University of Pretoria
Faculty of Law

Cross-border Mergers and Acquisitions in Malawi: The imperative for a foreign investment enabling legal environment to catalyse economic development

Thesis

Submitted in partial fulfilment of the requirement for the Degree of Master of Laws

By Temwa Mpho Kumwenda

Declaration

I, Temwa Mpho Kumwenda, declare that **Cross-border Mergers and Acquisitions in Malawi: The imperative for a foreign investment–inducing enabling legal environment to catalyse economic development**, is my own work. All references to sources and any quotations cited have been indicated and acknowledged herein.

Signed: ____________________ Temwa Mpho Kumwenda November 2017

Certification

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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Dedication

This work is dedicated to my late Grandfather Mr. Kenneth Kumwenda. You lovingly encouraged me to see beyond my limitations and to go after my dreams and for that, I am forever grateful. Gone but never forgotten, your legacy lives on.

List of Acronyms

BOP	Balance of Payments
CBM&As	Cross-border mergers and acquisitions
COMESA	Common Market for Eastern and Southern Africa
FDI	Foreign Direct Investment
LCD	Least developed country
M&A	Merger and acquisition
M&As	Merger and acquisitions
MRA	Malawi Revenue Authority
MSE	Malawi Stock Exchange
OECD	Organisation for Economic Co-operation and Development
OHADA	(Organisation pour l’harmonisation en Afrique du droit des affaires)
UNCTAD	United Nations Conference on Trade and Development

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CHAPTER ONE

INTRODUCTION

1.1. Background

In order to adequately contextualise the realm within which cross-border mergers and acquisitions (CBM&As) are discussed in this research paper, it is of necessity to briefly explain about Malawi, in terms of its geographical and economic placement. Malawi is a landlocked country that is classified as a least developed country.[1] Furthermore, 85% of the population relies on subsistence farming and more importantly for the purposes of this paper, Malawi's foreign direct investment (FDI) inflow only amounts to a meagre $ 142.5 million.[2] The private sector is like a bird with clipped wings because credit is very expensive and there is a "lack of equitable access to finance."[3] Consequently, the private sector is not vibrant and the companies in the private sector lack the capacity to drive economic growth and development because of the said financial constraints. Hence, the necessity for FDI.

Many African countries are struggling economically and Malawi is not exempted. One sad truth about Malawi is that as a nation, we are heavily reliant on donor aid. However, in recent years there has been great fluctuations in the amount of aid given by the donor countries. The resultant effect of the fluctuations in aid has brought about budgetary constraints for the government and the detrimental impact thereof upon the economy, companies and the lives of common Malawians has been immense. The need for FDI has never been as pressing as it is now. Thus, this study looks to analyse how an investment-inducing legal environment can be created, so that CBM&As can thrive as a viable mode of entry for FDI.

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[1] United Nations Conference on Trade and Development (UNCTAD) 'The least developed countries report 2016' xiii. http://unctad.org/en/PublicationsLibrary/ldc2016_en.pdf (accessed 9 July 2017).
[2] The Heritage Foundation '2017 Index of Economic Freedom' http://www.heritage.org/index/country/malawi (accessed 25 July 2017).
[3] as above.

It is no secret that the distribution of FDI across the world is unequal. [4] Thus, countries have to proactively create a favourable investment environment in order to attract FDI.

In light of the dire economic predicament of Malawi and the limited inflows of FDI flowing into Africa, CBM&As provide a unique opportunity for countries to capitalise on FDI by encouraging CBM&As. Mergers and acquisitions (M&As) have traditionally been viewed as a tool used by corporations to attain growth, competitiveness and strategic advantage over their competitors.[5] However, M&As are endowed with the distinctive ability to save struggling companies that are on the verge of going out of business. Thus, M&As provide a lifeline to companies, industries, and economies as a whole.

An example of what M&As can contribute to an economy can be seen in the most recent acquisition in the banking sector, of MSB Limited (a wholly State-owned bank) by FDH Financial Holdings Limited. On the 16th of January 2015, the leading newspaper, The Nation, reported that on account of "bad loans given to people who were 'politically exposed,'"[6] MSB was at risk of statutory closure by the Reserve Bank of Malawi if the said bank was not able to secure a financial injection of K 23.7 billion (about $ 47.4 million), to enable MSB to attain healthy liquidation and satisfy the Liquidation Reserve Requirement prescribed by the Basel II requirements.[7] The Government in its capacity as sole shareholder of MSB was unable to raise the aforementioned sum of money and rather opted to sell the bank. MSB was acquired by FDH Bank, with the approval of the Competition and Fair Trading Commission. The Commission further stated that a closure of MSB would have adversely affected "the stability of the banking industry and resulted in a massive loss of jobs."[8]

CBM&As is a vital tool that can be used to inject FDI into Malawi's private sector and the struggling economy as a whole. In order for M&As to be used effectively in the context of

[4] A Bitzenis et al *Mergers and acquisitions as the pillar of foreign direct investment* (2012) 4.
[5] as above.
[6] 'MBS exclusive: Bank needs K 23.7 billion to survive' *The Nation* 16 January 2015.
[7] "Basel II is an international business standard that requires financial institutions to maintain enough cash reserves to cover risks incurred by operations. The Basel accords are a series of recommendations on banking laws and regulations issued by the Basel Committee on Banking Supervision (BSBS)."TechTarget 'Basel II' http://whatis.techtarget.com/definition/Basel-II (accessed 11 June 2017).
[8] Competition and Fair Trade Commission 'Approval of the merger between FDH Financial Holdings and Malawi Savings Bank (MSB)' http://www.cftc.mw/index.php/2013-12-16-09-56-37/press-releases/152-approval-of-the-merger-between-fdh-financial-holdings-and-malawi-savings-bank-msb.html (accessed 11 June 2017).

FDI, the legal framework regulating M&As must in its totality create an enabling environment for CBM&As to flourish. The dominant Act that deals with mergers and acquisitions (take-overs) is the Competition and Fair Trading Act (Competition Act). [9] The problem, however, is that the narrative of the Competition Act is undesirable because it is founded on a premise of M&As being viewed as disadvantageous to the market. Hence, the necessity to critically analyse the current legal framework and determine how best the law can be couched in order to attract foreign investment and thereby cause a positive ripple effect that will catalyse economic development.

1.2. Research problem

The extent to which CBM&As can be encouraged in Malawi greatly hinges upon the Government's ability to create an enabling legal environment for foreign investment to thrive. Hence, this study analyses, how the inadequacies in the present legal framework in Malawi, adversely affect FDI inflows.

1.3. Research questions

In investigating the potential for CBM&As to be used as a vital key for drawing FDI in Malawi, the overarching legal question is, whether the extant legislation that underpins CBM&As in Malawi is adequate? In examining this question the following questions shall be considered:

a) What is CBM&As and why is CBM&As important for economic development in Malawi?
b) What laws and regulations govern CBM&As in Malawi?
c) What are the shortcomings of the legislative provisions pertaining to CBM&As in Malawi and how can these inadequacies be addressed?

1.4. Thesis statement

It is in light of the above that this research will argue that, the extant laws and regulations pertaining to CBM&As constrict Malawi's ability to attract sustainable inflows of FDI. The present laws do not encourage investor confidence. Thereby undercutting the effectiveness of CBM&As as a catalyst for economic development. Nevertheless, the study garners several solutions that can help to remedy the inadequacies in the legal framework.

[9] Competition and Fair Trading Act 43 of 1998.

1.5. Aims and objectives of the study

This research is important for various reasons. Firstly, FDI inflows in the mode of CBM&As offer a lifeline to the companies in Malawi that are struggling to survive in the harsh economic climate.[10] However, the said companies cannot reap the benefits of FDI inflows because the crucial loopholes in the legal framework impede the attraction of foreign investment into Malawi. Thus, this study endeavors to proactively address the said gaps in the law and create a legally enabling environment for CBM&As to thrive.

Secondly, the literature pertaining to the impact of legislation, on CBM&As in a host country is scarce. Furthermore, the literature pertaining to CBM&As in Africa is very limited. It is hoped that this work will fill the void.

Finally, by engaging with the key issues surrounding the regulation of CBM&As, it is hoped that policymakers will take note and endeavor to remedy the current inadequacies in the laws of Malawi. Thereby, creating a legal environment that will enable CBM&As to catalyse economic development in Malawi.

1.6. Literature review

For many centuries M&As have garnered vast attention in the world of business and as a topic, M&As have been the focal point of many researchers. However, the research agenda that is sought to be explored in this study is tripartite. Firstly, the significance of FDI inflows both domestically and in strengthening regional integration. Secondly, the determinants and resultant developments that CBM&As bring to the host country. Thirdly, the significance of the legal regime in the target country, as it relates to M&A transactions.

Velde, argues that over the past few decades there has been a distinct shift towards liberalisation of the FDI regime, as governments have begun to look at FDI more favourably, as they have realised that policies influence the effects of FDI on development. The point of convergence with the present research is that Velde points out that over the past few decades governments have favourably looked towards FDI as a significant contributor to their

[10] In the past three years (2014-2016), FDI inflows to Malawi have greatly decreased with 2016 registering the lowest decline in that period. United Nations Economic Commission for Africa 'Country Profile 2016- Malawi' (2017) ix.

development strategies and a source of technology and capital inflows.[11] Thus, this work acknowledges the role that FDI plays in the economic development of a country. However, Velde does not engage with the importance that the legal framework of the host country plays in creating an enabling environment to attract FDI.

Bénassy-Quéré, Coupet and Mayer argue that public efficiency and good institutions increase the amount of FDI inflows.[12] The significance of this study is that it shows the relevance of institutions and policy in relation to FDI. However, they do not venture into an empirical study of the impact of legal structures on FDI inflows, nor do they acknowledge the legal framework in the host country as a determinant of FDI inflows.

Agbloyor, Gyeke-Dako, Kuipo and Abor (2016), [13] hypothesize that the relationship between institutions, FDI and economic growth in sub-Saharan Africa differ based on the specific characteristics of the specific country. A key finding in their research is that in the quest to attract FDI countries must implement policies that take into account the particular context of the said country in order to realise the growth effects of FDI. However, the authors give no regard to the causal relationship between the law, the said institutions and inflows of FDI.

Wilson and Pholo contend that larger regional integration blocs attract greater M&A flows.[14] In their study, they state that, in order to reap the benefits from CBM&As, African countries need to strengthen the existing regional integration arrangements among the members, so as "to attract foreign investment from non-member countries."[15] Furthermore, in large free trade areas like COMESA (Common Market for Eastern and Southern Africa) economies of scale can be created which will lure M&A flows from outside of the integrated region. However, the authors do not address the differences in the legal frameworks of the respective member countries, which is a key consideration in CBM&As.

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[11] DW te Velde 'Foreign Direct Investment and Development An historical perspective' Overseas Development Institute (2006) 2.
[12] A Bénassy-Quéré et al; 'Institutional determinants of foreign direct investment' (2007) *The World Economy* 4.
[13] EK Agbloyor et al; 'Foreign direct investment and economic growth in SSA: The role of institutions' (2016) *Thunderbird International Business Review* 14.
[14] MK Wilson & A Pholo 'Determinants of cross-border mergers and acquisitions in Africa from 2000 to 2014: the role regional integration' (2017) 4.
[15] n 14 above 26.

Feito-Ruiz and Menéndez-Requejo argue that the legal regime of the target country bears ramifications in CBM&As transactions. If the target country's legal enforcement is much less than the acquiring country the acquirer may be exposed to operating risk. However, if the legal framework is over-regulated the transaction costs involved in completing the CBM&A transaction will adversely increase.[16] The findings of this paper specifically address bidder firms (bidder shareholders) and not foreign investors in general.

Several of the authors above have indicated that CBM&As are advantageous to the host country, but country-specific policies need to be implemented in order to reap the benefits of foreign investment. However, there is a gap in the literature as to how the legal framework of the host country affects inflows of FDI. Thus, this paper shall analyse the impact that the current legal framework in Malawi has upon inflows of CBM&As.

1.7. Research methodology

The study is a library and desktop based research. This dissertation is a qualitative research applying a descriptive, narrative, critical, analytical, comparative and prescriptive approach. The premise of the methodology is a critique of the present legal framework and an analysis of how the shortcomings in the extant laws can be remedied. The research reviews laws, textbooks, journal articles, reports and other documents from internet sources.

In order to address the gaps in the legal framework that governs CBM&As in Malawi, the research gleaned lessons learned from South Africa. South Africa is chosen as a comparator because the legal system in South Africa is progressive and dynamic. Furthermore, the bulk of FDI inflows per country ratio in Africa, flow to South Africa, which is indicative of investors having confidence in the legal framework of South Africa. Though it must be noted that one stark difference between South Africa and Malawi is that, the institutions and infrastructure in South Africa are much more advanced, so not all aspects of the South African legal structure can be legislatively adopted in Malawi. However, the lessons learned will permit a hybrid application that is malleable to the needs of Malawi.

[16] I Feito-Ruiz & S Menéndez-Requejo ‘Cross-border Mergers and Acquisitions in different legal environments’ (2011) 31 *International Review of Law and Economics* 170.

1.8. Limitation of the study

Though a huge part of the literature surrounding M&As focuses on the transactional aspects of the M&A deal, the present study will only focus on how the provisions in the laws of a host country impact upon CBM&As.

Furthermore, in considering FDI and economic development several issues such as financial markets, bilateral investment treaties and the role of economic growth are worth researching. However, due to the constraints on the parameters of this work, these issues cannot be traverses extensively.

Finally, the information pertaining to the development of the legal framework governing CBM&As across the different sectors in Malawi is very limited. Consequently, this research will not pursue an in-depth study in this area.

1.9. Structure of chapters

This dissertation is divided into five chapters and they are set out as follows:

1. Chapter one Introduction

This chapter provides a background to the research, the problem that gave rise to the research and the questions that the research is attempting to answer. The chapter also states the significance of the research and the methodology that is used in order to attempt to answer the questions that the research topic raises.

2. Chapter two Overview of mergers and acquisitions and foreign direct investment

This chapter sets out the theories that underpin M&As. The chapter also provides an introduction to the concept of CBM&As and why CBM&As are important for the economic development of Malawi.

