Decision of the Commissioners of the Competition Commission

Decision

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COMMISSION/HG/004/03

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Hearing COMMISSION/HG/004 – The Bundling of Insurance and Credit Products in the Banking Sector

Decision HG/004/03 – Relating to Bank One Ltd

Commissioners – *Mr R.T. Servansingh – Acting Chairperson*
Mr R.J.R. Rama – Commissioner
Mrs P.J.S. Poonoosamy – Commissioner
Mr M.R. Sadool – Commissioner

Pursuant to the report produced by the Executive Director of the Competition Commission (The *ED*) in the matter of the Bundling of Insurance and Credit Products in the Banking Sector, more specifically relating to ***Bank One Ltd*** *(Bank One)*, the Commissioners state the following:-

A. Introduction

1. On 31st August 2010, the Executive Director of the Competition Commission (ED), in the exercise of his powers under Section 30(c) and in accordance with Section 51(1) of the Competition Act 2007 (the Act), launched an investigation into whether banks offering housing loans are in a monopoly situation and whether they are tying those loans to decreasing term assurance (DTA).

2. DTA is a form of life insurance that a borrower procuring a housing loan generally takes out as a means of guaranteeing the repayment of the housing loan in the event of either death or permanent disability of the borrower.

3. Although there are some twenty banks licensed to operate in Mauritius, only 13 were under investigation on the basis that they that they provide housing loan facilities. The 13 banks under consideration were ABC Banking Corporation (ABC), AfrAsia Bank Ltd (AfrAsia), Bank One Ltd (Bank One), Barclays Bank Plc (Barclays), Banque des Mascareignes Ltee (BM), Bramer Banking Corporation Ltd (Bramer), Bank of Baroda (Baroda), Habib Bank Ltd (Habib), The Hong Kong and Shanghai Banking Corporation Limited (HSBC), The Mauritius Commercial Bank (MCB), Mauritius Post and Cooperative Bank (MPCB), SBI [Mauritius] and State Bank of Mauritius (SBM).

4. On 4th July 2012, the ED submitted his Final Report entitled "The Bundling of Insurance and Credit Products in the Banking Sector" to the Commissioners in accordance with Section 51(2) of the Act.

5. The ED found that in the case of eight of the banks under investigation, namely Bank One, Barclays, BM, Bramer, HSBC, MCB, MPCB and SBM, there had been breaches of Section 46 of the Act in that these banks were in a monopoly situation

in their respective housing loan/DTA markets, which breaches have the effect or object of preventing, restricting or distorting competition and that these banks are otherwise taking advantage of the monopoly situation.

6. The report concluded that the eight banks, all of which had agreements with insurance companies, did not offer housing loan borrowers a free choice as to DTA provider, which DTA was often bundled with the provision of the housing loan. It has been further argued that this resulted in more expensive DTAs and reduced choice for the borrower than had there been effective competition. This has been seen to be particularly anti-competitive in light of the existence of agreements between the banks and DTA providers.

7. In relation to the alleged contraventions of the Act, the ED has also proposed a remedy which he considers to be most apt, namely that banks requiring that a borrower take out a DTA provide at least three insurance quotes from different insurance companies and more information to customer in relation to choice of life assurance from different loan providers.

8. It should also be noted that the ED also concluded that in the case of five of the thirteen banks, namely ABC, AfrAsia, Baroda, Habib and SBI, no breach of section 46 of the Act had been committed.

9. The Commissioners proposes to examine in detail the cases of each of the individual banks, whether or not the ED has found that there has been a breach or not. In this decision we shall be looking most particularly at the conclusions of the ED relating to Bank One.

B. The Legal Background

10. Before looking at the details of the case, an overview of the law is important so as to situate the case put forward by the ED.

11. Prior to tackling the pertinent Sections of the Act, the ED considered the legal enactments relating to the provision of housing loans. Whilst both loans and leasing in Mauritius were initially considered, the ED concluded, that leasing would not be considered for the purpose of the investigation as it was not normally linked to the buying or renovation of a house. Furthermore, the ED, taking note of the provisions of the Insurance Act 2005, considered that insurance companies ought not to be part of the investigation as they did not provide housing loans.

