General Notice No. 1471 of 2021

competition commission

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Decision of the Competition Commission of 26 August 2021

In respect of the investigation into potential collusive agreements by members of the Association of Private Health Plans Administrators (INV031)

CC/DS/0047

Confidential

Decision of the Commissioners of the Competition Commission (the "Commission") on the investigation into potential collusive agreements by members of the Association of Private Health Plans Administrators ("APHPA")

THE COMMISSION

Mr. M.A. Bocus	-	Chairperson
Mr. A. Mariette	-	Vice-Chairperson
Mr. C. Seebaluck	-	Commissioner
Mrs. M. B. Rajabally	-	Commissioner
Mrs. V. Bikhoo	-	Commissioner

Having regard to –

the Competition Act 2007,

the Competition Commission Rules of Procedure 2009,

the Guidelines published under Section 38 of the Competition Act 2007,

the Final Report of Investigation of the Executive Director dated 19 January 2021 under section 51 of the Competition Act 2007 upon completion of his investigation into potential collusive agreements by members of the APHPA referenced INV031,

the Notices under Rule 22 of the Competition Commission Rules of Procedure 2009 issued to the main parties on 26 March 2021,

the written submissions made by the Mauritius Union Assurance C. Ltd; Medscheme (Mauritius) Ltd; Swan General Ltd, Eagle Insurance Ltd; Jubilee Insurance (Mauritius) Ltd; Linkham Services Ltd; SICOM General Insurance; Business Mauritius Provident Association; and Ireland Blyth Provident Fund on 02 April 2021,

the stand of Air Mauritius Provident Association and of Rogers Group Provident Association respectively communicated by email and letter of 07 April 2021,

We, the above-named Commissioners have on this day proceeded to make the following determination on the above matter.

I INTRODUCTION

1. This decision relates to the investigation (the "Investigation") made by the Executive Director of the Competition Commission (the "Executive Director") pursuant to s.51 of the Competition Act 2007 (the "Act") into potential collusive agreements of the type prohibited under section 41 of the Act by members of the APHPA, bearing reference INV 031.

2. On 19 January 2021, the Executive Director submitted his Final Report of the investigation (the "Final report") to the Commissioners of the Competition Commission (the "Commissioners") for determination of the matter as per s.5 of the Act .

II BACKGROUND

(a) The Parties

3. The parties to the investigation are: -
   (i) APHPA;
   (ii) Swan General Ltd;
   (iii) Mauritius Union Assurance Co Ltd;
   (iv) SICOM General Insurance Ltd;
   (v) Jubilee Insurance (Mauritius) Ltd;
   (vi) Eagle Insurance Co Ltd;
   (vii) Linkham Services Ltd;
   (viii) Medscheme (Mtius) Ltd;
   (ix) Business Mauritius Provident Association;
   (x) Air Mauritius Provident Association;
   (xi) Ireland Blyth Limited Provident Association;
   (xii) Mauritius Commercial Bank Staff Provident Association; and
   (xiii) Rogers Group Provident Association.

(b) The Impugned Conducts

4. The matter investigated by the Executive Director and subject of this decision is whether the members of the APHPA have been party to collusive agreements in breach of s.41 of the Act, viz - –
   a. agreements on a common scale of costs,
   b. agreements on clinic fees including room rates and operation theatre fees, and
   c. agreement in relation to overseas treatment.

III LEGAL FRAMEWORK

5. To determine whether the above-mentioned impugned conducts are in breach of s.41 of the Act, it is apposite to reproduce the relevant provision of the law.

41. Horizontal agreements
(1) For the purposes of this section, an agreement, or a provision of such agreement, shall be collusive if –

(a) it exists between enterprises that supply goods or services of the same description, or acquire goods or services of the same description;

(b) it has the object or effect of, in any way -

(i) fixing the selling or purchase prices of the goods or services;

(ii) sharing markets or sources of the supply of the goods or services; or

(iii) restricting the supply of the goods or services to, or the acquisition of them from, any person; and

(c) significantly prevents, restricts or distorts competition.

(2) Any agreement, or provision of such agreement, which is collusive under this section shall be prohibited and void.

6. It follows from the above that, for an impugned conduct to be in breach of the prohibition on horizontal agreement under s.41 of the Act, the following three main elements must be established: -
   (i) the existence of agreement;
   (ii) the object or effect of the agreement are as listed in under s .41(b); and
   (iii) The Agreement significantly prevents, restricts or distorts competition.

(a) Existence of Agreement

7. For the purposes of s.41(1)(a), there must first exist an agreement or provision of an agreement and secondly the agreement must exist between enterprises that supply or acquire goods or services of the same description.