3. Chapter three The legal framework for cross-border mergers and acquisitions in Malawi

This chapter gives a clear discussion of the current legal framework governing CBM&As in Malawi. A holistic approach is adopted in analysing the relevant laws and regulations, as they

pertain to CBM&As in Malawi. Further, the chapter analyses the regulation of CBM&As in the COMESA free trade area, as Malawi is a member state.

4. Chapter four A critique of the legal framework and lessons from South Africa

The chapter identifies the shortcomings found in the law and critiques the extant legal framework governing CBM&As in Malawi. Further, the chapter looks to address the inadequacies in the law by gleaning lessons from South Africa.

5. Chapter five Summary and Conclusion

This chapter provides a summary of the entire study and makes recommendations on how the legal framework in Malawi can be constructed to create a legally enabling environment for CBM&A to increase and thrive.

CHAPTER TWO

AN OVERVIEW OF MERGERS AND ACQUISITIONS AND FOREIGN DIRECT INVESTMENT

2.1 Introduction

The intent of this chapter is to provide a working understanding of CBM&As. First, however, the components that make-up CBM&As, namely: M&As and FDI will be investigated. This chapter is structured into three sections. Section 1 introduces the theories and concepts of M&As and offers a brief outline of the types of M&As and the motives for engaging in M&As. Section 2 discusses FDI and the economic significance of FDI in least developed countries, such as Malawi. Section 3 presents CBM&As as a culmination of M&As and FDI and discusses the role that CBM&As can play in stimulating economic development.

There are two modes of entry that are used by companies to invest in foreign countries. The aforementioned modes of entry are greenfield investment and M&As.[17] Greenfield investment occurs when an investor establishes a production facility or office buildings in the foreign country *de novo*.[18] Whilst M&As involve the coming together of pre-existing firms or the acquisition of assets.[19] However, it must be noted that M&As are becoming the more preferred mode of investment, and as such, garner greater policy engagement between the country of the acquiring company and the target country.[20]

The role of FDI is crucial in enabling Malawi, as a LDC country to cultivate sustainable development[21] and decrease the prevailing gaps in the capital inputs required to build thriving industries, which will nurture economic development. The determination of a correlating positive impact of FDI on economic growth has been a contentious issue that spans over many

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[17] L Colen et al; 'Foreign direct investment as an engine for economic growth and human development: a review of the arguments and empirical evidence' (2008) *Working paper prepared for the IAP P6/06 Project, Working Package FDI-1* 11.

[18] P Harms & P Méon, 'An FDI is an FDI is an FDI? The growth effects of greenfield investment and mergers and acquisitions in developing countries' (2011) *Working Paper, Study Center Gerzensee, No. 11.10* 2.

[19] as above.

[20] MK Wilson & A Pholo 'Determinants of cross-border mergers and acquisitions in Africa from 2000 to 2014: the role regional integration' (2017) 2. https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=CSAE2017&paper_id=838 (accessed 4 September 2017).

[21] United Nations Conference on Trade and Development (UNCTAD) 'Foreign direct investments in LDCs: Lessons learned from the decade 2001 to 2010 and the way forward' (2011) iii. http://unctad.org/en/docs/diaeia2011d1_en.pdf (accessed 11 September 2017).

years.[22] However, the indispensable role FDI plays in economic development has remained unchanged throughout the years.[23]

It is contended in this study that the legal structure of Malawi as a host country plays a crucial role in creating a pro-investment environment for CBM&As to thrive. Thus, it is imperative that we extensively examine the legal framework of Malawi and determine how a balance can be attained between safeguarding the industries and economy of Malawi, whilst at the same time creating an enabling environment that will attract inflows of foreign investment.

2.2 Theories of M&A

M&As are not an abstract concept, rather M&As are underpinned by theories that drive the motivation of companies' to undertake M&As. The said theories have been developed over different time periods and as such, the relevance of some of the theories in this modern era may not be as significant.

I. Efficiency theory

The efficiency theory states that companies engage in mergers only in instances where it is expected that by engaging in the merger, the gains generated in attainable synergies shall be beneficial to both companies.[24] If the gains in value are not beneficial to either party then the merger is not concluded because the prime objective of value creation has not been satisfied. Thus, mergers "are planned and executed to achieve synergies."[25]

The synergetic gains created by M&A activity can take several forms: manufacturing synergy, operations synergy, marketing synergy, financial synergy and taxation synergy.[26] The aforementioned synergies shall briefly be discussed below.

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[22] EK Agbloyor et al 'Foreign direct investment and economic growth in SSA: The role of institutions' (2016) *Thunderbird International BusinessReview* 2.
[23] S Lall & R Narula *Understanding FDI-assisted economic development* (2013) 1.
[24] U Weitzel & KJ McCarthy 'Theory and Evidence on Mergers and Acquisitions by Small and Medium Enterprises' (2009) *Discussion Paper Series 09-21* 4-5.
[25] K Wadhwa & SR Syamala 'An Empirical Examination of Efficiency Theory of Mergers in Emerging Market India' (2015) *Theoretical Economics Letters,5,* 758.
[26] PK Gupta 'Mergers and acquisitions (M&A): The strategic concepts for the nuptials of corporate sector' (2012) *Innovative Journal of Business and Management* 65.

a) Manufacturing synergy is the synergy created by combining the core capabilities of the acquiring company and the target company in different aspects of manufacturing, such as technology, design, technical know-how in production, research and development and procurement.[27]

The said synergy in the manufacturing process is not limited to inputs or technology, it also includes the way in which the combined manufacturing competencies are used. For example, if both companies own production lines that make generic products but the acquiring company has superior technology that increases output and reduces cost, the merger may rationalise that the target company transfers this particular production line to the acquiring company, whilst the target company uses their production line for another product.

b) Operations synergy is gained by combining the operations of the acquiring company and the target company. The operations include "facilities such as warehouses, transportation, software and common services such as accounting and finance, human resources and administration."[28] The synergy is generated because the merger drastically reduces duplication of the operational capacity of both companies thereby leading to cumulative cost saving.[29]

c) Marketing synergy consists of using the same distribution channel or selling points to brand and market the products of both the acquiring and the target companies. The effect of using the same marketing platform is that the total costs of running two independent marketing campaigns are reduced because the same outlet can market multiple products. Furthermore, the brand equity that has been created by one of the companies can help leverage the sales of the other company's products.[30]

d) Financial synergy comprises of coalescing the balance sheets of the acquiring company and the target company to gain advantages by adjusting financial resources to attain a decrease in the weighted average cost of capital, financial economies of scale in transaction costs and an overall reduction in the corporate risk.[31]

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[27] n 26 above.
[28] as above.
[29] as above.
[30] as above.
[31] B Al Qudaiby & MR Khan 'Financial Synergy in Mergers and Acquisitions in Saudi Arabia' (2014) ResearchGate 184.

e) Taxation synergy involves reducing the tax liability of company by merging a "loss-making company with a profitable one so that the profitable company can get tax benefits by writing off accumulated losses of the loss-making company against the profits of the profit-making company."[32]

II. Market power theory

The theory of market power dictates that by increasing the allocative synergy gains of a company, *ceteris paribus*, the increased market power will allow companies to charge higher prices and earn greater profit margins.[33] However, though the sales made by the company may not increase post-merger the profits will still be increased because of the higher prices charged.

In essence market power reduces the number of companies in the market and results in the reduction of the number of companies supplying to the market. So the consumers have a limited choice, and as such, gives the merged entity the opportunity to charge higher prices and thereby increase their profit margin.[34]

III. Monopoly theory

This theory holds that a M&A is carried out in order to attain greater market power in both horizontal and conglomerate acquisitions.[35] In the monopoly theory, there is a transfer of wealth from customers to the owners of the company occupying the monopoly position.[36]

In a conglomerate acquisition, the acquiring firm procures a company that is not in the same sector or industry as the acquiring company. The advantageous aspects of a conglomerate acquisition are known as collusive synergies and they are threefold: Firstly, the company can cross-subsidise their products, profits attained in a market where the company has a favourable position can be used to sustain products that are in a highly concentrated and competitive market.[37] Secondly, the acquiring company can tacitly limit competition in more than one market by "mutual forbearance or reciprocal dealing and combining business functions such as

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[32] n 26 above.
[33] n 24 above 5.
[34] N Gao et al; 'Market power in horizontal mergers: Evidence from wealth transfers between merging firms and their customers' (2016) 9. https://www.research.manchester.ac.uk (accessed 7 October 2017).
[35] F Trautwein 'Merger motives and merger prescription' (1990) *Strategic Management Journal* Vol. 11, 285-286.
[36] B Hellgren et al; 'The Reproduction of Efficiency Theory: The Construction of the AstraZeneca Merger in the Public Discourse' (2011) *International Journal of Business and Management* Vol. 6 no.5 17.
[37] n 35 above 286.

purchasing."[38] Lastly, the acquiring company can deter potential entrants into the market by using their monopolistic position to create barriers to entry.[39]

IV. Corporate control theory

The theory of corporate control suggests that in the world of business there is always a management team in another company that is continuously looking to acquire a company that is not performing well, in order to remove those managers who have been unable to adequately utilise the assets and opportunities at their disposal, to improve the performance of the company. [40] The theory further suggests that the desire of shareholders is to see the greatest possible return on their investment. Thus, the management team that can accord the said shareholders with the best possible value for their investment will assume the management of the assets in the underperforming company.

There is a direct correlation between unproductive managers and the occurrence of corporate control acquisitions. In a competitive market underperforming companies are often unable to survive and the mangers in the said companies are replaced in order to stimulate a turnaround in the business. However, the control theory suggests that if the competitive forces in the market do not eliminate the managers there will be a resultant 'hostile' takeover of the underperforming company in order to replace the management and cause the company to become profitable.[41]

V. Valuation theory

This theory submits that mergers are undertaken by companies because the acquiring company has better information about the value of the target company than the stock market, on account of private information that is in the possession of the acquiring company. The said private information allows the managers in the acquiring company to be uniquely placed to know the possible benefits of "combining the target's business with their own or may have detected an undervalued company just waiting to be acquired."[42]

[38] n 35 above 286.
[39] as above.
[40] n 24 above 5.
[41] n 24 above 6.
[42] n 36 above 18.

VI. Process theory

The process theory is a rudimentarily theory that states that M&A transactions are not the product of strategic decision making rather the result of processes that are influenced by three issues: First, "individuals possess limited information processing capabilities."[43] Second, the organisational routines embodied in solutions and lessons learned over time, affect the culture of the company and influence M&A behaviour.[44] Third, the influence of political power between the management unit inside the company and those outside the company.[45] Thus, the decision-making process is greatly influenced by tactical considerations[46] and organisational culture.

VII. Managerial hubris theory

The management hubris theory is a form of value-decreasing theory that states that though managers may be correctly desiring to increase the value of the company through an acquisition, the manager may be overconfident in evaluating the potential synergies that may be created by the said acquisition. As a result of the erroneous over-confidence, the acquiring company often overpays for the target that they are acquiring and because of the inadequacies in the target company, the acquiring company suffers losses and ultimately failure.[47]

VIII. Managerial discretion theory

Another type of a value-decreasing theory is the managerial discretion theory which suggests that some acquisitions are erroneously entered into because companies have excess liquidity, so companies engage in seemingly 'strategic acquisitions' with poor research and analysis.[48] In this theory, the management team will wrongly undertake a well-intentioned acquisition because they are not enduring the financial pressure to correctly analyse every aspect of the proposed acquisition.

IX. Managerial entrenchment theory

The third value-decreasing theory of managerial entrenchment states that managers engage in mergers in order to entrench their position in the company by making M&A transactions that

[43] n 35 above 288.
[44] n 35 above 289.
[45] as above.
[46] as above.
[47] n 24 above 6.
[48] n 24 above 7.

increase their value in the company and decrease their ability to be replaced.[49] Hence, the M&A is not predicated upon adding value to the company but rather securing the tenure of the managers.

X. Empire-building theory

Empire theory suggests that management teams are driven by the desire to conduct take on a M&A to grow the company by increasing the asset or revenue base in order "to maximise their own utility instead of that of the shareholders."[50] However, in the present author's thorough reading of the literature, no practical examples were found of instances in which the mangers of a particular company engage in a M&A in order to maximise their own utility instead of that of shareholders.

XI. Disturbance theory

The disturbance theory is peculiar because unlike the theories stated above the theory suggests that M&A waves occur on account of economic disturbances. The effect of the economic disturbance causes a shift in the expectation of the different players in the market that results in "previous non-owners of assets now placing a higher value on these assets than their owners, and *vice-versa*. The result is a merger wave."[51]

2.3 Definition of M&A

M&As are often grouped together and generically termed 'mergers and acquisitions,' even though mergers and acquisitions are different and possess diverse types of processes.[52] The Organisation for Economic Co-operation and Development (OECD) defines a merger as an instance in which, "two (or more) companies agree to merge into a new single company rather than remain separated for creating business synergies."[53]

Bitzenis, Vlachos and Papadimitriou define a merger in the following terms;

> one or more firms cease to exist without liquidation and their assets are transmitted to another firm. The return to the shareholders of the absorbed firm is a stock of shares of

[49] n 24 above 8.
[50] n 35 above 18.
[51] n 35 above 290.
[52] OECD Benchmark Definition of Foreign Direct Investment (2008) 197.
[53] as above.

the firm that absorbed them. A merger differs from a consolidation, which is a business combination where two or more firms join to form an entirely new firm.[54]

On the other hand, "an acquisition is the purchase of existing shares issued by another company for increasing ownership or control level by the acquiring company." [55] However, in procuring the target company, the acquiring company buys the assets and undertakes the liabilities of the target company.[56] "The target company either becomes an associate or a subsidiary or part of a subsidiary of the acquiring company."[57]

The discussion here is focused on M&As, but it is important that we define takeovers because the Companies Act and the Competition and Fair Trading Act in Malawi both refer to mergers and takeovers, as opposed to mergers and acquisitions. A "takeover is a form of acquisition where the acquiring firm is much larger than the target company. The term is sometimes only used to designate 'hostile transactions', but in other instances, takeovers also refer to "friendly and unfriendly mergers."[58]

This study shall adopt a restrictive definition of M&As, which excludes portfolio investments. Furthermore, on account of the imprecise[59] use and application of the word takeover, this research shall use the term M&A.