12. Therefore, only housing loans were considered, and given that these are offered by banking institutions, the ED naturally looked at the Banking Act 2004. More particularly, the ED looked at the fact that the Banking Act has a segmented industry consisting of those banks offering *international* financial services and

those dealing in transactions with Mauritians. It is the latter category that is concerned with the ED's investigation given that it deals in housing loans to Mauritians, hence the targeting of those banks which offer this service.

13. It should also be noted that two organisations, the Mauritius Housing Company Ltd and the Mauritius Civil Service Mutual Aid Association Ltd, both of which provide housing loans, were excluded from the investigation in that the respective pieces of legislation creating these entities either limit to whom the loans may be given or how those loans are given.

14. Another piece of legislation looked at was Section 13(1) of the Borrower Protection Act 2007, whereby it is stated that a lending institution ***may*** require a lender to take out an insurance policy specifically as a means of guaranteeing against non-repayment of the loan in the event of death or permanent disability of the borrower. It is pertinent to note that despite this being optional banks will invariably require this second form of security prior to the approval of a housing loan.

15. Let us now look at the Sections of the Competition Act 2007 (the Act) that have been considered. Under Section 46(1) of the Act, a monopoly situation is deemed to exist in relation to the supply of goods and services where:

    a) *30 per cent or more of those goods or services are supplied, or acquired on the market, by one enterprise; or*

    b) *70 per cent or more of those goods or services are supplied, or acquired on the market, by 3 or fewer enterprises.*

16. It should be noted that the existence of a monopoly is not in itself a breach of the Act and Section 46(1) should be read in conjunction with Section 46(2) which states that a *"monopoly situation shall be subject to review"* where there are reasonable grounds to believe that a monopolist is engaging in conduct that:

    a) *has the object or effect of preventing, restricting or distorting competition; or*

    b) *in any other way constitutes exploitation of the monopoly situation.*

17. These two Sections set the scene for a possible breach of the Act by a monopolist. Section 46(3) of the Act also which ought to be looked at to determine the existence of a breach by a monopolist, namely:

    a) *the extent to which the an enterprise enjoys or a group of enterprises enjoy a position of dominance in the market as to make it possible for that enterprise or group of enterprises to operate in that market, and*

to adjust prices or output, without effective constraint from competitors or potential competitors;

b) *the availability or non-availability of substitutable goods or services to consumers in the short term;*

c) *the availability or non-availability of nearby competitors to whom consumers could turn in the short term; and,*

d) *evidence of actions or behaviour by an enterprise that is, or a group of enterprises that are, a party to the monopoly situation where such actions or behaviour that have or are likely to have an adverse effect on the efficiency, adaptability and competitiveness of the economy of Mauritius or are likely to be detrimental to the interests of consumers.*

C. The Issues

18. Before considering the individual cases in this matter, we shall now proceed to define the main issues which need to be determined in light of the ED's report. These issues may be summarised in the form of the following questions:

    a) *Is the basis of the investigation founded?*

    b) *Has the market been correctly defined?*

    c) *In light of the above, which institutions are in the relevant market?*

    d) *Can we infer the existence of monopoly situations?*

    e) *Should all of these institutions have been considered for investigation? If not, which ones should not have been considered?*

    f) *Which of the investigated institutions, if any, are in breach of the Section 46 of the Act?*

    g) *What remedies, if any, would correct any anti-competitive practices deemed to exist?*

19. We propose to look at questions (a) and (b) and (c) initially, prior to responding to questions (c), (d), (e), (f) and (g) specifically in relation to each of the parties to the investigation.

D. Is the basis of the investigation founded?

20. The basis of investigation rests upon the decision of the ED to investigate an allegation that banks offering housing loans are acting in a monopoly situation and have tied these loans with the insurance taken out to secure the repayments on the initial loan; and that many of the banks may have agreements with certain insurance companies in relation to these insurance policies. Under Section 51 of the Act, the ED has a duty to investigate where he has "reasonable grounds to believe a restrictive business practice is occurring or is about to occur" which empowers the ED with all the reason he needs.

21. As seen above (paragraphs 15 and 16), it is clear that any such behaviour, if proved, may amount to anti-competitive behaviour in contravention of the Act, more particularly Section 46 of the Act in that they may have the object or effect of preventing, restricting or distorting competition or that it may constitute exploitation of a monopoly situation.