8. Agreement has been defined at s.2 as being *"means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice"*.

9. According to the above definition, an agreement includes a decision by an association of enterprises and this would capture enterprises, by virtue of their membership in an association of enterprises, as being party to an agreement among the members of the association concerned and falling within the purview of the Act.

10. Agreement also includes both legally enforceable and non-enforceable agreements, whether written or oral, for e.g., the so-called gentlemen agreements[1].

11. A concerted practice may also amount to an agreement as it is defined at s.2 of the Act as *"a practice involving contacts or communications between competitors falling short of an actual agreement, but which nonetheless restricts competition between them"*.

[1] The Competition Commission Guidelines on Collusive Agreements (Guidelines 3), para. 1.9

(i) Qualification *as enterprise*

12. It is important to note that for an agreement to be captured under s.41, such an agreement must exist between enterprises. The Act defines enterprise to mean *"any person, firm, partnership, corporation, company, association or other juridical person, engaged in commercial activities for gain or reward, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them"*.

13. It follows from the above that, to fit in the definition of an enterprise, an entity specifically mentioned as 'person', 'firm', 'partnership', 'corporation', 'company' or 'association' is qualified as an enterprise so long it is engaged in commercial activities for gain or reward. An entity could also be qualified as an enterprise provided that it is firstly a juridical person and secondly it is engaged in commercial activities for gain or reward.

(ii) *Horizontal agreement / Agreement concerning goods or services of the same description*

14. The s.41 collusive agreement is referred to as horizontal agreement. This term is defined, at s.2 of the Act as *"an agreement between enterprises which, for the purpose of that agreement, operate in the same market and are actual or potential competitors in that market"*.

15. Moreover, for an agreement to qualify as horizontal agreement under s.41 of the Act, the enterprises party to the agreement must supply or acquire goods or services of the same description, that is the agreement is between actual or potential competitors.

(b) Object or Effect of Agreement

16. As already mentioned above, the second element under s.41 of the Act is that the object or effect of the agreement has to satisfy one of the three conditions under s 41(b) which are by:
    - *(i)* *Fixing the selling or purchase prices of the goods or services;*
    - *(ii)* *Sharing markets or sources of the supply of the goods or services; or*
    - (iii) *Restricting the supply of the goods or services to, or the acquisition of them from, any person*

(c) Significance of prevention, restriction or distortion of competition

17. The third element to satisfy under s.41 of the Act is that the agreement must significantly prevent, restrict or distort competition. The Competition Commission Guidelines on Collusive Agreements ('Guidelines 3')[2] provides that the Competition Commission will interpret *"significant"* to be *"of significance"* or *"not significant"*.

[2] Para. 2.11

(d) Financial Penalty and Directions

18. S.58 and s.59 of the Act provide for directions and penalties that the Competition Commission may impose on enterprises where a restrictive agreement falls within the scope of s.41.

19. S.58 more specifically provides that when a restrictive agreement falls within the scope of s.41, the Commission may impose a direction on an enterprise requiring the latter to terminate or modify the agreement within such a period as may be specified by the Commission.

20. S.59(1) provides that, in relation to a restrictive agreement falling within the scope of s.41, in addition to giving directions, the Commission may make an order imposing a financial penalty on the enterprise. However, the Commission shall not impose a financial penalty unless it is satisfied that the breach of the prohibition was committed intentionally or negligently.

21. It is to be highlighted that where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 per cent if the turnover of the enterprise in Mauritius during the period of the breach of the prohibition up to a maximum period of 5 years[3].

22. Furthermore, s.59(7) of the Act empowers the Commission to grant immunity or leniency to any person. Granting *"immunity"* implies that the enterprise is totally exempted from a financial penalty while *"leniency"* means partial exemption from a financial penalty.

IV THE INVESTIGATION AND FINDINGS OF THE EXECUTIVE DIRECTOR

23. The Executive Director has carried out the investigation, pursuant to s.51 of the Act, in respect of the Impugned Conducts to determine whether the parties are in breach of s.41 of the Act. He proceeded to determine firstly whether the parties qualify as enterprises under the Act and secondly whether all the three above mentioned elements of s.41 of the Act[4] are present.

24. Finally, the Executive Director assessed the factors which may be appropriate to consider in the determination of the amount of any applicable financial penalty. He also recommended indicative figures for the financial penalties as well as directions for the Commission's determination.

[3] S.59(3) of the Acct
[4] Mentioned at paragraphs 5 and 6 of the present decision.