2.4 Classifications of M&As

2.4.1 *Types of mergers*

Mergers are often classified in terms of the particular type or sector in which the respective merging companies are located and carry on business. When we speak of the type and sector of the business, it is in relation to the products that the companies sell and the commercial relationship between the merging companies whether they are competitors or non-competitor. There are four main types of mergers and they are discussed below.

[54] n 4 above 164.
[55] n 52 above.
[56] n 52 above 198.
[57] n 52 above 198.
[58] n 52 above 198.
[59] PA Gaughan *Mergers, acquisitions, and corporate restructuring* (2010) 13.

a) *The horizontal merger* involves two or more merging companies that are competitors and they operate in the same industry.[60] By engaging in horizontal integration the merging companies increase their market share which results in an increase of market power.[61]

b) A *vertical merger* occurs when "two companies with complementary activities such as those having a buyer-seller relationship,"[62] combine and become a single enterprise. The integration in a vertical merger is along the same supply chain[63] and this provides certainty and security to the merged company because the two companies complement one another.

c) *The congeneric merger* is a type of merger that involves companies that may be in the same or related industries, but they do not sell the same products.[64] For example, the two merging companies may both produce chemical substances though one company manufactures **herbicides** (a chemical substance that kills weeds) and the other company manufactures pesticides (a chemical substance used to kill insects and animals that destroy crops).

d) A *conglomerate merger* takes place in instances where the business activities of the merging companies are unrelated,[65] both in terms of the products and the sectors involved. This enables companies to diversify and spread risk, by investing in products that are in another sector.

2.4.2 Forms of acquisitions

When acquisitions are categorised the categorisation is dependent upon what the acquiring company is purchasing *vis-a-vis* the target company.[66] The acquisition may occur in the form of asset purchase, stock purchase or a combination of both.[67] Below is a brief analysis of the difference between an asset purchase and a stock purchase.

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[60] n 4 above 164.
[61] n 52 above 198.
[62] as above.
[63] n 4 above 164.
[64] n 4 above 164.
[65] as above.
[66] F Aytac & CT Kaya 'Contemporary look on the historical evolution of mergers and acquisitions' (2016) vol. IV, Issue 2 International Journal of Economics, Commerce and Management 191.
[67] JC Coates IV 'Mergers, Acquisitions and Restructuring: Types, Regulation and Patterns of Practice' (2014) Harvard John M. Olin Discussion Paper Series Discussion Paper No. 781 3.

Asset purchase

In an asset purchase, the acquiring entity will buy the assets and liabilities of the target company. "Typically, asset acquisition occurs when the target company gets into a process of liquidation. Before entering into liquidation, target companies occasionally choose to liquidate all assets in the market."[68] However, if the target company sells all of its assets then characteristically the said sale will amount to a liquidation of the target company.[69]

Stock purchase

In a stock purchase, all of the assets and liabilities of the target company are procured by buying the “stocks on shareholders.”[70] Moreover, by purchasing the stocks the acquirer also obtains the right to participate in the target company's board meetings and ultimately contribute to the "decision-making process of the business."[71]

2.5 Historical development of M&As

M&As date as far back as the 1800s, though the M&As largely occurred in the United States of America.[72] The history of M&As portrays the important role that the law plays in both guiding and encouraging the occurrence of M&A activity.[73] The development of M&As has predominantly occurred during waves. M&A waves are periods within which there is concentrated M&A activity.[74] Thus, it is necessary to outline the different waves that have lead up to the current structure of global M&As.

First wave

The first wave of M&As arose towards the end of the nineteenth century, as a result of the grave conditions brought about by the economic depression.[75] The industrial revolution provided an ideal environment for M&As to occur because the entrepreneurs wanted to benefit from the breakthroughs made in the industrial sector and reduce the risks of doing business. Predominantly the M&A activity resulted in the creation of monopolies.[76]

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[68] n 66 above 192.
[69] as above.
[70] n 66 above 192.
[71] n 66 above 192.
[72] CA Hill & SD Solomon *Research handbook on mergers and acquisitions* (2016) 13.
[73] D Faulkner et al; *The handbook of mergers and acquisitions* (2012) 26.
[74] n 73 above 20.
[75] n 66 above 193.
[76] as above.

Second wave

The second wave happened between 1916 and 1929.[77] World War I placed pressure on companies to advance industrial developments because the technology was needed to enable the government to have a comparative advantage over their enemies in battle. So the governments engaged in the war supported industrial companies, which in turn fuelled the second wave. The major difference between the first and second wave is that the second wave embarks on greater vertical integration, whilst the first wave had greater horizontal integration.[78]

Third wave

The third wave commenced in the United States of America in the 1960s, though it reached its peak between 1965 and 1969.[79] The laws in the United States inhibited companies from merging if they were in the same kind of business, as such, by default, conglomerate mergers were encouraged. In adopting conglomerate mergers companies benefited in two ways. Firstly, companies decreased their financial risk by not launching a brand new product. Secondly, companies mitigated the risks associated with downturns or volatilities in the market because the conglomerate merger expanded their product lines.[80]

Fourth wave

The fourth wave was characterised by the proliferation of hostile takeovers which were unwinding the vast conglomerates created during the third wave.[81] However, "the fourth wave of mergers was mainly confined to the United States of America."[82]

Fifth wave

The fifth wave is generally accepted to occur around 1992 and 2001.[83] In this period, large unprecedented global companies were formed on account of "the buoyancy of the stock market and the expansion of the technology bubble."[84] The fifth wave was not confined to America as

[77] n 66 above 194.
[78] as above.
[79] as above.
[80] n 73 above 20.
[81] n 73 above 21.
[82] n 66 above 196.
[83] n 73 above 23.
[84] n 73 above 24.

substantial M&A activity also occurred in Europe and Asia.[85] The bulk of the M&A dealings in the fifth wave were cross-border transactions necessitated by the globalisation of the capital markets.[86] Hence, the fifth wave ushered in M&A activity that was premised upon companies needing to gain a competitive edge in order to survive in this modern era of business.

Sixth wave

In the years during 2004 to 2008, the sixth wave of M&A activity occurred.[87] The sixth wave is very similar to the fifth wave because the driving force for this wave was also globalisation and the need for companies to gain a greater competitive edge. One stimulating factor that ushered in the sixth wave is the prevalence of liquidity in the markets because of low interest rates on credit.[88] The sixth wave also saw the emergence of Brazil, India, and China in the realms of trade and industry.[89] However, the financial crisis that began in 2008 brought the sixth wave to an end as credit became expensive because of the diminished liquidity of the markets.[90]

2.6 Motives for M&As

The motivations that drive companies to engage in M&As are vast. At times the said motivations may be sector specific, for example in the oil and gas sector where the resources and drilling licenses are limited. Necessitating growth by M&A. Another motivation may be geographical in nature, for example, companies providing tertiary education may merge because the respective institutions provide education for students in specific locations. Thus, it is evident that the reasons for M&As may vary. Hence, it is important to analyse the motives for M&As transactions because the motives of the acquirer speak to the reasons why a company participates in M&As and by knowing the reasons, Malawi as a host country can tailor its policies in appreciation of these motivations. Thereby, attract foreign investment. Below I highlight some common value-increasing motives that cause companies to participate in M&As.

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[85] GN Gregoriou & L Renneboog *Understanding mergers and acquisitions: activity since 1990: Recent research and quantitative analysis* (2007) 4.
[86] n 85 above.
[87] n 73 above 25.
[88] as above.
[89] n 73 above 26.
[90] as above.

2.6.1 Synergy

Synergy is the notion that states that two companies will attain greater value by operating together as opposed to the said companies operating independently.[91] There are two types of synergy that are created, namely, operating synergy and financial synergy.[92]

a) Operating synergy comprises of both economies of scale and economies of scope.[93] The gains that the companies enjoy from the economies of scale occur because the fixed cost per unit decreases as the volume of production increases.[94] In terms of economies of scope, the advantage gained by the companies stems from the fact that when the companies are combined the skills and assets used in production can produce multiple products and positively impact the company's revenue inflows.[95]

b) Financial synergy refers to the "lowering of the cost of capital" because the risk involved decreases, so the sums charged by investors and lenders on the returns is less. [96] Furthermore, in embarking on investment opportunities the merged or acquired company can internally create the funds that are sought, as opposed to borrowing the sums from external financers.[97]

2.6.2 Diversification

Diversification through M&As provides an opportunity for a company with a core product line to reduce their risk in the market by adding new products to their line or "by entering other markets."[98] Also, if the growth rate in the industry where the core products are is slowing, then the merging or acquiring company seeking to diversify, can invest in products that are located in industries that are experiencing a high growth rate.

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[91] E Duksaitė & R Tamošiūnienė 'Why companies decide to participate in mergers and acquisition transactions' (2009) Vol 1, no. 3 Verslas XXI amžiuje 23.
[92] D DePamphilis *Merger, acquisitions and other restructuring activities: An integrated approach to process, tools, cases and solutions* (2009) 6.
[93] n 92 above 7.
[94] n 66 above 197.
[95] n 92 above 7.
[96] n 66 above 197.
[97] n 92 above 7.
[98] n 66 above 198.

2.6.3 Strategic realignment

Strategic realignment is a tool that allows a company through M&As to reposition itself in response to changes in technology and in the regulatory framework.[99] Thus, the acquiring company can utilise the strengths of both companies in terms of skills, processes, know-how, technology, licenses and any comparative advantage that the companies have accumulated over the years of doing business.

2.6.4 Government policies

The policies made by government impact upon greatly upon investors because the said policies create the environment within which the companies operate in the host country. Thus, in countries with favourable conditions investors will seek to take advantage of the said conditions and undertake investment projects.

2.6.5 Growth

In instances where organic growth in the market share of a company may not be possible or is very limited because the industry is concentrated or highly regulated, a merger or an acquisition may be the preferred option to cause growth in the market share. For example, as it has been cited above, on the 12th of February 2016 the Competition and Fair Trading Commission of Malawi approved the acquisition of MSB bank (target bank) by FDH bank (acquiring bank).[100] Prior to the merger, FDH enjoyed an asset market share of 5.2% and a capital market share of 6.3%.[101] The acquisition then saw FDH bank assume 15% of the market share in the banking sector. In so doing, though the banking industry is highly regulated, FDH used M&A to become the third largest bank in Malawi, when initially FDH was the seventh largest bank.[102]

2.7 Foreign direct investment

The second component of M&As is FDI. In order to adequately engage with the research topic, we need to define FDI and identify the significant role that FDI plays in aiding the economy of a host country.

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[99] n 92 above 9.

[100] Competition and Fair Trading Commission 'Approval of merger between FDH Financial Holdings and Malawi Savings Bank (MSB)' http://www.cftc.mw/index.php/2013-12-16-09-56-37/press-releases/152-approval-of-the-merger-between-fdh-financial-holdings-and-malawi-savings-bank-msb.html (accessed 22 September 2017).

[101] Reserve Bank of Malawi 'Financial institution supervision annual report 2014' file:///C:/Users/Temwa/Downloads/Financial%20Institutions%20Supervision%20Annual%20Report%202014%20(2).pdf (accessed 22 September 2017).

[102] n 100 above.

2.7.1 Definition of FDI and foreign direct investor

In the World Investment Report produced by the United Nations Conference on Trade and Development (UNCTAD), FDI is defined as follows,

> Foreign direct investment (FDI) is defined as an investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate). FDI implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy. Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among foreign affiliates, both incorporated and unincorporated. FDI may be undertaken by individuals as well as business entities.[103]

Furthermore, "FDI is typically considered to transfer both physical capital and intangible assets, such as technology, among countries."[104] "FDI is a balance-of-payments concept involving the cross-border transfer of funds."[105] So, the foundational aspect of FDI is the reallocation of assets and capital across the borders of a nation with the aim of obtaining value for the said investment.

The OECD defines a foreign direct investor in the following terms,

> A foreign direct investor is an entity (an institutional unit) resident in one economy that has acquired, either directly or indirectly, at least 10% of the voting power of a corporation (enterprise), or equivalent for an unincorporated enterprise, resident in another economy. A direct investor could be classified to any sector of the economy and could be any of the following: i) an individual; ii) a group of related individuals; iii) an incorporated or unincorporated enterprise; iv) a public or private enterprise; v) a

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[103] UNCTAD World Investment Report 2012, Methodological note http://unctad.org/en/PublicationChapters/WIR2012MethodologicalNote_en.pdf (accessed 23 September 2017) 3.
[104] M Wang & MC Sunny Wong 'What drives economic growth? The case of cross-border M&A and Greenfield FDI activities' (2009) KYKLOS, Vol. 62, no. 2 316.
[105] n 85 above 65.

group of related enterprises; vi) a government body; vii) an estate, trust or other societal organisation; or viii) any combination of the above. In the case where two enterprises each own 10% or more of each other's voting power, each is a direct investor in the other.[106]

2.7.2 The motives for foreign investment

In undertaking foreign investment by way of a merger or an acquisition, the motives of the investor are important to ascertain because they speak to the derivative benefits or spillovers that the local companies and host nation can stand to gain from the respective foreign investment. There are four core motives that drive foreign investors to invest, namely, (a) seeking natural resources, (b) the penetration and access to new markets, (c) restructuring for efficiency purposes and (d) the pursuit of strategic assets.[107] Each of these motives shall briefly be discussed below.

i) The concept of Natural-resource seeking FDI is premised upon investment that looks to take advantage of the deposits of natural resources that are found in a particular country. The said resources may not be found in the home country, or the particular natural resources are obtained at a cheaper price *vis-a-vis* the home country.[108] However, predominantly the raw materials that are extracted in this form of FDI investment are exported without any value addition.

ii) Investors undertaking market-seeking FDI, want to penetrate and secure market presence in regions where there is a demand for their product. So the company looks to efficiently supply their products to a market in another country, by producing the product locally in the target country, as opposed to the product being imported into the target country.[109]

iii) "Efficiency-seeking FDI occurs when part of the value chain is located abroad in order to improve the company's profitability."[110] By taking advantage of economies of scale and scope that are created by the gained obtained from the factor endowment in the host country, the investor can increase their profitability, on account of the increased efficiency.[111]

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[106] OECD Benchmark Definition of Foreign Direct Investment (2008) 49-50.
[107] n 52 above 5.
[108] C Franco et al; 'Why do firms invest abroad? An analysis of the motives underlying Foreign Direct Investments' (2008) 7. https://ssrn.com/abstract=1283573 (accessed 26 September 2017).
[109] n 17 above 10.
[110] n 17 above 11.
[111] n 81 above 8.

iv) In strategic asset seeking, the investor invests in order to attain or supplement a novel technology, which most likely stems from advancements in research and development. In essence, the investor invests in order to gain knowledge and technologies that the investor does not possess. For example acquiring software.[112]

A close analysis of the four motives aforementioned reveals the peculiarity of the fourth motive. The first three motives namely, natural-resources seeking, market-seeking, and efficiency-seeking are motivated by the investor being in a position of dominance in relation to capital and technical know-how. Whilst in the fourth motive the investor is seeking to obtain something from the host country, in order to enhance the investor's production or service. Hence, the fourth motive is specialised in nature and requires the capacity and the capability of the industries in the host country to be well advanced in research-and-development and cutting-edge technology.

