEIP the authorities reported that the Companies Act, Business Names Registration Act were recently reviewed, as such there would be need for the Authorities to properly go through these documents and provide proper

updates, which will be provided in the next report. The Authorities did not address this issue further in their written submissions.

- Insufficient progress noted.

R. 39: Extradition [rated PC]

96. 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.

97. In September 2016 the authorities have (albeit with no specific section cited) indicated that the Act clearly provides for extradition requests, complimented by the SADC Protocol on Extradition which provides guidelines for extradition cases within SADC.

98. In the current PEIP 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.

99. 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.

100. 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.

101. They also 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.

102. In their current written submission the Authorities did not address this issue at all.

103. The reviewers 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.

- Insufficient progress recorded.

SR. VIII: Non-Profit Organisations [rated NC]

104. Authorities in their previous PEIP argued that the MER required them to designate NPOs as reporting institutions, but neither the old nor the new FATF Recommendations require NPOs to be reporting institutions. At most the FATF Recommendations require that NPOs should be registered and monitored for the TF risk that they pose.

105. Both the ECG and the Task Force agreed with the authorities on this point.

- Sufficient progress was noted.

REVIEWERS COMMENTS AND RECOMMENDATIONS

106. The Reviewers are not satisfied of overall sufficient progress having been made by the authorities in respect of SR II & III, which is a concern, since the FATF already targeted Malawi for not progressing in the implementation of their TF regime.

107. It is recommended that Malawi addresses the deficiencies in its TF regime as a matter of urgency to avoid being referred to the FATF ICRG process.

108. It is recommended that Malawi continues to report annually and only on the recommendations on which insufficient progress has been noted