IV (a) Qualification as enterprise

25. As mentioned above, for an agreement to fall under s.41 of the Act, the agreement must be between enterprises. The Executive Director carried out an assessment as to whether the main parties to the investigation qualify as enterprises as defined under the Act.

26. The Executive Director found that the members of the APHPA can be classified into three categories, namely:

    i. **Insurance companies** - which hold a general insurance license under the Insurance Act 2005,

    ii. **provident funds or associations** - which are registered as an association under the Registration of Association Act and have been set up at the initiative of an employer to provide medical covers to its employees (and at times family members of employees and retired employees), and

    iii. **third party administrators** - which provide membership and claims administration services to suppliers of medical insurance policies and covers.

27. As per the definition s.2 of the Act, to qualify as an enterprise, an entity must first be a juridical personal and secondly, be engaged in commercial activities for gain or reward.

28. The Executive Director proceeded to find that the insurance companies[5], provident funds/association[6] and third-party administrators[7] members of the APHPA are engaged in commercial activities for gain or reward in as much as they all provide their services in return for a fee/rate, and therefore qualify as enterprises within the meaning of the Act.

IV (b) ASSESSMENT OF THE EXISTENCE OF AGREEMENTS UNDER SECTION 41 OF THE ACT

29. As already mentioned above, the parties under investigation are alleged to be parties to agreements that may amount to a breach under s.41 of the Act, viz, agreement on a common scale of costs, and agreement in relation to overseas treatment.

30. The Executive Director has conducted an in-depth investigation to assess whether the alleged agreements are in breach of s.41 of the Act. He has also assessed the factors which may be appropriate to consider in the determination of the amount of any financial

[5] Swan General Ltd, Mauritius Union Assurance Co. Ltd, Jubilee Insurance (Mauritius) Ltd, Eagle Insurance Ltd and SICOM General Insurance Ltd are all health insurance providers duly incorporated under the Companies Act 2001.

[6] Air Mauritius Provident Association, Mauritius Commercial Bank Staff Provident Association, Rogers Group Provident Association, IBL Provident Fund and Business Mauritius Provident Association

[7] Medscheme (Mauritius) Ltd and Linkham Services Ltd

penalty and he has recommended directions and final penalties. The details of the assessment exercise which are found at chapter 5, 6,7, 8 and 9 of the Final Report will not be reproduced here but they will be referred to as may be required.

31. Following his assessment, the Executive Director concluded that there are two agreements which may be in breach of s.41 of the Act, namely:

    (i) Agreements between members of the APHPA on a common scale of cost in so far it concerns gynaecological procedures, and the
    (ii) Agreement between certain members of the APHPA on referrals of cases for overseas treatment.

32. Based on the evidence gathered during his investigation, the Executive Director is of the view that

    (i) all twelve members of the APHPA have been party to the agreement on a common scale of cost in so far it concerns gynaecological procedures, and
    (ii) eight members[8] of the APHPA have been party to the agreement on referrals of cases for overseas treatment.

33. The Executive Director recommends the Commissioners to consider imposing financial penalties in accordance with s.59 of the Act on the two agreements mentioned at paragraph 31. He however recommends that financial penalties not be imposed on provident associations/fund. He recommends imposition of fines only on insurance companies and third-party administrators as set out at paragraph 75 below.

34. The Executive Director further recommends the Commissioners to declare the agreement on common scale of costs for gynaecological procedures as prohibited and void.

35. In particular, the Executive Director recommends that members of the APHPA be directed, within a period of two months from the date of the decision of the Commission to:
    (i) Terminate the agreement in relation to the scale of cost in so far that it concerns gynecological procedures and to remove all references which cap gynecological procedures in the scale of cost; and
    (ii) Procure from the APHPA that those who were issued with the common scale of cost to be notified that gynecological procedures are no longer part of the common scale of cost.

[8] Swan General Ltd; Mauritius Union Assurance Co Ltd; Medscheme (Mtius) Ltd; Business Mauritius Provident Association; Air Mauritius Provident Association; Ireland Blyth Limited Provident Association; Mauritius Commercial Bank Staff Provident Association; and Rogers Group Provident Association

36. The Executive Director also recommends the Commissioners to declare the agreement on referral of cases for overseas treatment as prohibited and void.

37. In particular, the Executive Director recommends that the members of the APHPA be directed, within a period of two months from the date of the decision of the Commission to terminate the agreement on referral of cases for overseas treatment.