On account of Malawi's categorisation as a least developed country with limited industries and technological prowess, it is highly unlikely that investors seeking to enhance their business will be drawn to invest in Malawi. Hence, it is prudent that in creating a legally enabling environment for CBM&As to thrive, the focal point of the legal framework must key in on the first three motives which embody the extractive industry, manufacturing industry, and service industry.

2.7.3 The vital role of FDI in Malawi and the importance of institutions

FDI provides stable inflows of capital into the economy of Malawi. Also, on account of the different levels of advancement in the world, FDI operates as a means for the transfer of technological advancements and improvements, to the host country."[113] Thus, the capacity of the host country is improved by the economic integration.[114]

Another positive impact that FDI may have upon a host country is in the area of employment. On account of the multinational organisation investing in the host country, employment may

[112] n 17 above 11.
[113] A Bénassy-Quéré et al; 'Institutional determinants of foreign direct investment' (2007) *The World Economy* 764.
[114] n 4 above 39.

be created directly when the merged or acquired company employs people, or indirectly because other jobs are created as a result of the business generated by the CBM&A.[115] In a country like Malawi with an abundance of labour as opposed to capital, the creation of jobs is a huge factor that the Government desires when it considers a foreign investment.

FDI is also significant in the area of balance of payments (BOP). BOP is the record of the international financial transactions that the residents of a country undertake, in relation to imports and exports. FDI in the form of CBM&As has three significant impacts on BOP. Firstly, at the point of the merger or the acquisition, the foreign investor injects capital into the host country. Secondly, if production substitution occurs and products that were initially imported but now start to be produced locally, the Government will externalise less foreign currency, which in turn will improve the BOP. Thirdly, if the CBM&As results in the export of products this will have a positive impact on the BOP.[116]

Also, FDI stimulates healthy competition in the domestic markets. When a foreign company enters the domestic market with technology and efficiencies, the domestic merchant is compelled to improve their product or service delivery in order for them to remain competitive and ultimately survive.[117] Hence, CBM&As is a tool that can be used to improve the quality of the products and industries in the host country.

Previous work done on the topic of FDI identifies several determinants of FDI, namely: "market size and growth potential of the host market, exchange rate valuation, political stability, the degree of openness of the host economy, the clustering effects and the quality of institutions."[118] For the purposes of this research, the relevant focal point of the aforementioned determinants is institutions.

In LDC countries institutions are a key consideration for investors. Institutions in this context capture three main aspects; governance, corruption and regulation and each of these institutional aspects shall be briefly analysed. Firstly, good governance is related to increases

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[115] S Kurtishi-Kastrati 'The Effects of Foreign Direct Investments for Host Country's Economy' (2013) Vol. 5 Issue 1 *European Journal of Interdisciplinary Studies* 28.
[116] n 93 above 29.
[117] n 93 above 31.
[118] JP Walsh & J Yu 'Determinants of foreign direct investment: A sectoral and institutional approach' (2010) IMF Working Paper 10/187 5-6.

in economic growth, which in turn attracts FDI.[119] On the other hand, corruption adds to investment costs and thus discourages investment because the increase in operating costs reduces profits.[120] Thirdly, uncertainty in the regulations of a host country on account of poor institutions raises the sunk costs. [121] The law is vital to the operation of the institutions, and as such, the regulatory framework must set the tone for an investment-inducing enabling environment for CBM&As to thrive.

2.7.4 FDI friend or foe?

It must be emphasised that FDI does not only benefit a host country. FDI can also potentially adversely affect the host country in four potential ways. Firstly, the employment generated may, in the absence of local content requirements, generate employment for foreign nationals from the acquiring company's home country, as opposed to the local labour force. Furthermore, the employment created may be at the expense of the loss of more jobs as the result of local businesses not being able to compete with the capital, technology, and skills of the merged or acquired entity.[122]

Secondly, though competition may be healthy for the development and improvement of products and industries, competition also has the potential to force the local companies out of business. When a CBM&A takes place the foreign company is operating from a dominant position, in terms of capital, technology, and skill. The various resources at the disposal of the foreign company provide greater leeway for the company to operate and implement different business or marketing strategies. However, a local company may not have the wealth of resources enjoyed by the foreign company, and as such, the local company may fail to match the business strategies deployed by the foreign company. Thus, the local company will be less competitive and may go out of business because they are failing to keep afloat.

Thirdly, the foreign investment will cause business activity to operate across the borders of the country. If the merged or acquired entity need to remit large sums of the profits made in the host country to the home state this will adversely affect the BOP because there will be greater outflows of foreign currencies. Furthermore, if the CBM&A results in increased production

[119] n 93 above 6.
[120] as above.
[121] as above.
[122] n 93 above 32.

and the majority of the components used are imported, the large sum of imports will also have a negative effect upon the BOP.[123]

Lastly, in countries like Malawi where the law governing environmental protection isn't fully developed and the enforcement thereof is inadequate, CBM&A may bring about adverse effects on the environment. It is argued that the environment may be adversely affected by the foreign investment because the regulation of environmental protection is not up to date with the best practices in the world and the governmental institutions lack the capacity to properly monitor environmental degradation, omissions, and waste management. Thus, providing room for the foreign investor to adopt practices that are cost-effective to their business, though the said practices are detrimental to the environment.

2.8 Cross-border mergers and acquisitions and the significance of the legal framework

CBM&As comprises of the partial or complete takeover or the merging of capital and assets of an existing company in the host country by a multinational company from the home country.[124] In essence, CBM&As is the fusion of M&As and foreign investment.

It must be noted that, when an acquiring company originates from a country which has a strong legal system but, the target company is in a country in which there is less legal enforcement, the legal framework in the target country will adversely affect CBM&A negotiations because the acquiring company has a corporate responsibility to adhere to laws of the home state, and as such, the disparity in the legal systems increases the risk of operating in the target country.[125]

Conversely, if the target country has a stronger more regulated legal framework than the country of the acquiring company, investing in the target country will result in increased transaction costs for the completion of the cross-border merger or acquisition.[126] Thus, it is clear that the legal framework of a country is a determinant in CBM&As transactions. Hence, the structuring of the legal provisions governing M&As must appreciate the balancing act that has to occur between the domestic legal system and the legal systems in foreign states.

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[123] n 93 above 33.
[124] n 18 above 11.
[125] I Feito-Ruiz & S Menéndez-Requejo 'Cross-border Mergers and Acquisitions in different legal environments' (2011) 31 *International Review of Law and Economics* 170.
[126] n 98 above 170.

2.9 Conclusion

This chapter has shown the importance of CBM&As to the economic development of a host country. However, foreign investment does not, in and of itself, cause economic development. In order to benefit from CBM&As as a mode of foreign investment, a host country must create an enabling environment that will cause CBM&As to thrive.

An absent determinant in the literature pertaining to CBM&As is the legal framework of the host country. The laws and regulations of the host country are crucial in the negotiations, operating risk of the acquiring company, cost of M&A transaction and the overall perception and confidence that an investor has in Malawi. Thus, irrefutably it is vital for the Government of Malawi to consciously create a legally enabling environment that will attract foreign investment.

The next chapter will discuss the current legal framework governing CBM&As in Malawi. The chapter starts by acknowledging the segmented nature within which CBM&As are regulated. The chapter further discusses the relevant laws and regulations that regulate CBM&As, generally across all sectors and sector specific provisions.

CHAPTER THREE

THE LEGAL FRAMEWORK FOR CROSS-BORDER MERGERS AND ACQUISITIONS IN MALAWI

3.1 Introduction

In the previous chapter we discussed the theories, classifications, development, motives for M&As and the role and significance of FDI and CBM&As to a host country. This chapter will analyse the legal framework governing CBM&As in Malawi and in the regional bloc of COMESA. The analysis will commence with an appreciation of the multidimensional legal implications that a single CBM&As transaction may have. The chapter further discusses the legislative framework of CBM&As and the unique sectorial regulation of mergers and acquisitions in Malawi. Lastly, the chapter will discuss the regional regulation of CBM&As under COMESA.

CBM&As is an important tool that can enhances how the private sector conducts business in Malawi. The present harsh economic climate in Malawi and the adverse competitive pressures accorded by globalisation are threatening the survival of businesses, as evidenced by the thousands of workers being retrenched.[127] Hence, it is imperative for the government of Malawi to recognise the vital contribution that CBM&As can make by allowing foreign investors to merge or acquire struggling companies and turn them around for the betterment of entire industries and the economy at large.

The world of business is changing and evolving at a rapid pace and many countries are competing to be the preferred destination for foreign investment. The law and regulations of a country play an enormous role in attracting investment because the legal framework provides the parameters within which businesses negotiate and determine the viability of a CBM&As transaction. Thus, the policy makers in Malawi need to pay particular attention in the framing of the laws and regulations.

The law is fundamental in creating an investment enabling environment. It must be noted however, the use of the word law encompasses multiple laws in Malawi and not a single piece

[127] 'Lay-offs Increase' *The Nation* 2 September 2017 http://mwnation.com/lay-offs-increase/ (accessed 28 September 2017).

of legislation because the law that governs CBM&As is broken-up under several pieces of legislations.

3.2 Regulation of CBM&As

As it has been stated above, this paper looks to investigate how a favourable legal framework can be created to cultivate and facilitate CBM&As in Malawi. There are two unique aspects in the regulation of CBM&As. Firstly, the act of merging or acquiring of a business involves two or more entities that are located in two different legal jurisdictions, which may potentially have different regulations pertaining to M&As. Secondly, the merger or acquisition itself results in a multiplicity of legal implications that affect different aspects of the law, different sectors and different stakeholders. Hence, the regulation of M&As is not singular, but multidimensional. Thus, the segmented nature of the said regulation necessitates an analysis of the different legislative provisions that have a bearing upon the CBM&A transaction.

3.3 Regulations of CBM&As in Malawi

The Legislature in formulating the legal structure governing M&As, established the Companies Act to permit the occurrence of M&As, the Competition Act to regulate M&As from the stand point of competition law. Any other ancillary aspects that have a bearing on the M&A transaction are governed by specific legislations. Thus, the analysis of the law below shall engage with the broad spectrum of the laws and regulations that apply to CBM&As.

3.3.1 Companies Act

The starting point of the legal analysis of CBM&As must begin with the Companies Act.[128] In Part XII of the said Act provision is made for mergers and take-overs (acquisitions) to occur in Malawi. Section 261 of the Act, clearly states that for purposes of Part XII, any reference to a company also includes a foreign company. Thus, it is clear that cross-border mergers and acquisitions can lawfully occur in Malawi because there is no barring or distinction drawn between locally incorporated companies and foreign companies.

Section 266 of the Companies Act, makes provision for a merger by absorption and a merger by formation of a new company. A merger by absorption occurs when the assets and liabilities of one or more public companies are transferred to an existing public company. A merger by

[128] Companies Act 15 of 2013.

formation is when the assets and liabilities of two or more companies are transferred into a newly formed company which may be public or private.

3.3.2 Competition and Fair Trading Act

The principal statute that governs and ultimately sets the tone for the regulation of mergers and acquisitions in Malawi is the Competition and Fair Trading Act.[129] The said Act establishes the Competition and Fair Trading Commission (the Commission), which is the regulatory body tasked with overseeing all M&A transactions in Malawi.[130] A primary function of the Commission is to regulate and prevent the occurrence of an act or behaviour which would adversely affect competition and fair trading in Malawi.[131]

The Act clearly states that any person may apply to the Commission for an order authorising them to undertake a merger or a takeover (acquisition).[132] In relation to the persons who possess the standing to make the application to the Commission, the Act does not distinguish between a local company and a foreign investor. Thus, CBM&As can occur by way of application to the Commission.

However, though CBM&As are permitted under the Competition Act, section 38(1)(a) states that M&As are regarded as disadvantageous "to the extent that it is likely to reduce competition in the domestic market and increases the ability of producers of the goods or services in question to manipulate domestic prices, output and sales." The formulation of section 38(1)(a) contextualises M&As as disadvantageous, and as such, places a great burden upon an investor to prove that the said CBM&A will not be detrimental to competition, production or prices and sales within the domestic market.

On the other hand, a CBM&As transaction will be considered to be advantageous if the resultant impact is the following,

> "(i) a substantially more efficient unit with lower production or distribution costs;
> (ii) an increase in net exports;
> (iii) an increase in employment;

[129] Competition and Fair Trading Act 43 of 1998.
[130] n 129 above section 4.
[131] n 129 above section 8.
[132] n 129 above section 36.

(iv) lower prices to consumers;

(v) an acceleration in the rate of economic development;

(vi) a more rapid rate of technological advancement by enterprises in Malawi."[133]

It must be noted that the determination as to whether a merger or acquisition will be authorised by the Commission is dependent upon a balancing act that takes into account whether the advantages of the M&A outweigh the disadvantages.[134] The Act is unclear about the elements that are taken into consideration when the weighing of the advantages and disadvantages is concerned. Is it a numerical balancing that just takes into account the number of advantages versus the number of disadvantages? Does the analysis also look at the significance of the advantages and disadvantages within the specific sector, context or external circumstances?

The Commission in section 39(1) of the Act has 45 days from the receipt of a complete application for a merger or takeover (acquisition), to render a decision on whether the merger or takeover must be authorised. Once the Commission makes their order it must be published in the Government Gazette no later than 14 days, after the said order has been made.