22. We find this to be a legitimate basis for the investigation and that any institution found to be behaving in such a manner would indeed be breaching the Act.

E. Has the market been correctly defined?

23. The first element to decipher is the definition of the market. The relevant market is described in *CCM 2 - Guidelines on Market Definition and the Calculation of Shares* as *"... a defined set of products and a defined geographic area, within which competition occurs. Relevant markets could be defined narrowly or widely....The narrower the market definition, the higher is likely to be any given enterprise's product share of the market."*

24. This is an essential factor to determine and has the purpose of aligning those products or services whose suppliers are in direct competition with each other, thus forming the basis upon which any analysis of this kind must rest. The two elements of any market definition are the geographic market and the relevant product market.

25. For the definition of the geographic market, the Commissioners agree with the ED's conclusion that this would be **Mauritius** (including Rodrigues) as the offering of DTAs would be offered in relation to home loans taking place within this clearly defined geographic area. For example, it would be hard to imagine a home loan being taken out in Mauritius relating to a property in Madagascar.

26. As regards the determination of the relevant product, there is a need for far more in-depth analysis. The ED looked at two possible markets, namely the housing loan market and the point of sale advantage. We shall now look at the arguments put

forward by the ED in relation to this and whether or not we agree with them as well as to offer alternative views which might be considered. The ED then went on to analyse the compatibility of both markets in relation to the case put forward. The ultimate question that needs to be answered is which of these two is the correct choice and why.

27. The Commissioners consider that one of the crucial elements that needs to be determined is which market definition is correct. This rests in the mind of the consumers. Which is more important to the customer, who they want as the credit provider (i.e. the bank) or the cost of the DTA premium? Herein lies the determining factor and the answer is found in the survey results carried out by TNS Analysis at Annex E of the ED's Report.

28. The survey questions geared towards finding the most important issues for home loan seekers, show that these relate predominantly to issues surrounding the bank and its services, not the cost of the DTA premium. For example, trustworthiness of the credit provider (26%), reputation (26%), experience (18%), all rate highly as important factors to consider prior to choosing. Perhaps most pointedly, interest rates were considered more important than insurance premiums by the persons questioned. In other words, prior to considering the DTA, the customer has normally made up his/her mind as to which loan provider to contract with. Implicit in this is the conclusion that the DTA is more of an afterthought, rather than a major consideration for the customer. Factors such as the bank's reputation and stability, the interest rate being charged, hassle-free procedures and the amount of the loan are the most important considerations for the loan-seeker.

29. We can deduce from this that the customer's choice of DTA provider is almost invariably decided upon well after the decision to contract with the loan provider. This would infer that the customer chooses the loan provider before even considering the question of the DTA provider. Inherent in this reasoning is the conclusion that customer will only decide on the DTA provider at the point of sale (i.e. at the point when he or she has already chosen the loan provider) and not before. This would indicate that the point of sale argument has more applicability to the case at hand and that each individual bank is a market unto itself at that point

30. The distinction to be made here is a subtle, yet simple one. When considering the housing loan market the customer may look at all the banks offering home loans and decide who to contract with on the basis of a number of determining factors as explained above. It appears that once this choice is made, and almost always only then, will the loan-seeker bring his/her mind to the question of the DTA. Therefore, the choice of DTA occurs at the point of sale and not before.

31. In the UK Competition Commission Report, *Extended Warranties on Domestic Electrical Goods* it was succinctly put that *"...the point of sale is the time when*

customers are likely to focus their attention on the needs which Payment Protection Insurance (PPI) is designed to meet, and is therefore an opportune time for distributors to attempt to sell PPI to the customer."

32. Drawing a comparison in the case at hand, the Commissioners agree with the ED's argument that a similar situation exists as regards banks providing housing loans secured by DTAs. Given that the decision to contract with one particular bank has already been taken by the customer, that customer having chosen his/her loan provider then has to decide as to the DTA provider. Given the unique access that the loan provider has to the customer at this stage, it is a potentially opportune moment to push the customer to taking out a DTA with the bank's preferred provider.