V THE STAND OF THE PARTIES

The Mauritius Union Assurance Co. Ltd; Medscheme (Mauritius) Ltd; Swan General Ltd, Eagle Insurance Ltd; Jubilee Insurance (Mauritius) Ltd; Linkham Services Ltd; SICOM General Insurance; Business Mauritius Provident Association; Mauritius Commercial Bank Staff Association Provident Association and Ireland Blyth Provident Fund

38. The ten (10) above mentioned parties submitted written representations on 02 April 2021 indicating that, without in any way accepting liability in respect of the alleged prohibitions as may be contained in the Statement of Issues, the Preliminary Report and the Final Report, nor in respect of any agreement on gynecologists' fees or on referral of cases for overseas treatment, the above named parties are willing to accept fines and/or directions as set out in their respective Notices issued by the Commission on 26 March 2021.

39. The ten (10) above mentioned parties also submitted that, it is only on the basis of their above submissions, they will not insist on a hearing as per section 56 of the Act.

Air Mauritius Provident Association

40. In an email dated 07 April 2021, Air Mauritius Provident Association submitted that they do not have any representations to make in view of the Notice sent by the Commission on 26 March 2021 nor do they wish to be present at the hearing.

Rogers Group Provident Association

41. In a letter dated 07 April 2021, Rogers Group Provident Association submitted that other than the submissions made in the course of the Investigation INV 031, it does not have further representations to formulate with respect to the findings and recommendations of the Executive Director.

VI DETERMINATION

42. In line with the scope of the investigation of the Executive Director, the task for the Commissioners is firstly, to determine based on the facts of the case whether the members of the APHPA have been party to collusive agreements of the type prohibited by s.41 of the Act. Secondly, taking into consideration the stand of the main parties of not making submissions to the Commissioners to dispute the findings and

recommendations on directions and fines of the Executive Director as set out in the Final Report, the Commissioners' task is to substantiate whether directions and or financial penalties are needed and subsequently, to determine same in accordance with the notices issued as per Rule 22 (3) to all 12 main parties on 26 March 2021.

43. The Commissioners note that the Final Report sets out in details the finding of the Executive Director in relation to all the elements of s.41 and s.58 &59. The Commissioners will set out in similar fashion their reasons and determination on the qualification of the parties as enterprises within the meaning of the Act, the horizontality requirement, existence of agreement, the collusive object or effect of the agreement(s) before concluding on breach and then move on to directions and financial penalty.

VI (a) Application of the Act to enterprises

Insurance companies

44. Swan General Ltd, Mauritius Union Assurance Co. Ltd, Jubilee Insurance (Mauritius) Ltd, Eagle Insurance Ltd and SICOM General Insurance Ltd are all businesses offering health insurance covers in return for a premium and operating 'General Insurance Business' under the licensing and monitoring purview of the Financial Services Commission. It is thus clear that all these health insurance providers supply and sell their health insurance covers to policy holders for health risks in return for a premium.

45. In this regard, the Commissioners form the view that both limbs of the definition of enterprise in s.2 of the Act are satisfied by virtue of the existence of the insurance companies as 'companies' and by virtue of their being engaged in commercial activities for gain or reward, namely providing health insurance for a premium.

Third-party administrators

46. Regarding Medscheme (Mauritius) Ltd and Linkham Services Ltd which are third -party administrators, the Commission agrees with the findings of the Executive Director and likewise finds that since both are registered companies and both are engaged in the provision of membership management and claims administration of health policies of insurance companies and provident fund administrators, they both qualify as enterprises in as much that they generate revenue for the provision of their services on a market in exchange of a fee.

Provident associations

47. Regarding the five provident associations subject to the investigation, namely Air Mauritius Provident Association, Mauritius Commercial Bank Staff Provident Association, Rogers Group Provident Association, IBL Provident Fund and Business Mauritius Provident Association, since they are all registered as associations pursuant to section 5 of the Registrar of Association Act, the first limb of the concept of enterprise in s.2 of the Act is satisfied.

48. The Commissioners refer to the Executive Director's explanation that the aim of a provident association/fund is to provide a medical cover to the employee where contributions are made either by the employer or jointly by the employer and employee on determined rates. It is noted that membership to the associations subject of the investigation is usually open to the present employees and their dependents and retired employees and in case of Business Mauritius Provident Association is open to members of Business Mauritius, to approved subsidiaries and organisations which are members of Business Mauritius Provident Association and those approved by Business Mauritius Provident Association. It is further noted that the parties have in their submissions to the Executive Director indicated that each of the provident association/fund was set up on the initiative of the employers which are private companies to cater for the healthcare needs of their respective employees, except for Business Mauritius Provident Association which provides its services to a range of corporate members of Business Mauritius.