A stringent aspect of the regulation of CBM&As in Malawi is the fact that in the absence of authorisation from the Commission, when a merger or acquisition is effected and results in the lessening of competition in the market, the persons participating in the merger or acquisition in the capacity of an agent or a principal, shall be guilty of an offence.[135] In essence the Competition Act criminalises the lessening of competition within the market in instances where the authorisation of the Commission was not sought. Furthermore, any right, obligations or agreements arising out of the unauthorised merger or acquisition shall be unenforceable and all agreements are deemed null and void.[136]

However, the Competition Act makes no provision for any form of regulation for extra-territorial M&As transactions that have an effect on the market in Malawi. So though the behaviour may be anti-competitive and it has implications for Malawi, the Act is silent on that particular transaction. For example, if there are two manufacturers of cement in South Africa

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[133] n 102 above section 38(1)(b).
[134] n 102 above section 38(2).
[135] n 102 above section 35(1).
[136] n 102 above section 35(2).

with subsidiaries in Malawi. The said manufactures are not dominant plays within the South African market but the two manufacturers are the two dominant players within the Malawian market. Then these two manufacturers decide to merge in South Africa, in so doing become a monopoly in Malawi. As the law stands the regulator in Malawi shall have no legal recourse to redress the anticompetitive practice even though it has an implication upon the market in Malawi.

3.4 Taxation

Though M&As are permitted under the Companies Act and the Competition and Fair Trading Act, an important influence in whether to engage in a M&A deal is the tax rate. Taxation plays a key role in an investor's decision whether to invest in a particular country because though the profits may be made, the said profits may be eroded by taxation. The taxation scheme in Malawi can be classified as source based system, which is sometimes also known as the territorial system. The said source based system stipulates that whenever income is sourced within the borders of Malawi it must be taxed irrespective of whether the designated taxpayer is a resident of Malawi. [137] Therefore, an investor or a foreign company conducting business and generating income in Malawi are taxed according to the specific provisions that relate to the nature of their business.

It must be noted that, the empirical studies have shown that high tax rates have a negative impact on a host country being chosen as an ideal location for CBM&As to occur.[138] Taxation falls within the sole prerogative of the Malawian Government as a sovereign state. Malawi is heavily dependent upon taxation to finance the activities of the Government, however there has to be a purposeful application in the setting of taxes, to ensure revenue for the State but at the same time not over burden the private sector.

The regulatory authority that is responsible for assessing the taxation, setting guidelines and collecting taxation in Malawi is the Malawi Revenue Authority (MRA).[139] The MRA was established by an Act of Parliament in 1998, though the MRA only began to function in the year 2000. The MRA does not have specific in-house guidelines that lay out how tax is treated

[137] K James 'Taxation of foreign investments in Malawi. Lessons from Japan' (2010) MPRA Paper No. 28191 17-18.
[138] W Arulampalam et al; 'How do taxes affect cross-border acquisitions?' (2010) European Tax Policy Forum (ETPF) Conference 24.
[139] Malawi Revenue Act 14 of 1998.

in terms of M&As or CBM&As. Hence, the default position is to deal with taxation from the stance of corporate taxation and the distinction is drawn whether the company is incorporated in Malawi or not.

3.4.1 *Income tax*

A key aspect in the analysis of the taxation is income tax because income tax has a direct bearing upon the profits of the company. The present income tax is 30% for companies incorporated in Malawi. However, if a company operates as a branch in Malawi the levied taxation in 35%.[140] So the determination as to the income tax bracket of the CBM&As hinges upon whether the merger is by absorption or formation and the place of incorporation.

3.4.2 *The ring-fencing of mining projects*

Ring-fencing occurs when a limitation is placed upon a company's ability to consolidate its income and deductions for tax purposes, in relation to different activities and different projects which the respective taxpayer is involved in.[141] In essence ring-fencing places a limitation on a taxpayer's ability to move money around in different projects, in a way that would be disadvantageous to each project's ability to rightfully account for the income and deductions accrued during the subsistence of the mining project.

For taxation purposes, all the mining projects in Malawi are ring-fenced. Hence, all income generated from one mining project cannot be transferred to another project, nor can the expenses arising out of one mining project be used to offset the expenses arising out of another mining project.[142] Each mining project operating in Malawi must file a separate income tax statement.

3.4.3 *Royalty Tax and Resource Rent Tax in mining*

The MRA is permitted to set a mineral royalty tax, which is the payment received as consideration for the extraction of minerals.[143] However, the exact percentage to be charged as

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[140] PWC 'Corporate Taxes on Corporate Income' http://taxsummaries.pwc.com/ID/Malawi-Corporate-Taxes-on-corporate-income (accessed 1 October 2017).

[141] World Bank Group 'The Tax Treatment of the Mining Sector: An IMF Perspective' 4-5 http://siteresources.worldbank.org/INTOGMC/Resources/sunley-baunsgaard.pdf (accessed 1 October 2017).

[142] Malawi Revenue Authority 'New Tax Measures for 2016/17 Gazetted' http://www.mra.mw/press-releases/new-tax-measures-for-201617-gazetted (accessed 1 October 2017).

[143] n 142 above.

royalty tax is still yet to be officially stated by the MRA.

Resource rent tax is levied upon the profits that a company makes as a result of mining non-renewable minerals. Hence, the resource rent tax is applicable to CBM&As in the extractive industry. The present rate on the resource rent tax in Malawi is 15%.[144] However, just like the royalty tax, though this form of taxation has been introduced there is no clear indication as to its application and the formula necessary in calculating resource rent tax.

3.4.4 *Incentives*

A foreign investor looking to invest in Malawi also enjoys the following tax incentives. The assets in the following sectors manufacturing, agricultural and tourism are eligible for a 100% investment allowance in the first year of acquisition. If the company in question is licensed to operate in an Export Processing Zone and they are subject to 0% taxation.[145] For companies operating in "priority" industries (though the term is not defined), the said company will enjoy a taxation rate of 0% for 10 years or 15% (no time limit is specified). Lastly, when a company which is listed on the Malawi Stock Exchange is disposed of, the transfer of the shares is not taxable, if the shares have been held for 12 months.[146]

The incentives offered to investors generally apply without problems. However, due to the fact that the MRA is often stretched to capacity in terms of its staff, there is often long delays in the processing of the applicable benefits that a foreign investor is to enjoy. So the resultant effect that foreign investors often undertake to incur the tax and then claim back from MRA when they are doing their monthly remittances or at the point of annual audit. Furthermore, though you may have a benefit within the tax scheme you have to claim the benefit and at times negotiate with the tax officers and prove your eligibility.[147] So in terms of CBM&As the need to claim and negotiate incentives that are rightly granted by the law poses two issues. Firstly the negotiation may be burdensome to a foreign investor who is not based in Malawi and has other business dealings in several countries. Secondly, a negotiated deal with an official doesn't have the surety of perpetuity if the laws or the Government changes. Hence, the incentives may have to be renegotiated, which may be costly to the business because in the interim when the

[144] n 115 above.
[145] IBP USA *Malawi business law handbook: Strategic information and laws* (2013) 111.
[146] Malawi Investment and Trade Centre & Malawi Revenue Authority 'Tax Incentives in Malawi' Vol. 1.
[147] U.S Department of State 'Malawi Investment Climate 2015' 9.

negotiations are taking place the foreign investor may be treated as a national and not enjoy the benefits of the incentives given to foreign investors.

3.4.5 *Turnover tax & areas that are not taxed*

Section 91A of the Taxation Act, makes provision for turnover tax. Turnover tax is levied on gross income, though it is not applicable to "rental income, management fees, professional fees or training fees, income of incorporated companies and any income that is subject to a final Withholding Tax."[148] Furthermore, it be noted that turnover tax is 2% of the gross receipts of the business within the range of 2 to 6 million kwacha (the currency of Malawi). If the business activities of the merged or acquired company exceed the sum of 6 million kwacha, turnover tax is not applicable.[149]

The current taxation scheme in Malawi does not levy taxes in the following areas, property tax, transfer tax and stamp duty in the transfer of shares.[150] The fact that no taxation is placed in the aforementioned areas helps to reduce the costs incurred in completing a CBM&A, which is to the benefit of foreign investors.

3.4.6 *Transfer pricing*

In the current global sphere within which businesses are operating, transfer pricing has become an important concept. The OECD defines a transfer price as, "the price charged by a company for goods, services or intangible property to a subsidiary or other related company. Abusive transfer pricing occurs when income and expenses are improperly allocated for the purpose of reducing taxable income."[151]

The significance of abusive transfer pricing is that by companies altering prices charged on good, services and intangible property across related companies, the domestic tax base is eroded. Thereby, reducing the domestic revenue that enables Malawi to achieve its socio-economic goals. In order to combat the grave impact of abusive transfer pricing, the Legislature

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[148] Malawi Revenue Authority 'Understanding Turnover Tax' http://www.mra.mw/business/understanding-turn-over-tax (accessed 1 October 2017).
[149] as above.
[150] PWC 'Corporate – other taxes' http://taxsummaries.pwc.com/ID/Malawi-Corporate-Other-taxes (accessed 1 October 2017).
[151] OECD 'Glossary of Tax Terms' http://www.oecd.org/ctp/glossaryoftaxterms.htm#T (accessed 4 April 2017).

enacted section 127A of the Taxation Act. The said section states that, in determining the perforation of abusive transfer pricing practices, the arm's length principle must be used.

The arm's length principle dictates that, for tax purposes the prices for transactions should be set between group entities, by deriving that said price as it would have been applied by unrelated parties in similar transactions under similar conditions on the open market.[152] A principle of comparability is used to determine what ought to have been in relation to what factually is.[153]

Section 127A subsection (1) and (2) of the Act, deal with transfer pricing of deductions and incomes that arise for the taxpayer. In light of the fact that, deductions and incomes are covered under the transfer pricing framework, the MRA is not limited to just looking at the transaction as per the arm's length principle, but rather the Commissioner General of the MRA can also look at the nature of the transaction in terms of excessive deductions and understated income. Hence, section 127A (1) and (2) increases the realm within which the arm's length principle can apply. Thus, the increase will allow the MRA to consider the tax implications of a merged entity and an acquired company.

Section 127A (3) includes transactions where the arrangement is direct or indirect and arrangements which are contractual or not.[154] In legal disputes regarding transfer pricing, the MRA would have the great onus of proving the existence of conduct that is tantamount to abusive transfer pricing. However, section 127A (3) has lightened the burden on the regulator because the arrangement can be non-contractual and indirect. Hence, the 'net' with which the MRA can identify and hold to account taxpayers perpetrating abusive transfer pricing has strengthened and broadened. Thus, a cross-border merger or acquisition that possess an arrangement, be it, direct or indirect, contractual or non-contractual will be in violation of transfer pricing regulations.

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[152] G. Cottani, 'Transfer Pricing, Transfer Pricing IBFD' (accessed 29 June 2016) 18.
[153] PWC 'Spotlight on Africa's transfer pricing landscape.' http://www.pwc.com/transferpricingperspectives (accessed 4 April 2017) 39.
[154] KPMG Malawi Fiscal Guide 2015/2016, Tax. www.kpmg.com (accessed on 3 April 2017).

3.5 Labour Law and Performance and local content requirements

Section 31 of the Constitution, provides that every person has the right to fair and safe labour practices, fair wages and equal remuneration for work and the freedom to form and join a trade union. Thus, when companies engage in CBM&As they have to consciously pay attention to the labour provisions. However, it must be noted that Malawi does not have a strong trade union culture, and as such, strikes and interruptions are rare, which is to the benefit of foreign investors.

In terms of the conditions within which employees work, an employer is has a duty to ensure that the environment within which employees work is safe and not hazardous to the health of the said employee.[155] In a CBM&A, the obligation to safeguard the employee rests on both of the companies in the merger or acquisition.

The Government of Malawi does not place any performance requirements upon investors in the form of the business that is to be established, or the area of advancement that the investment should take, nor does it place requirements on the quantity of the output in the manufacturing sector. However, there is a requirement that at least two Malawian resident in Malawi be appointed as directors of companies incorporated in Malawi.

3.6 Exchange controls (remittance of profits)

There are no restrictions on remittance of foreign investment funds (including capital, profits, loan repayments and lease repayments) as long as the capital and loans were obtained from foreign sources and registered with the Reserve Bank of Malawi (RBM). The terms and conditions of international loans, management contracts, licensing and royalty arrangements, and similar transfers require initial RBM approval. The RBM grants approval according to prevailing international standards and guidelines especially in relation to money laundering. Though, subsequent remittances do not require further approval. All commercial banks are authorized by the RBM to approve remittances and approvals are fairly automatic as long as the applicant's accounts have been audited and sufficient foreign exchange is available. However, an impediment may be the availability of the foreign exchange, so the transaction may be delayed for a short period or the amount sought may be limited to the sums that are available.

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[155] Section 13(1) of Occupational Safety, Health And Welfare Act 21 of 1997.

3.7 Protection of intellectual property

Malawi recognizes the importance of intellectual property protection and enforcement. Intellectual property protection is a key issue for investors looking to protect their intangible property in Malawi. However, there is often a lack of capacity in protecting intellectual property. The Registrar General administers the Patent and Trademarks Act of 1948, which protects industrial intellectual property rights in Malawi. A public registry of patents and patent licenses is kept. Patents must be registered. Trademarks are registered publicly following advertisement and if there has been no objection to the registration of the trademark during the allotted time period given in the advertisement.

The government has signed and adheres to bilateral and multilateral investment guarantee treaties and key agreements on intellectual property rights. "Malawi is a member of the convention establishing the Multilateral Investment Guarantee Agency, the World Intellectual Property Organization (WIPO), the Berne Convention, and the Universal Copyright Convention."[156]

3.8 Environmental law

The Act responsible for regulating environmental issues is the Environment Management Act[157] and the pertained provisions are the following:

a) Section 3 National environmental policy

> (1) It shall be the duty of every person to take all necessary and appropriate measures to protect and manage the environment and to conserve natural resources and to promote sustainable utilization of natural resources in accordance with this Act and any other written law relating to the protection and management of the environment or the conservation and sustainable utilization of natural resources.

b) Section 4(a) natural and genetic resources

> The natural and genetic resources of Malawi shall constitute an integral part of the natural wealth of the people of Malawi and shall be protected, conserved and managed for the benefit of the people of Malawi.