33. This aspect was also explored in the UK Competition Commission Report, "Market Investigation into Payment Protection Insurance (PPI)", where it was stated that *"the sale of PPI at the initial point of sale and continued exclusive access to customer accounts restricts the extent to which other PPI providers can compete effectively, and is therefore a feature of relevant markets which prevents, restricts and distort competition in the supply of PPI market.*"

34. Expanding upon this point, one needs to look at the possible harm that such a situation could *potentially* cause a customer. The ED has looked at two possible ways in which use of the point of sale could harm or potentially harm consumers. The ED carried out a detailed study into two "theories of harm":

    (a) Exploitative Abuse – Unilateral Market Power;

    (b) Exclusionary Abuse – Foreclosure.

35. In simple terms, exploitative abuse describes a situation where a good or service provider in a monopoly situation abuses its dominant position to exploit consumers by charging high prices, reducing quality or reducing choice. Applying this to the current case, one could argue that a bank in a monopoly situation by virtue of a point of sale advantage could abuse its dominant position to exploit its customers by reducing those customers' choice of DTA provider and also by not ensuring that the customers get the best prices or quality – all of this to the ultimate benefit of the bank and its chosen partner(s). Such behaviour would be in breach of Section 46(2)(b) of the Act.

36. Foreclosure describes a situation where a monopolistic provider of a good or service, through an anti-competitive act, effectively excludes equal right of entry to all players within a particular market by abusive use of its market power; an act which has the effect or object of preventing, restricting or distorting competition. Such an Act would be a breach of Section 46(2)(a) of the Act. Applying the

concept to the case at hand it could be argued that a bank in a monopoly situation by virtue of its point of sale advantage and which has an agreement with a DTA provider may by virtue of that agreement be engaging in anti-competitive behaviour which may have the object or effect of preventing, restricting or distorting competition, to wit, by excluding other DTA providers from gaining equal access to the market.

F. Bank One Ltd (Bank One)

37. Bank One is a provider of housing loans and the bank exercises its right to require all customers requiring this product to take out an insurance policy to cover repayments in case of default as per S13 of the Borrowers Protection Act. By applying the point of sale argument to the case of Bank One, it may be concluded that Bank One is in a monopoly situation with regard to the provision of a DTA to its housing loan customers.

38. In a letter to the ED following the issue of provisional findings in this matter, Bank One accepted that it not only has agreements with three DTA providers (✂,✂ and ✂), but that it has received the approbation of the Financial Services Commission to enter into these agreements. The existence of these agreements poses a problem in as much that they infer a pre-disposition by Bank One to offer insurance from one of these three DTA providers, an act which excludes other DTA providers on the market and which may be considered as a breach of Section 46 of the Act in that it may have the object or effect of preventing, distorting or restricting competition.

39. The ED has concluded that evidence provided by the survey of TNS Analysis leads to number of conclusions namely that:

a) Bank One's agreements with the three DTA providers have given rise to a situation where some ✂% of applicants have opted for a DTA from one particular provider, ✂. Furthermore, virtually all applicants have opted for one of the three DTA providers with which Bank One has an agreement;

b) ✂ % of Bank One customers stated that they had been guided in their choice of DTA provider, whereas ✂ % had not;

c) ✂ % of Bank One customers would have benefitted from a cheaper DTA from an alternative insurer (✂);

d) Bank One customers, at the point of sale, do not have access to the most competitive DTA insurance premiums available and they are paying significantly higher for their DTA premiums.

e) As a result of the combination of the monopoly situation in existence and the agreements that Bank One has in place with DTA providers there is an absence of choice for consumers which has an anti-competitive effect in breach of Sections 46(2)(a) and 46(2)(b) of the Act.

40. Bank One, in its afore-mentioned letter has made a number of representations to justify why it believes it is not in breach of the Act, namely that:

(a) It has received the approval of the FSC to enter into agreements with the three DTA providers mentioned at Paragraph 45;

(b) It always gives a free choice of insurers to its customers;

(c) Clients tended to prefer one DTA provider proposed (✂) in preference to the two others, often opting for the simpler and hassle-free option, with less delay;

(d) By having to provide customers with multiple DTA quotes, customers will ultimately pay higher premiums as banks will have less bargaining power vis-a-vis insurance companies;

(e) Selling insurance is only ancillary to Bank One's main business and a small income source;

(f) One should not just look at premium costs, but also the stability of insurance companies and their ability to pay claims.