49. The provident funds/associations therefore serve to provide medical/health cover to members which is understood as an alternative to buying medical/health cover directly from insurance companies. Both would serve the same purpose from the point of view of a policy holder/member of a provident fund. The Executive Director further argued that the service provided by the provident funds/associations is being offered on a market and that market comprises of past and present employees of the provident association/fund. Hence, the view that the provident funds/associations are engaged in commercial activity the more so that the service provided by them is offered in exchange of a fee/rate. The provident associations/funds derive income from contributions paid by or on behalf of members and its expenses are mainly the claims paid. They generate funds/revenue from the members with payments coming either from the employers, or from both employees and employers.

50. The Commission further considered the relevance of profit making to the concept of carrying commercial activity for gain or reward in s.2 of the Act. The Commissioners espouse the case of *Federation Francaise des Societes d'Assurance and others Ministère de l'Agriculture et de la Peche*[9], as referred in the Final Report. The mere fact that an entity is a non-profit-making body does not deprive the activity which it carries on of its economic character. Therefore, having regard to the features referred to in the previous 3 paragraphs and in more details in the Final report both in chapters 4& 8, the activity of the five provident funds/associations is not precluded from being commercial in nature. It can therefore be deduced that the activity of the provident association is for gain or reward, albeit not for profit.

51. The Commissioners also do not find any information which may sustain the claim that the activities of the provident funds/associations are excluded under Part A (1) of the Schedule to the Act on the ground that the activities relate to the remuneration, terms or conditions or employment of employees. As rightly concluded by the Executive

[9] [1995] ECR I-4013

Director, the alleged practice under consideration is not an agreement between an employer and employee as per the Schedule to the Act, but the matter concerns agreement between different associations and companies in respect of their commercial activity which is provision of medical/health cover.

52. Based on the above, the findings of the Executive Director that the five provident funds/associations subject to the investigation qualify as enterprises within the meaning of the Act finds approval with the Commissioners.

VI (b) Horizontal relationship between the main parties

53. The next element to be considered when applying s.41 of the Act is the horizontal nature of agreements between enterprises. The Executive Director has addressed this matter at Item D in Chapter 5 of the Final Report. The Commissioners agree with the Executive Director's view that there is no need to conduct full-fledged assessment of relevant markets and market shares when establishing the extent of product similarity or horizontal relationship under s.41 of the Act. All that is required is that the parties to the agreement acquire or supply products of similar description and that they are actual or potential competitors for the purposes of the agreement.

54. Notwithstanding the above, the Executive Director referred to the investigation referenced INV 047 on the Acquisition of 30% shares in Medscheme (Mtius) Ltd by Eagle Insurance Ltd which led to the finding that from the perspective of employers, health insurance covers from insurance companies could be substituted with medical schemes from provident associations coupled with third party administration. Medical schemes from provident associations coupled with third party administration could therefore be said to be providing products and services which are similar to a medical insurance coverage from insurance companies, and that that access to third-party administration is an integral part of a health insurance cover provided by either insurance companies or provident associations.

55. The Commissioners therefore finds that in the present matter insurance companies on the one hand and provident associations and third-party administrators on the other hand are in the same market of supplying medical coverage (through insurance policies or medical schemes) including coverage for overseas treatment. As such, they supply services of similar nature and are competitors operating within same market for the supply of medical coverages through medical insurance or schemes and the supply of medical coverage for overseas treatment. It is also found that the insurance companies and third-party administrators share a horizontal relationship in the acquisition of private health services/ in-patient services from doctors and private health care providers (private clinics and hospitals) for the coverage of their policy holders, as well as the acquisition from clinics of services. Therefore, the parties to the investigation acquire services of the same description at both levels.

VI (c) ***Agreements falling within ambit of the prohibition on horizontal agreement***

56. The findings of the Executive Director are that the members of the APHPA have been party to two types of collusive agreements, namely agreement on scale of cost regarding gynecological inpatient treatments and agreement on referral of overseas treatment.

The scale of cost agreement

57. The scale of cost as the focus of this decision is a document containing the amount payable for different types of in-patient interventions by the main parties as insurance companies/third party administrators/provident funds. It attributes classes varying from 1 to 9 to operations and procedures. Each operation class is given a number of units and the unit is thereafter given a monetary value. As such, multiplying the units as per that class by the value of the unit will give the monetary value for that surgical procedure.

58. Having perused the evidence produced in chapter 5 of the Final Report, which are cogent enough, the Commissioners agree with the finding that by virtue of the APHPA regrouping health funders prior to its registration with a formal structure, engaging into discussions with doctors and issuing communications with a letterhead amongst others, the scale of cost amount to a decision of an association of enterprises within the Act.