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[156] n 147 above.

[157] Environment Management Act 23 of 2005.

c) Section 24 projects for which an environmental impact assessment is required

The Minister may, on the recommendation of the Council specify, by notice published in the Gazette, the types and sizes of projects which shall not be implemented unless an environmental impact assessment is carried out.

d) Section 37 waste management

The Minister, on the recommendations of the Council, may, by regulations published in the Gazette, control the management, transportation, treatment and recycling, and safe disposal of waste and for prohibiting littering of public places.

e) Section 38(1) Waste license

(1) No person shall handle, store, transport, classify or destroy waste other than domestic waste, or operate a waste disposal site or plant, or generate waste except in accordance with a license issued under this section.

f) Discharge of pollutants

No person shall discharge or emit any pollutant into environment, except accordance with this Act. It shall be the duty of person to prevent the discharge or emission of any pollutant into the environment otherwise than in accordance with this Act and to comply with such general or specific directions of the Minister or Director for preventing, minimizing or cleaning up, removing or disposing of any pollutant discharged or emitted into the environment.

e) Pollution (fine)

"Fine of not less than K20,000 and not more than K1, 000,000 and to imprisonment for ten years."

3.8.1 Environmental provisions

The environmental provisions laid out above indicate that the duty to take care of the environment has been placed upon all the people in Malawi, which includes companies carrying on business in Malawi.

In the extractive industry the CBM&As must observe the respective provisions pertaining to natural resources and all waste management. Any violation of the environmental provisions warrants a hefty fine of up to K 1, 000, 000 and a prison term of 10 years. Thus, investors have to pay particular attention to environmental management considerations.

3.9 Expropriation and dispute resolution

The Constitution in section 28(2), categorically states that, no person may be arbitrarily deprived of their property. Any form of deprivation of property must be accompanied by fair compensation. The present legal structure effectively protects local and foreign investments. The likelihood of direct expropriation is very low, ever since the Forfeiture Act in 1992 was repealed. The said Forfeiture Act legalised the arbitrary expropriation of private property by the Government.

Both foreign and domestic investors have access and can obtain recourse from the legal courts in Malawi. The present legal system is predominately unbiased and there is little government interference in the court system because the independence of the Judiciary encouraged. However, the Courts are plagued by severe backlog and overwhelming caseloads, with limited staffing. Thus, the legal remedies can take a long time to be obtained, often taking many months or years.

In relation to international arbitration, Malawi is a member of the International Center for Settlement of Investment Disputes (ICSID). Malawi's membership to ICSID allows for the orders given by ICSID to apply within the judicial system of Malawi. Thus, applicability of ICSID provides an extra layer of protection to foreign investors investing in Malawi.[158]

Furthermore, the Arbitration Act[159] provides for the recognition and enforcement of foreign awards in sections 36 to 39. Below are the said provisions:

ENFORCEMENT OF CERTAIN FOREIGN AWARDS

Section 36. Awards to which Part III applies

(1) This Part applies to any award made after the 28th of July, 1924—

[158] IBP USA *Malawi business law handbook: Strategic information and laws* (2013) 110.
[159] Arbitration Act 26 of 1967.

(a) in pursuance of an agreement for arbitration to which the protocol set out in the Second Schedule applies; and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Minister, being satisfied that reciprocal provisions have been made, may by notice published in the Gazette declare to be parties to the convention set out in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid; and

(c) in one of such territories as the Minister, being satisfied that reciprocal provisions have been made, may by notice published in the Gazette declare to be territories to which the said convention applies; and an award to which this Part applies is in this Part referred to as "a foreign award".

(2) The Minister may by a subsequent notice vary or revoke any notice previously made under this section.

(3) Where Malawi becomes a party to any protocol or convention in lieu of or in addition to, those referred to in subsection (1) the Minister may, by regulations, amend the Second and Third Schedules and may make any necessary amendments to this Part.

[Ch0603s37]37. Effect of foreign awards

(1) A foreign award shall, subject to this Part, be enforceable in Malawi either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 27.

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Malawi, and any references in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

[Ch0603s38]38. Conditions for enforcement of foreign awards

(1) In order that a foreign award may be enforceable under this Part it must have—

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;

(c) been made in conformity with the law governing the arbitration procedure;

(d) become final in the country in which it was made;

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of Malawi, and the enforcement thereof must not be contrary to the public policy or the law of Malawi.

(2) Subject to this subsection, a foreign award shall not be enforceable under this Part if the Court is satisfied that—

(a) the award has been annulled in the country in which it was made; or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in subsection (1) (a), (b) and (c), or the existence of the conditions specified in subsection (2) (b) and (c) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Thus, from the provisions afore cited it is unequivocally clear that the recognition and enforcement of foreign awards in Malawi is provided for in the legal framework. Hence, investors must be confident in the fact that they have dual protection of their interests both locally and internationally.

3.10 Industry Specific Regulation

In the regulatory framework of Malawi there is industry specific regulations in terms of the energy sector. The regulatory body tasked with the said regulation is the Malawi Energy Regulatory Authority. The specific provisions that are relevant to a CBM&A are laid out in a memorandum of understanding which was entered into between Malawi Re and the Competition Commission.

3.10.1 The Malawi Energy Regulatory Authority has a memorandum of understanding (MOU) with the Competition Commission of Malawi. The terms of the MOU are as follows:

The Malawi Energy Regulatory Authority is established in terms of Section 3 of the Energy Regulation Act in order to, inter alia; regulate activities in the Energy Sector in Malawi in accordance with the Energy Regulation Act.

The Commission in terms of the provisions of Section 8 of the Competition and Fair Trading Act has the responsibility to regulate, monitor, control and prevent acts or behaviours which are likely to adversely affect competition and fair trading in Malawi.

The Authority, in terms of the provisions of Sections 9 (1) (i); 9 (2)(a) and (c) of the Energy Regulation Act, has the mandate to regulate the energy sector and the

responsibility to protect the interest of consumers, purchasers and other users of energy in respect of energy prices charged for the continuity and the quality of energy supply and to promote efficiency and competition among persons engaged in the energy sector.

There exist a potential overlap between the functions of the Commission and the Authority in competition cases affecting the energy sector, as the Commission has general powers in relation to competition and fair trading under the Competition and Fair Trading Act, whilst the Authority has powers under Section 9 of the Energy Regulation Act and section 30 of the Liquid Fuels and Gas (Production and Supply) Act in relation to competition and consumer protection matters in the energy sector.

THEREFORE, the parties now agree as follows:

1.0 BASIS OF AGREEMENT

1.1 This Agreement is entered into in order to establish the manner in which the parties will interact with each other in respect of any matters relating to anti-competitive behaviour and unfair trading practices in the energy sector, to minimize the duplication of activities wherever possible; and improve understanding of the roles of the Commission and the Authority.

1.2 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the two regulatory bodies hereto.

2.0 AREAS OF COOPERATION AND COOPERATION STRATEGIES

2.1. The Parties agree to cooperate in their respective roles in dealing with matters relating to;

• Anti-competitive behaviour and unfair trading
• Mergers and acquisition;
• Consumer protection;
• Market analysis and other research.

2.2. The cooperation between the Parties shall centre around the following processes:

• Investigation and determination of cases;

- Hearings;
- Consultations on certain regulations;
- Use of technical expertise;
- Monitoring and Enforcement of relevant provisions of the Acts; or
- Any other strategy deemed necessary and appropriate by the Parties.

3.0 MATTERS OF CONCURRENT JURISDICTION REGARDING COMPLAINTS

3.1 Where a complaint is lodged about a practice in respect of which the Commission and the Authority have concurrent jurisdiction, the following process shall be followed:

3.1.1 The regulator that receives the complaint ("the recipient regulator") shall ensure that the said complaint is made available to the other regulator;

3.1.2 The recipient regulator shall inform the complainant(s) that the matter will be dealt with jointly by the Commission and the Authority in terms with matters of concurrent jurisdiction under this Agreement;

3.1.3 The Commission and the Authority shall consult with each other and evaluate the complaint in order to establish how the matter should be dealt with in terms of this Agreement;

3.1.4 The recipient regulator shall advise the complainant(s) of the decision of the consultation between the Commission and the Authority within 60 days of receipt of the complaint;

3.1.5 The recipient regulator shall give the complainant(s) further directions regarding the prosecution of the complaint in question;

3.2 In the event that the complaint is dealt with by the Commission, persons from the Authority may participate in an advisory capacity;

3.3 In the event that the complaint is dealt with by the Authority, persons from the Commission may participate in an advisory capacity.

3.3 Nothing in the procedures contemplated in paragraph (6) or (7) shall:
3.3.1 Detract from the jurisdiction of the Commission or the Authority to receive and deal with complaints in terms of their enabling statutes; or

3.3.2 Preclude parties from lodging a complaint with both regulators

3.5 Where a complaint relates to a matter where either the Commission or the Authority has jurisdiction, but there is no concurrent jurisdiction, the following shall apply.

3.5.1 If upon receiving a complaint, the regulator is of the view that it does not have jurisdiction over the complaint, the regulator with whom the complaint is lodged shall advise the complainant(s) accordingly and recommend that the complainant(s) refer the complaint to the relevant regulator;

3.5.2 If the Authority is the regulator that has jurisdiction, it shall, if it is legally competent under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to ensure the consistent application of competition principles to the complaint in question;

3.6 Clause 3.5.2 shall apply mutatis mutandis where Commission is the regulator with jurisdiction, and shall consult with the Authority on the regulatory aspects subject to the Authority's jurisdiction in order to obtain the Authority's input on energy regulatory issues pertaining to the complaint;

3.7 The Commission and the Authority may, upon request from each other, participate in each other's proceedings in their advisory capacity.

3.8 In the circumstances contemplated in clause 3.5 above, the decision by the regulator exercising jurisdiction over the complaint to consult the other regulator shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.

3.9 When the Commission and the Authority consult each other as contemplated in clause 3.3 or clause 3.4 above, they shall do so at no cost to each other.

3.10 In either of the circumstances contemplated in 3.3 and 3. 4 above, the two regulators shall act as expeditiously as circumstances permit.

3.10.2 The MOU entered into between the Malawi Energy Regulator and the Competition Commission of Malawi looks to remedy the regulatory overlap between the two regulatory bodies. A key aspect of this MOU is the concurrent regulatory application of both the Commission and the Authority. Thus, investors undertaking CBM&As in the energy sector have to be mindful of the dual regulation in the energy sector and make sure that the nuance aspects or the finer details of both the Regulator and the Commission have been adhered to.

3.11 Regional regulation under COMESA

Malawi is a member state under COMESA. The membership to COMESA also imposes extra regulation upon investors. The guidelines under COMESA apply to mergers that occur within the COMESA bloc and have a regional significance. Key provisions shall be laid out below for ease of referencing when analysing the regulation of CBM&As within COMESA.

3.11.1 COMMESA Guidelines[160]

Section 1 Scope of Application

1.1 Without prejudice to Section 4.8this Guideline shall apply to all mergers with a regional dimension as defined hereunder.

1.2 A merger has a regional dimension where: a) Both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more Member States; and b) The threshold of combined annual turnover or assets is exceeded.

1.3 Where both the acquiring and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, the merger shall be notified in accordance with Article 23 of the Regulations subject to the following thresholds:

[160] COMMESA Guidelines file:///C:/Users/Temwa/Downloads/COMESA%20-%20%20merger%20assessment%20guidelines%20-%20draft.pdf (accessed 21 June 2017).

(a) the combined worldwide aggregate annual turnover or the combined worldwide aggregate value of assets, whichever is higher, of all firms to the merger in the Common Market equals or exceeds COM$ Zero; and

(b)the aggregate annual turnover or the aggregate value of assets, whichever is higher, of each or at least two firms to the merger in the Common Market equals or exceeds COM$ Zero.

1.4 From the foregoing it follows that a merger is construed even if a target firm has no operations in COMESA but the acquiring firm has operations in two or more Member States. The converse is also true. In addition, for a merger to be construed, it shall have met the merger notification threshold as prescribed under Rule 4 of the Rules on the Determination of Merger Notification Threshold under Article 23 of the Regulation.

1.5 The term operation is construed widely to include not only the physical presence of merging parties but also their turnover derived from the Common Market.

2.3 The Commission shall assess material influence on a case by case basis, having regard to the overall relationship between the acquiring firm and the target firm in light of the commercial context.

2.4 In its assessment of material influence, the Commission shall focus on the acquiring undertaking(s). Minority and other interests shall be examined by the Commission to the extent that they are able to influence the policy of the undertaking(s) concerned.

2.5 The Commission shall consider an acquiring firm's ability to influence policy relevant to the behaviour of the target firm in the market place. This includes the management of the business, in particular in relation to its competitive conduct, and thus includes the strategic direction of a firm and its ability to define and achieve its commercial objectives.

2.6 The Commission shall consider an acquiring firm’s ability to block special resolutions by virtue of share ownership or other factors, including:

a) The distribution and holders of the remaining shares, in particular whether the acquiring entity's shareholding makes it the largest shareholder;

b) Patterns of attendance and voting at recent shareholders' meetings based on recent shareholder returns, and, in particular, whether voter attendance is such that in practice a minority holder is able to block a special resolution;

c) Any special voting or veto rights attached to the shareholding under consideration;

d) Any other special provisions in the constitution of the target firm which confer the ability to exercise influence.

3.1 Article 23(3) of the COMESA Competition Regulations ('the Regulations') provides that: "This Article shall apply where: a) both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States; and b) the threshold of combined annual turnover or assets provided for in paragraph 4 is exceeded.

3.10 The word operate is taken to mean that a firm(s) in issue derives turnover in two or more Member States. Therefore does not need to be directly domiciled in a Member State but it can have operations through exports, imports, subsidiaries etc. in a Member State.

Section 4 Notification of a Proposed Merger

4.1 Mergers with a regional dimension defined in this Guideline shall be notified to the Commission in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge.

4.2 'Decision to merge' in Article 24(1) is construed when there is established a concurrence of wills between the merging parties in the pursuit of a merger objective.

4.3 The notification shall be on the prescribed form 12 and Accompanied by a fee calculated at 0.5% or COM$500 000, or whichever is lower, of the combined annual turnover or combined value of assets in the Common Market, whichever is higher.