41. The Commissioners wish to state the following in relation to the case of Bank One and in answer to Questions (d), (e), (f) and (g) at Paragraph 18 above:

(d) By virtue of the Point of Sale advantage discussed earlier, Bank One is in a monopoly situation. It should be noted that at no time does Bank One raise an objection to being in a monopolistic situation in its letter to the ED following the provisional findings.

(e) The ED was correct in continuing to include Bank One as a party to the investigation. Bank One has agreements with three insurance providers and the great majority of its home loans (some 90%) are secured by insurance policies from one of these three providers.

(f) The mere existence of written agreements with three insurance providers gives us with proof of the fact that Bank One has a consensual arrangement with these insurers. It also receives a commission from each customer referred to certain

insurers. Indeed the results of the survey make illuminating reading collectively with the existence of the aforementioned agreements lead us to conclude that Bank One has indeed been involved anti-competitive acts.

Some ✂% of Bank One's housing loan borrowers have taken out insurance with one of the three insurers with which Bank One has an agreement. TNS Analysis' survey results show that the majority of borrowers (✂%) do not learn of the need to take out an insurance policy until well into negotiations with Bank One. Furthermore, some ✂ % of these borrowers were actively guided to take out insurance with one of the three insurers. Perhaps more revealing is the fact that all of the borrowers could have benefitted from a cheaper DTA had they exercised or been encouraged to exercise their right to choose a DTA provider. As a result one can conclude that Bank One borrowers do not have access to the most competitive insurance premiums at the point of sale when contracting with Bank One.

Why is this so? Firstly, being in a monopoly situation at the point of sale, Bank One is in a dominant position and it uses or may use this to influence its home loan customers to purchase DTA from one of the three DTA providers with which it has an agreement. The truth is that had borrowers been able to shop around, they may well have found cheaper DTAs. This influence amounts to exploitative abuse, as explained above and is a breach of Section 46(2)(b) of the Act. Bank One has abused its dominant monopolistic position to exploit its customers by influencing them to take out DTAs with its chosen partners.

Secondly, by favouring its three DTA partners, Bank One is engaging in foreclosure. In so doing it is in effect preventing other insurers from entering the market at the point of sale. Therefore, the other insurers have very little opportunity to benefit from selling their DTAs to Bank One's housing loan purchasers. This act has either the object or effect of preventing, restricting or distorting competition and is a contravention of Section 46(2)(a) of the Act.

We also wish to point out that Bank One's claim that it gives free choice to its customers to choose their DTA provider may be overridden by the desire of the customer to secure his/her loan from the bank and the lack of active explanation as to the choice available to the customer. Also, Bank One's claim that customers also look at factors like delay and hassle, as well as the stability of the insurer may well be true. However, there is nothing to suggest in Bank One's argument that this is especially true of its particular contractual partners.

(g) *The Commissioners, having considered the breaches of the Act which* Bank One *has committed consider that the most apt remedy would be a remedy along the lines of Remedy C as suggested by the ED, namely that* Bank One *should provide more comprehensive information at the very outset of negotiations to*

customers as to their free choice in relation to life insurance from DTA providers and provide at least three insurance quotes from different DTA providers. Bank One might argue that it already has agreements with three insurers and that it could potentially not change what it is currently doing. However, this argument is far too simplistic and what needs to change in Bank One's actions is the elimination of any agreements or behaviour which might result in preferential treatment in favour of particular DTA providers.

In addition, the Commissioners also believe that there is a need for a more general directive to be sent out to the Banking Industry. In this context, we would also recommend applying Remedy E in combination with our recommended remedy, as suggested above. This would entail that the Banking Industry in Mauritius considers adopting a code of practice with a view to having all banks that sell DTA insurance with their housing loans to align their conduct with the recommendations under our recommended remedy above.

Dated this 05 November 2012

Mr R.T. Servansingh ..... Date 05/11/2012

(Chairperson)

Mr R.J.R. Rama ..... Date 05/11/12

(Commissioner)

Mrs P.J.S. Poonoosamy ..... Date 05-Nov-2012

(Commissioner)

Mr M.R. Sadool ..... Date 05.11.2012

(Commissioner)