59. The evidence adduced by the Executive Director also demonstrate that the members of the APHPA were directly involved in contacts, communications and decisions regarding the scale of cost including revision thereof. Thus, through the APHPA its members have agreed to applying common the scale of cost for the reimbursement of doctor fee for the in-patient treatment of their clients.

60. Similarly, the Commissioners finds for the reasons and evidence adduced by the Executive Director as from page 66 of the Final Report, that

    (i) Swan General Ltd being a member of the APHPA prior to the coming into force of the Act, is thus - in the absence of an express withdrawal from the scale of cost agreement - a party to the scale of cost agreement since 25 November 2009 up to the date of the Final Report.

    (ii) Mauritius Union Assurance Ltd, through the then La Prudence Mauricienne has been party to the common scale of cost agreement and member of the APHPA prior to the coming into force of the Act, and as from 2011 it was member of the APHPA and is thus a party to the scale of cost agreement since 2011 up to the date of the Final Report.

(iii) Mauritian Eagle Insurance Co Ltd being a member of the APHPA as from April 2012, is thus party to the scale of cost agreement since 2012 up to the date of the Final Report.

(iv) SICOM General Insurance Ltd being a member of the APHPA since 2012, is thus - in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement since 2012 up to the date of the Final Report.

(v) Jubilee Insurance (Mauritius) Ltd being a member of the APHPA since 2011, is thus - in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement from 2011 up to the date of the Final Report.

(vi) Medscheme (Mauritius) Ltd previously operating as Administrators and Consultants Ltd being a member of the APHPA prior to the Act coming into force, is thus – in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement since 25 November 2009 up to the date of the Final Report.

(vii) Linkham Services Ltd being a member of the APHPA since January 2012, is thus - in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement from 2012 up to the date of the Final Report.

(viii) Ireland Blyth Provident Fund being a member of the APHPA since 2009, is thus - in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement since 2009 up to the date of the Final Report.

(ix) Rogers Group Provident Association being a member of the APHPA since 2011, is party to the scale of cost agreement since 2011 until 2017.

(x) Business Mauritius Provident Association being a member of the APHPA since 2012, is party to the scale of cost agreement since 2012 up to the date of the Final Report.

(xi) MCB Staff Provident Association being a member of the APHPA since 2011, is thus - in the absence of an express withdrawal from the scale of cost agreement - party to the scale of cost agreement since 2011 up to the date of the Final Report.

(xii) Air Mauritius Staff Provident Association being a member of the APHPA since 2011, is thus - in the absence of an express withdrawal from the scale

of cost agreement - party to the scale of cost agreement since 2011 up to the date of the Final Report.

61. The Commissioners further agrees for the reasons mentioned at chapter 6 of the Final Report that the scale of cost being in itself a document detailing the list of procedures and the amount to be paid for those procedures will by its object fix the maximum price for the different inpatient treatments. As such, it has the object of fixing the purchase price of doctor's service within the meaning of the Act. The very object of the common scale of cost is to fix, among others, the maximum price to be paid to doctors for inpatient treatments. Thus, amounting to having the object of fixing the selling or purchase prices of the goods or services, within the meaning of section 41(1)(b)(i) of the Act.

62. It is further observed that the scale of cost also sets the maximum amount of various components of medical practitioners' services for surgical and non-operative procedures services that will be acquired. Based on the evidence and arguments presented at paragraphs 6.25 to 6.30 of the Final Report, the Commissioners find that by setting the maximum amount of certain services that may be acquired, the scale of costs has the object of restricting the acquisition of the said services beyond the prescribed amount. Moreover, the fact that the parties are capping the maximum amount that they will reimburse to the patient for the inpatient treatment and any additional amount that will have to be paid by the patient, the scale of cost is in fact restricting the supply of such medical coverage to the amount prescribed in the common scale of cost. The Commissioners, thus, find reason in the finding that the scale of cost agreement also amount to an agreement to restrict the supply of coverage for inpatient treatments of accident and health policies, which has the object or effect of a "restriction of the supply of [...] services" in accordance with section 41(1)(b)(iii) of the Act.

63. However, as per the Final report the scale of cost agreement may not necessarily meet all the requirement of s.41 in its totality, to the exception of gynecological treatments since it is gathered from the Association of Gynecologists that they did not adhere to the common scale of cost. As such through the scale of cost which applies to gynecological treatments, the members of the APHPA have fixed a rate for the operations knowing that gynecologists will not adhere to same. This is done by members of the APHPA agreeing through the common scale of cost to cap the maximum amount that they will reimburse policy holders for gynecological treatment knowing that the gynecologist will not adhere to said cap. The APHPA has thus fixed a rate for the operations knowing that the gynecologist will not adhere. Therefore, in so far gynecological treatment is concerned the scale of cost will by its object itself distort competition as it does not consider the potential countervailing arguments from the acquisition side.