4.9 Within 21 days of receiving such a request from a Member State, the Commission shall make a decision pursuant to Article 24(8) of the Regulations and inform the Member State as to whether it will: (i) Retain its jurisdiction and deal with the case itself in order to maintain or restore effective competition in the market concerned and the region as a whole; or (ii) Refer the case in whole or in part to the Member State. The meaning of the foregoing is that the Commission has the sole discretion of deciding whether or not the case should be referred to a Member State. This will be after the Commission has taken into consideration all the relevant factors surrounding such a merger.

4.10 A merger which is implemented in contravention of the Regulations is void and has no legal effect in the Common Market. Consequently, the Commission shall take action under Articles 8(5), 24(3) and 24(4).

Section 5 Time Limits for Initiating proceedings and for Decisions

5.1 Pursuant to Article 25(1) of the Regulations, the Commission shall examine the merger as soon as the notification is received.

5.2 Where the Commission concludes that a notified merger falls within the scope of the Regulations, it shall notify this decision to the merging parties as soon as it is practicable but not later than 30 calendar days.

5.3 Where the Commission concludes that a notified merger falls within the scope of the Regulations, it shall publish, on its website, the facts of the notification, while indicating the names of the parties to the merger, their country of origin, the nature of the merger and the economic sectors involved. The Commission shall take account of the legitimate interests of the parties in the protection of confidential information.

5.4 Where the information included in the notification is incomplete, the Commission shall advise the notifying party of any further information or documents required before the notification will be deemed complete and fix a time limit within which to provide this information.

5.5 The Commission shall make a decision on a proposed merger within 120 working days from the date a completed merger notification is received, unless an extension is approved by the Board pursuant to Article 25(2) of the Regulations. The Commission may seek such an extension from the Board in circumstances where it is impractical to complete the assessment of such a merger. The maximum time for examination of the merger after an extension has been approved by the Board shall be determined by the Board taking into account the exigencies of the situation. The reasonableness test shall be applied here. The parties shall be informed within 5 calendar days of such extension and the duration thereof.

5.6 The 120 days within which the decision on the notification must be made are working days as opposed to calendar days. This position is derived from Rule 3(2) of the COMESA Competition Rules on the Computation of time. Rule 3(2) provides that where the time prescribed by or allowed under these Rules for doing an act or taking a proceeding expires on a Sunday or on a day on which the office of the Registrar is closed, the act may be done or the proceeding may be taken on the first day following that is not a Saturday, Sunday or day on which that office is closed. It therefore means that Saturdays, Sundays and Public holidays are not taken into account in the computation of time and hence the days contemplated are the working days.

5.7 The holidays to be considered are those of the host country i.e. the Country in which the Commission is domiciled and this is Malawi in this case. The Commission shall however endeavour to complete all the mergers within the 120 days as provided for by Article 25(1) unless it is impracticable to do so. To ensure that it completes its merger assessment in the quickest possible manner, the Commission shall allow for pre-merger notification meetings with the parties. This shall enable the parties and the Commission to address matters requiring clarification and whether or not a merger should be notified.

Section 7 Merger Assessment A Substantial Lessening of Competition (SLC) 19
7.1 The Commission shall prohibit a proposed merger if it would be likely to substantially prevent or lessen competition or to restrict trade or the provision of any service or endanger the continuity of supplies or services. A merger shall be deemed

likely to prevent or lessen competition where there is a real chance that a lessening of competition will occur.

Merging firms have large market shares

7.18 The larger the market share, the more likely a firm is to possess market power. And the larger the addition of market share, the more likely it is that a merger will lead to a significant increase in market power. The larger the increase in the sales base on which to enjoy higher margins after a price increase, the more likely it is that the merging firms will find such a price increase profitable despite the accompanying reduction in output. Although market shares and additions of market shares only provide first indications of market power and increases in market power, they are not a complete premise on which to base conclusions.

Efficiencies 7.52

The Commission shall consider any substantiated efficiency claim in the competitive assessment of a proposed merger.

Barriers to Entry 7.57

The Commission shall conduct an entry analysis as part of the competitive assessment of a proposed merger.

Public Interest Considerations

7.66 The Regulations presupposes that any merger that leads to a substantial lessening of competition or resulting in the strengthening of a position of dominance is contrary to public interest. The converse is true. Reference should be made to the Commission Guideline on Public Interest.

Section 14

Liaison with the authorities of the Member States Liaison with Member States on mergers shall be done in accordance with Articles 24(7) and 26(6) of the Regulations. It is important to note here that information submitted as confidential to the Commission shall not prevent the Commission from sharing such information with the National Competition Authorities where this need arises. This notwithstanding, such

National Competition Authorities shall have the obligation to treat this information as confidential.

3.11.2 The regulation under COMESA

The COMESA guidelines seek to encourage CBM&As between member states. The regulations under COMESA take effect when the merger has a regional dimension. The grounds for having a regional dimension are twofold namely: the merger must involves a country that is a member state in COMESA and secondly the prescribed amount for the annual turnover generated by the merging entities must be satisfied. Once the aforementioned two elements are satisfied this merger falls within the jurisdiction of the competition Commission of COMESA and the merger is only referred to the local competition commissions by the discretion of the competition Commission of COMESA.

3.12 Conclusion

The regulation of CBM&As in Malawi is a concerted effort of several pieces of legislation and regulations. However, though there are multiple laws that come into play when dealing with CBM&As there is no specialisation or legal advancements made in the law to specifically deal with CBM&As.

Though this study is advocating for the use of CBM&As as a tool for attracting FDI and thereby catalyst economic development, it is argued that the government has not taken proactive steps in formulating the law in such a way as to attract FDI and create an investment-inducing legal environment for CBM&As to thrive. The present formulation of the law predominantly appreciates CBM&As as being regulated from a competitively disadvantageous perspective. We cannot say that the Malawian legal framework is encouraging CBM&As to occur, by discouraging anticompetitive behaviour. The discouragement of anticompetitive behaviour does not directly translate into the encouragement of CBM&As. Thus, the present uncertainties and gaps in the law must be addressed in order for Malawi to fully benefit from foreign investment.

Furthermore, the COMMESA guidelines provide another layer of regulation because the only requirement that is to be satisfied is that the proposed merger must have a regional impact. The threshold to be satisfied for the merger to have a regional dimension is not exceptionally high.

Hence, the merger can trigger the application of the aforementioned guidelines though the guidelines are not fully developed in as far as their application, implementation and enforcement.

In the next chapter, the key aspects in the legal framework of M&As that are uncertain, possess gaps and not investment-inducing will be discussed. A causal link shall be established as to how these uncertainties and gaps in the law adversely affect Malawi's ability to attract FDI. Further lessons that can be implemented in Malawi shall be drawn from South Africa as it pertains to CBM&As.

CHAPTER FOUR
A CRITIQUE OF THE REGULATORY FRAMEWORK AND LESSONS LEARNED FROM SOUTH AFRICA

4.1 Introduction

In the previous chapter we analysed the extant legal framework governing CBM&As in Malawi. The analysis considered relevant laws that have an impact upon CBM&A, the industry specific regulations and the regulation of CBM&As in COMESA.

This chapter critically examines the key gaps and uncertainties in the present legal framework governing CBM&As. The critique focuses on the laws and regulations that are vital to creating an investment-inducing legal environment for CBM&As to thrive and benefit Malawi as a host country. Lastly, lessons shall be gleaned from South Africa, as to how the law pertaining to CBM&As can be structured to attract investment.

With the economy in Malawi flux companies need to turn to CBM&As, to enable the companies to survive, be competitive and ultimately grow. The economic challenges and the soaring interest rates have reduced the liquidity within the markets in Malawi, and as such, the lack of credit is limiting the ability of companies to engage in M&As domestically. Hence, it is necessary to attract FDI inflows into the country because local companies do not have the capacity to safeguard their survival by engaging in M&As. This begs the question, whether the present legal framework and regulatory parameters are conducive for attracting foreign investment through CBM&As.

When we consider the determents for FDI and CBM&As as cited above, one glaring omission in the literature has is an empirical study of the impact of the legal framework of the host country has upon the viability of CBM&As. Most of the literature in this realm speaks of institutions and not purely the legal structure in the host nation. Though this paper does not contain an empirical study on the aforementioned topic, this paper does seek to highlight the crucial role that the legal framework of Malawi plays in attracting and creating an enabling environment for foreign investment thrive.

A unique aspect of M&As that makes it different to greenfield investment is that, greenfield investment drives economic growth, whereas investor confidence drives M&As.[161] The law plays a huge role in creating investor confidence because the law creates the environment for investment and the overall rules of engagement for the foreign investor. However, the role of the law as a foundational stimulus, has often been overlooked both by academics and governments alike.

It must be noted though that, the occurrence of CBM&As and the literature pertaining to CBM&As in Malawi, is very limited. From the time that the Competition Commission in Malawi came into existence to date, there has only been a few CBM&As, which were concentrated in the following sectors, telecommunications, insurance and the beverage markets.[162] Hence, the legal framework has not been fully tested with complex CBM&As. Thus, this paper will aid in identify and address the gaps within the legal framework that are adverse to creating an enabling environment for CBM&As.

4.2 Companies Act

The Companies Act makes provision for CBM&As to occur, as it has been established above. Part XII and more specifically section 266 of the said Act, makes provision for the merger to occur but the ancillary aspects such as processes, disclosure, secrecy, taxation of the merged or acquired entity are not thoroughly detailed in the Act or schedules thereof. Thus, there is uncertainty as to how these vital aspects of the CBM&A transaction are dealt with in Malawi.

Also, when we consider CBM&As, foreign investors may be interested in merging or acquiring companies that are listed on the Malawi Stock Exchange (MSE). When we look at the present Companies Act there is no regulatory indication or any guidelines as to how a merger or acquisition of a listed company is to be carried out. The lack of guidance in the realm of listed companies can lead to a varied application of the law. Furthermore, on account of the fact that, CBM&As inherently already pose a risk for foreign investors, they may shun from merging or acquiring companies listed on the MSE.

[161] n 17 above 1.

[162] S Gasparikova 'Competition Law in Malawi: A Toolkit' (2008), CUTS Centre for Competition, Investment & Economic Regulation 43 & 47.

An element of huge importance in takeovers is secrecy. The acquiring company needs to enjoy secrecy concerning the dealings of their company and their intention to acquire the target company. The necessity for the secrecy is that, confidential information or what is often termed insider information, must not be leaked because this may jeopardise the assets and the value of the target company. In many jurisdictions, the obligation to maintain secrecy is enshrined in the Companies Act. However, the Companies Act in Malawi does not set out clear guidelines in respect to secrecy. Thus, a layer of protection for the acquiring company in terms of the transactionary phase, has gravely been omitted.

4.3 The Competition and Fair Trading Act

4.3.1 *Disadvantageous nature of M&As*

The core of the regulation of CBM&As in Malawi is the Competition and Fair Trading Act. The said Act is applicable to all commerce in Malawi, across diverse sectors. As it has been stated above, foreign investors are not prevented from undertaking CBM&A transactions in Malawi. However, in accordance with section 38(1)(a) of the said Act, M&A transactions are considered to be disadvantageous to the extent that they will reduce competition in the domestic market and manipulate prices and sales.

In couching M&As as being disadvantageous, an onus is placed upon the merging or acquiring entity to establish that, the proposed merger will not be detrimental to domestic competition and the market as a whole. So an investor faces an uphill battle in convincing the Commission that the intended merger or acquisition is not disadvantageous to the specific sector in which the M&A is to take place. Furthermore, by placing the burden upon the investor to prove that the merger or acquisition is not detrimental, the Commission has to a degree, been relieved of its obligation to prove that the merger or acquisition is indeed anticompetitive and harmful to the domestic market.

The Competition and Fair Trading Act sets the tone as to how the different departments within the Government regard M&As. Undeniably, perception is key in negotiations and in the world of business. Thus, with the present formulation we cannot say that, the Government of Malawi is encouraging M&As by discouraging anticompetitive conduct. In encouraging CBM&As the Legislature needs to take a further step by not couching M&As as disadvantageous, but rather formulating the provisions in the Act to state that, conduct that is anticompetitive and adversely

manipulates the domestic market shall be deemed disadvantageous and not the M&A itself. In so doing, the Legislature will remove the onerous burden placed upon the foreign investor and the said burden will be rightfully placed upon the Commission to prove the anticompetitive nature of the proposed M&A. Hence, the default position will be that, M&As will be seen as advantageous to the economy, to the extent that the Commission through their investigations prove that the intended merger or acquisition is disadvantageous to competition and the respective market.

4.3.2 *Criminalising unauthorised M&A transactions*

Section 35(1) of the Act, criminalises the lessening of competition within the market, in instances where the authorisation of the Commission was not sought when the merger or acquisition was carried out. Furthermore, the rights, obligations or agreements arising out of the unauthorised merger or acquisition are unenforceable and all agreements are deemed null and void. Two troubling aspects are clear from the formulation of this provision. Firstly, though M&As have their foundations in contract law the punishment that the Legislature deems appropriate is that of criminal law. This formulation is absurd because the resultant penalties of violations in civil law and criminal are different. In civil law you can have a fine or the loss of a license, whilst in criminal law the offence may have a fine and/or a prison sentence. The absurdity of this provision is further compounded by the fact that, the Act does not state the specific punishment that the offence carries in respect of prison term. The uncertain nature of the punishment can give rise to inconsistent application and possibly abuse, in instances where the government may want to make an example of a particular company.

Secondly, it is clear that the default position regarding M&A in the abovementioned provision is wanting because no provision is made to remedy the fact that notification was not given in undertaking the merger. The significance of the lack of remedy is that, no time periods are given as to when the cut-off point is for the Commission to determine whether the unauthorised M&A transaction has lessened competition within the market. Consequently, an investor may continue with their business post-merger or acquisition and then at a later stage be guilty of an uncertain criminal offence. The uncertainty and lack of remedy pertaining to the criminalisation of unauthorised M&A transactions erodes investor confidence because some entrepreneurs are opportunistic and would feel more confident if an unauthorised M&A can be remedied, be it with a fine or conditions attached for a period of time.