64. The Commissioners taking into account the stand of the Executive Director and that of the main parties therefore accordingly find that the scale of cost in so far that it concerns gynecological inpatient treatments, is collusive within the meaning of section 41 of the Act.

Agreement on referral of cases for overseas treatment

65. The second type of agreement which the Executive Director finds to be in breach of section 41 of the Act is agreement between the following eight members of APHPA (hereinafter also referred to as 'the eight members of APHPA') on referrals of cases for overseas treatment –

    a. Swan General Ltd;

    b. Mauritius Union Assurance Co Ltd;

    c. Medscheme (Mtius) Ltd;

    d. Business Mauritius Provident Association;

    e. Air Mauritius Provident Association;

    f. Ireland Blyth Limited Provident Association;

    g. Mauritius Commercial Bank Staff Provident Association; and

    h. Rogers Group Provident Association

66. The Final Report provides evidence in the form of communications showing that there has been an agreement among the eight members of the APHPA to restrict claims in respect of referrals for treatment abroad.

67. Having reviewed the evidence and argument relied upon by the Executive Director in the Final Report, the Commissioners find that there exists an agreement among the eight members of APHPA, in the form of a decision of the association (the APHPA) to restrict overseas treatment only to treatments which are not available in Mauritius and where such treatment is not available, the members have agreed as to which countries from which treatment can be obtained, namely [redacted] Confidential to the 8 parties named at paragraph 65

68. The Executive Director, is right in his assessment that agreement limiting reimbursement for overseas treatment amounts to an agreement between the eight members of APHPA not to supply coverage for overseas treatment beyond the agreed policy, going to the extent of not reimbursing patients for overseas treatment if it is available locally. The agreement also put limitations on the country where such treatment can happen by making clear that preference should be given to [redacted] As such, this agreement embodies a policy to limit coverage for overseas treatment. [Confidential to the 8 parties named at paragraph 65]

69. The conclusion of the Commissioners having reviewed the evidence produced in the Final Report is that the eight members of APHPA have indeed been party to prohibited agreement under s.41 of the Act, owing to the fact that they have agreed on a common policy, and have thus limited the competition that could have happened among them in terms of the policy, that is coverage, with regards to overseas treatment they would have offered.

VI (d) Directions under s.58 Financial Penalty under s.59 and Leniency

70. Owing to the fact that all the main parties to the investigation have expressly given their stance not to dispute the findings of the Executive Director including his recommendations on fines, and taking our above findings regarding the existence of two sets of collusive agreements, namely agreement on scale of cost in respect of gynaecological treatment and agreement on referrals of cases for overseas treatment which respectively fall within s.41 of the Act, we in judiciousness decide to impose directions and financial penalty as per the recommendation of the Executive Director in his Final Report.

71. We therefore endorse under s.58 of the Act, the recommendations submitted by the Executive Director, and accordingly direct the abovenamed parties to terminate the aforesaid infringing agreements.

72. Regarding the agreement on common scale of cost in regard to rates for gynaecological interventions, we agree with the view of the Executive Director that the parties to the agreement could not have been unaware that the agreement will affect competition among them. Hence, they could not have been unaware that it will cap insured patients in terms of reimbursement claims. Similarly, with respect to overseas treatment, the Commissioners adopt the view that the eight members of APHPA could not have been unaware that they were in practice agreeing to adopt a single policy with regards to overseas treatment and agreeing on limiting overseas treatment. The two agreements being in breach of s.41 of the Act are therefore amenable to fines under s.59 of the Act.

73. We accept that no financial penalty be imposed on the provident funds/association for the reasons mentioned in the Final Report at 9.131 to 9.136.

74. We note that Swan General Ltd was the first to apply for leniency, followed by the other main parties (members of the APHPA). Taking into consideration the Executive Director's assessment that the leniency applications have assisted him to an appreciable extent in completing the investigation; more so given the complexity of the matter, we further decide to accept the leniency applications and grant leniency to the tune of [redacted]% to Swan General Ltd and a maximum of [redacted]% to the other applicants, which is nonetheless to be adjusted for each member depending on the value of the information it provided. [Confidential to Swan General Ltd]

75. Consequently, we deem it appropriate to, impose financial penalties under s.59 of the Act as per the recommendations of the Executive Director as follows -

(i) For Swan General Insurance, MUR 6,773,680 net of [redacted]% leniency reduction for its participation in the two collusive agreements on common scale of cost for gynaecologists and on overseas treatment;

(ii) For Mauritius Union Assurance Co. Ltd, a total of MUR 2,553,092 net of [redacted]% leniency reduction for its participation in the two collusive agreements on common scale of cost for gynaecologists and on overseas treatment;

(iii) For Medscheme (Mtius) Ltd, a total of MUR 318,395 net of [redacted]% leniency reduction for its participation in the two collusive agreements on common scale of cost for gynaecologists and on overseas treatment;

(iv) For Eagle Insurance Ltd, MUR 803,404 net of [redacted]% leniency reduction in respect of the agreement on common scale of cost for gynaecologists;

(v) For SICOM General Insurance Ltd, MUR 435,175 net of [redacted]% leniency reduction in respect of the agreement on common scale of cost for gynaecologists;

(vi) For Jubilee Insurance (Mauritius) Ltd, MUR 333,966 net of [redacted]% leniency reduction in respect of the collusive agreement on common scale of cost for gynaecologists; and

(vii) For Linkham Services Ltd, MUR 45,485 net of [redacted]% leniency reduction in respect of the collusive agreement on common scale of cost for gynaecologists;

VII DECISION

76. The decision of the Commissioners in respect of the investigation into potential collusive agreements of the type prohibited under section 41 of the Act by members of the APHPA, bearing reference INV031 is as follows.

A. We hold that

(i) All the members of the APHPA namely Swan General Ltd; Mauritius Union Assurance Co Ltd; SICOM General Insurance Ltd; Jubilee Insurance (Mauritius) Ltd; Eagle Insurance Co Ltd; Linkham Services Ltd; Medscheme (Mtius) Ltd; Business Mauritius Provident Association; Air Mauritius Provident Association; Ireland Blyth Limited Provident

Association; Mauritius Commercial Bank Staff Provident Association; and Rogers Group Provident Association, are found to have participated in collusive agreements in breach of s.41 of the Act, namely agreements on common scale of cost in relation to gynaecological procedures/treatment which have the objects of fixing the acquisition price of doctors' services for inpatient treatment, of restricting the acquisition of doctors' services, and of restricting the maximum amount of insurance coverage supplied to insured for such inpatient treatments, and

(ii) Swan General Ltd; Mauritius Union Assurance Co Ltd; Medscheme (Mtius) Ltd; Business Mauritius Provident Association; Air Mauritius Provident Association; Ireland Blyth Limited Provident Association; Mauritius Commercial Bank Staff Provident Association; and Rogers Group Provident are found to have participated in collusive agreements in breach of s.41 of the Act, namely agreements on referral of cases for overseas treatment which have the object or effect of restricting supply.

(iii) The abovementioned agreements on common scale of cost for gynaecological procedures are prohibited and therefore void.

(iv) The agreements on referral of cases for overseas treatment are prohibited and therefore void.

B. Further pursuant to s.58 of the Act we hereby direct the members of the APHPA, within a period of two months from the date of this decision to –

(i) Terminate the agreement in relation to the scale of cost concerning gynaecological procedures and to remove all references which cap gynaecological procedures in the scale of cost within any such agreements;

(ii) Terminate the aforesaid agreement on referral of cases for overseas treatment; and

(iii) Notify, through the APHPA, all parties who were issued with the common scale of cost that gynaecological procedures are no longer part of the common scale of cost.

C. We also impose financial penalties pursuant to s.59 of the Act, and order -

(i) Swan General Insurance to pay fines totalling MUR 6,773,680;

(ii) Mauritius Union Assurance Co. Ltd to pay fines totalling MUR 2,553,092;

(iii) Medscheme (Mtius) Ltd to pay fines totalling MUR 318,395;

(iv) Eagle Insurance Ltd to pay fines totalling MUR 803,404;

(v) SICOM General Insurance Ltd to pay fines totalling MUR 435,175;

(vi) Jubilee Insurance (Mauritius) Ltd to pay fines totalling MUR 333,966; and

(vii) Linkham Services Ltd to pay fines totalling MUR 45,485

within 60 working days from the present decision.

Done at Port-Louis this 26 August 2021.

Mr. M. A. Bocus
(Chairperson)

Mr. D. P. A. Mariette
(Vice-Chairperson)

Competition Commission

Mr. C. Seebaluck
(Commissioner)

Mrs. M. B. Rajabally
(Commissioner)

Mrs. V. Bikhoo
(Commissioner)