4.3.3 *Balancing Advantages and Disadvantages & Public opinion*

Section 38(2) of the Act, mandates that in determining whether the M&A transaction must be approved the Commission must consider whether the advantages outweigh the disadvantages. The said provision does not speak to whether certain considerations outweigh other considerations. For example does a great increase in net exports trump the manipulation of prices for small businesses in the same industry?

Furthermore, the Act does not clearly address public opinion considerations, rather the Commission undertakes an assessment of the various stakeholders. Public opinion is important in CBM&As because public opinion has got the potential to delay or derail a M&A transaction that the public vehemently opposes, especially if an election year is on the horizon and the government is not looking to anger the people.

Though the Act does not clearly address public opinion considerations, it would be prudent if the provisions in the Act would indicate the weight that is attached to public opinion considerations. For example, at the time of writing this paper there is a pending application before the Commission for a domestic acquisition in the banking sector. In this application First Merchant Bank Malawi Plc is to acquire Opportunity International Bank of Malawi. The Commission has asked various stakeholders to make written representations as to any issues that they may have if the acquisition were to be approved.[163] Opportunity International Bank mostly caters for low income Malawians predominantly farms. Whilst First Merchant Bank is a commercial bank. Public opinion is key in this regard because the clientele that Opportunity Bank service is often in remote areas which are only reached by a mobile van. So these account holders may desire to oppose this acquisition because they are of the opinion that, once First Merchant Bank acquires Opportunity Bank, First Merchant Bank may not adequately service the people in the rural areas. Thus, the public opinion considerations have to be considered.

4.3.4 *Regulation of extraterritorial M&A transactions*

The Competition Act does not provide for the extra-territorial application of the law pertaining to competition and market manipulation in M&A transactions. Hence, though a transaction can occur outside the borders of Malawi and have implications for the market in Malawi, the

[163] The Competition and Fair Trading Commission 'Press Release' 15 August 2017 http://www.cftc.mw/index.php/2013-12-16-09-56-37/press-releases/183-press-release.html (accessed 2 October 2017).

Commission doesn't have the precise guidelines on how to address extraterritorial anticompetitive conduct.

4.4 Taxation

Taxation is a key component that investors look at when they are looking to invest in a country. Taxation influences the viability of an investment project. Investors need certainty in the percentages charged for taxation. The tax system in Malawi does not make provision for a taxation scheme specifically for CBM&As, rather taxation is determined in terms of general corporate tax.

One of the key areas that Malawi as a LDC must focus on in attracting CBM&As is in the extractive industry. However, in order to help investors make the decision to invest in Malawi there has to be certainty as to the tax that will be charged, especially considering that mining is a capital intensive industry.

Malawi has recently discovered phosphate, copper, coal, kimberlite, niobium and uranium.[164] Investors who are motivated by natural-resources seeking will greatly desire to invest in Malawi, especially because the deposits are vast and there is a lot of cheap labour available. However, one impediment is the lack of certainty in the taxes levied in relation to royalty tax and resource rent tax. Though the aforementioned taxes have been introduced the percentage and formula used in the calculation is still unknown. The infrastructure and capital investment needed in the extractive sector is long term, and as such, an investor seeks to reduce variables and risk. Hence, in order to create an enabling environment for natural-resources seeking investors, certainty must be attained in the taxation. Thus, the laws pertaining to taxation have to be precise so that investors are not left at the mercy of the Malawi Revenue Authority.

4.5 Corruption

In the discussion above it was stated that, institutions play a key role in how investors perceive LDCs. One feature of institutions is corruption. Corruption undoubtable increases the transaction cost. According to Transparency International, Malawi is ranked as the 120th least

[164] EURACTIV 'Malawi discovers new mineral deposits, eyes investors' https://www.euractiv.com/section/development-policy/news/malawi-discovers-new-mineral-deposits-eyes-investors/ (accessed 2 October 2017).

corrupt nation out of 176 countries.[165] This figure is very high and it unequivocally erodes the investor's confidence to invest in Malawi.

Section 13(o) of the Constitution places a duty upon the Government in light of Public Trust and Good Governance, "to introduce measures which will guarantee accountability transparency, personal integrity and financial probity and which by virtue of their effectiveness and transparency will strengthen confidence in public institutions." In furtherance of this duty, the Government enacted the Corrupt Practices Act,[166] which in Part IV clearly states that, it is an offence for public officers, those in positions of power to misuse their office for personal gain. A violation of Part IV of the Corrupt Practices Act carries the punishment of imprisonment for 12 years.

Corruption is a serious problem that cannot be underestimated. However, the crackdown on corruption requires political will that is evidenced by constant laws and regulations that are enacted and enforced. The government needs to take measures that will fight corruption and instil investor confidence in the public sector and ultimately curb out corruption. For example in a story written by CNBC Africa, the President of Tanzania has recently been named the World's Best President by the United Nations Economic and Social Council because of his firm stance on fighting corruption by introducing severe austerity measures.[167]

4.6 Environmental

Environmental considerations are key both to the host nation and investors alike. Often foreign companies are accused of violating environmental obligations because they want to take short cuts and increase their profits. However, the need to conserve the environment has growingly become important firstly for purposes of corporate responsibility and secondly because the investor needs to sustain the finite resources in the host nation, so that they can continue to enjoy the benefits that attracted them to the host country.

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[165] Transparency International 'Malawi' https://www.transparency.org/country/MWI (accessed 3rd October 2017).
[166] Corrupt Practices Act 18 of 1995.
[167] CNBC Africa 'Tanzania's President John Magufuli: The bulldozer crushing corruption' https://www.cnbcafrica.com/news/east-africa/2017/01/03/tanzanias-president-john-magufuli-the-bulldozer/ (accessed 4 October 2017).

Section 24 of the Environment Management Act,[168] stipulates that, the Minister of Natural Resources, Energy and Environment, only upon recommendation of the Council will publish in the Gazette, the types and sizes of projects which can only be implemented once an environmental impact assessment is undertaken. Thus, it can clearly be seen that, the environmental management of projects and the determination of whether they can be undertaken, has greatly been left to the discretion of the Minister. Consequently, if a CBM&A project is looking to be undertaken with a major expansion in mind, it is not desirable for an investor to be put at the mercy of the Minster, whose decisions may be inconsistent. The preferred position would be that the Minister must Gazette the types and sizes of projects, which should be reviewed from time to time. Also, the Minister of Natural Resources, Energy and Environment must develop regulations that dictate the projects that necessitate environmental impact assessment, in so doing, a foreign investor has certainty as to what their environmental obligations entail.

However, one major challenge in protecting the environment is the lack of resources, personnel and technical capacity in the Ministry of Natural Resources, Energy and Environment. This, lack of capacity greatly affects the ability of the Ministry to effectively manage the environment. Hence, measures need to be taken by the government to drastically improve the capacity in the Ministry.

4.7 Intellectual Property

The protection of intellectual property is adequately provided for in the present legal framework. However, the major shortcoming is the enforcement of the legislative provisions is enforcement. One crippling aspect in terms of enforcement is a lack of capacity in terms of resources and personnel in order to safeguard the rights of the intellectual property holders. Furthermore because of the fact that enforcement of the intellectual property rights are not often enforced the law has not been fully tested, nor has the law been developed through judicial findings.

Foreign investors often have intellectual property that they seek to protect when engaging in CBM&As. Thus, the government of Malawi needs to take proactive steps to develop the law

[168] Environment Management Act 23 of 1996.

and the capacity of personnel so that within the jurisdiction of Malawi the intellectual protection accorded to investors must not be diminished.

4.8 Local Content

Though Malawi has minimal local content requirements, in order to prevent heated altercations between the local population and foreign investors it would be advisable for a legislated provision to be enacted that outlines the rights and obligations of foreign investors as it pertains to local content.

In most of the literature it is argued that local content requirements deter foreign investors. In this paper it is advocated that local content provisions that are not onerous will not deter investors because the obligations placed upon foreign investors shall be clearly detailed. Furthermore, in light of the present economic hardship, by providing opportunities to the local population an investor will secure their allegiance of the populous because the local Malawians will not fight the hand that feeds them.

4.9 Regional regulation under COMESA

It is important for African countries to trade amongst ourselves. The COMESA guidelines provide a unique opportunity for CBM&As between member states. However, a major hurdle to the smooth operation of the regulation of CBM&As in COMESA is the alignment of the different laws in the member states. Furthermore the different countries are at different levels of economic development, so harmonisation may be a challenge.

Cliffe Dekker Hofmeyr Attorneys have insightfully observed the following:

> Africa has an additional difficulty of establishing competition law which aligns with each countries national competition laws. Despite the challenges, common economic links between states makes it ideal to operate a regional competition authority. In East Africa, the East African Community Council of Ministers adopted the East African Community Competition Authority ("**EACCA**"), which is the competition authority over Burundi, Kenya, Rwanda, Tanzania and Uganda. The EACCA has jurisdiction over all M&A transactions and enforcement matters with cross-border competition effects in terms of the East African Community Competition Act, 2006. However, there has been challenges in aligning the approach of both the national regulators and that of

> the EACCA. Timing of these approvals are also problematic as they may delay deal implementation.[169]

On account of the differences in terms of domestic regulation, institutional and economic development within the member states it is difficult to have uniform regulation of CBM&As in COMESA. Two major impediments is that COMESA does not use one legal system or one currency, they are all different. Thus, an investor has to painstakingly determine the different applicable regulations in the respective member states. Whilst if there was uniformity in COMESA like in OHADA (Organisation pour l'harmonisation en Afrique du droit des affaires) regional regulation would be easier and foreign investors would enjoy greater certainty.

4.10 Lessons from South Africa

South Africa has enjoy the bulk of M&A transactions in Africa. Hence lessons will be gleaned from South Africa in order to key in on the reasons why investors are confident in engaging in CBM&As in South Africa.

The Competion Act of South Africa[170] in section 12A states that when considering a merger

> the Competition Commission or Competition Tribunal must initially deter-
> mine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2).

From the reading of this provision we can clearly see that M&As are not seen as disadvantageous, rather what the Commission considers is the effect of the merger and not the occurrence of the merger. Thus the law does not place any onus upon the investor to prove why the particular merger would be advantageous. Thereby encouraging the legislative culture in South Africa not to see M&A in a negative light.

Secondly, in section 12(6) of the said Competition Act, when an investor makes an application for the authorisation of a M&A and the time period required for the authorisation of a M&A lapses whilst the investor is still waiting to obtain an approval from the Commission, the merger

[169] Cliffe Dekker Hofmeyr https://www.cliffedekkerhofmeyr.com/en/news/press-releases/2017/corporate/cross-border-mergers-and-acquisitions-charting-the-regulatory-landscape.html (accessed 2 October 2017).
[170] The Competition Act 89 of 1998.

shall be deemed as approved. Hence, it can be clearly seen that the default position is geared to be pro-investment.

In Malawi delays are common, the enactment of provisions that allow for the automatic authorisation of M&A transactions will aid investors to quickly conclude the M&A transaction and not loose further costs because of the delay.

4.11 Conclusion

In this chapter the inefficiencies in the legal framework of Malawi have been identified. The key shortcomings are in the Competition Act, intellectual property, environmental law and the taxation provisions. The said inadequacies are adversely affecting FDI inflows into Malawi and impeding economic development because investors do not have confidence in investing in Malawi. Thus it is imperative for legal provisions to be enacted that attract investment through CBM&As.

The next chapter shall summarise the conclusions from each chapter and provide recommendations to address the present shortcomings in the legal framework.

CHAPTER FIVE
CONCLUSION AND RECOMMDATIONS

5.1 Summary of key points

The central analysis in this paper was premised upon examining whether the extant legal framework of Malawi is investment enabling or adversely affects FDI inflows. In considering the impact of the present legal framework in Malawi *vis-à-vis* CBM&As the first chapter was an introductory chapter that contained a background to the study, a broad overview of the research paper and a layout of the subsequent chapters.

Chapter 2 of this study provides a working understanding of CBM&As by looking at the components that make up CBM&As, namely: M&As and FDI. The chapter further analysed the importance of CBM&As and found that CBM&As are beneficial to the Malawian economy because they provide as injection of capital, improve the balance of payments, save companies that are going out of business and ultimately benefit economic development in Malawi as a whole.

Chapter three examined the regulatory system of CBM&As in Malawi and in COMESA. It was submitted that the laws governing CBM&As are not investment enabling as the laws contain inadequacies and uncertainties.

Chapter four is a critique of the extant legal framework and it identified shortcomings in the Competition Act, taxation regulations, environmental protection regulations and the COMESA guidelines. The said shortcomings in the competition structure in Malawi, which is the paramount law governing CBM&As were addressed using lessons from the South African Competition Act.

5.2 Recommendations

Flowing from chapter four the following recommendations are advanced:

• The Competition Act of Malawi must be reformulated in order to cause M&As not to be viewed as disadvantageous. By omitting, the word disadvantageous the legislature will remove an onerous burden that has been placed upon the foreign investor to prove that the proposed CBM&A is in fact advantageous.

- The default position in the laws must be to encourage CBM&As and not discourage CBM&As. When there is a lapse in time regarding the authorisation period the default position must be that the said merger must be deemed as authorised. Thus, the investors will not be at the mercy of inefficient public officials.

- Taxation is an important element in the extractive industry. The uncertainties that presently exist adversely impact upon investor confidence and ultimately FDI inflows. Thus, the MRA must draw up clear provisions for taxation in the extractive industry because Malawi needs to attract resource-seeking investors.

- In order to have efficient regulation in COMESA there has to be an alignment of the laws that govern M&As locally and those that apply regionally. It is recommended that the COMESA member states must embark on a harmonisation of the laws governing M&As. The said harmonisation will reduce transaction costs of M&As and the members states will benefit because foreign investors who are outside of COMESA will be attracted to undertake M&As within the region because the legal framework will be uniform, certain and will allow for a multiplicity of benefits that are generated across the regional bloc of COMESA.

5.3 Conclusion

The present legal framework governing CBM&As in Malawi is not investment-inducing as there are glaring inadequacies and uncertainties. A concerted effort needs to be made by the legislature in Malawi to formulate the law in a way that instils confidence and certainty, so as to attract foreign investors seeking efficiency, natural resources and new markets. The law must strive to be less onerous upon investors and the default position must be to encourage CBM&As.

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