Decision of the Commissioners of the Competition Commission

Decision

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

Decision HG/004/04 – Relating to Banque des Mascareignes Ltee

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 ***Banque des Mascareignes Ltee (BM)***, 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 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 BDM.

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 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 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. Banque des Mascareignes Ltee (BDM)

38. BDM provides housing loans to customers and it 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. As explained above, if the point of sale advantage is applied to the case of BDM, one may conclude that BDM is in a monopoly situation with regard to the provision of DTAs to its housing loan customers given that it has sole access to those customers at the point in time when the provision of the DTA is considered.

39. BDM is one of the four banks that requested a hearing following the ED's report. In this regard we shall look firstly at the case against BDM as per the report, then consider the representations proffered by BDM during the hearing, before giving our decision.

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

a) BDM has an agreement with a DTA provider, to wit, ✂. However, no information has been received relating to the commission, if any, that BDM receives for the sale of ✂ to its home loan customers. However, over ✂ % of BDM's housing loan customers have taken out an insurance policy with ✂;

b) Despite the existence of this agreement, BDM customers have benefitted from the cheapest premium rates on the market.

c) Furthermore, BDM does not charge a fee if a borrower wishes to take insurance of his/her choice.

d) Due to its point of sale advantage, BDM may be seen to be acting in breach of S 46(2)(a) of the Act, in that, as a result of the agreement that BDM has with ✂, there is an absence of choice for BDM's home loan customers, an act which may prevent, restrict or distort competition. However, it was also found that because BDM ends up offering the cheapest insurance premium to its home loan borrowers,

the latter have not been exploited by BDM and it has therefore not committed a breach under Section 46(2)(b) of the Act.

41. BDM chose to exercise its right to a Hearing in this matter and was heard by the Commissioners. BDM made the following representations during the Hearing:

a) BDM uses a checklist when processing a home loan application, and this checklist makes mention of "nantissement assurance vie". BDM argued that this term means that that the customer may pledge in favour of BDM any insurance policy it wishes;

b) In addition, BDM stated that at the time of signing their acceptance to the loan its clients also acknowledge having been informed of their right to choose an insurance provider of their preference;

c) There is a confusion in the report because at one moment it makes mention of BDM not exploiting its point of sale advantage, yet at another time the report accuses BDM of exploiting this advantage;

d) The survey carried out indicates that ✂ % of customers seeking a home loan from BDM already know from whom they will take out their insurance and are not therefore influenced by BDM in this choice;

e) BDM staff has been not trained in explaining about cover and it would be too costly to do so in relation to the potential gains.

42. Let us look at each of these arguments and their merits. The checklist referred to in (a) is a document that BDM uses to record the loan application requests with potential clients. The term "nantissement assurance vie" makes reference to life insurance and the fact that a pledge in favour of life insurance has been made. The argument of BDM makes is that this is proof that the question of life insurance is taken up with loan-seekers at an early stage. The Commissioners do not dispute this fact. All this proves is that the question of life insurance and the need for it is mentioned to the client at some stage of the negotiations. However, the BDM's argument that the term "nantissement assurance vie" indicates that the question of free choice of insurance provider is discussed with the client cannot be justified. It cannot be implied that free choice has been considered and the form does not make any specific mention as to the question of choice. Furthermore, the survey results indicate otherwise. In fact, over ✂ % of BDM borrowers take out their policy with ✂ which is far more indicative and relevant when considering the question of whether free choice has been granted to the customer or not. The fact that such a high percentage of borrowers end up

taking insurance from ✂ may be considered to be proof that BDM has indirectly or directly guided its clients towards ✂ as insurance provider.

43. BDM also contends that the acknowledgement made at the end of the loan agreement signed by the client is proof and a clear acceptance of the fact that he or she has been given the free choice of insurer. The Commissioners believe that this contention is tenuous as this statement is placed at the end of the contract, at a time when the loan seeker is expectant of receiving the desired sum. It is highly unlikely that at this stage when all formalities have been completed and when the deal is virtually done that the customer will refuse to sign the agreement because of a statement regarding the free choice of insurance provider. We would go so far as to say that at this stage of the transaction the customer's attention is so fixed upon receiving the loan that he/she would most likely sign the agreement without any second thoughts, having already decided to take the loan and, more importantly, having reasoned that the monthly cost of the loan **together with** the insurance premium is affordable and acceptable. It would indeed be a rare occurrence for a borrower to stop matters at this stage because of the acknowledgement mentioned. Therefore, we believe that to give too much credence to this statement would be incorrect. Such a statement, if it had been signed at the outset of negotiations, would have been a far more credible and valuable piece of proof.

44. The question of confusion in the report as raised in point (c) above is an interesting point which merits explanation. As explored earlier, having settled on the fact that the market is the point of sale, there are two Theories of Harm that could explain possible anti-competitive behaviour under Section 46 of the Act: Exploitative Abuse [a breach under Section 46 (2)(b)] and Foreclosure [a breach under Section 46 (2)(a)]. These are two distinct and different wrongdoings under the Act. A party may be found to have committed one and not the other, which is what the ED has concluded in the case of BDM. The ED states clearly that he believes BDM to have acted in breach of Section 46(2)(a) relating to foreclosure and not of Section 46(2)(b) relating to exploitative abuse. We believe that herein lies the confusion that BDM mentions that BDM is not exploiting its point of sale advantage, this is a clear reference to a breach under Section 46(2)(b) of the Act; hence in this case BDM, according to the ED, has not exploited its customers in such a way as to make them pay more for their insurance. This is evidenced by the fact that BDM's home loan customers have benefitted from the lowest possible premiums by taking out their policy through BDM.

45. However, when the ED states that BDM has exploited its Point of Sale advantage by resorting to foreclosure, this is a clear reference to a breach under Section 46(2)(a) of the Act which sanctions "an enterprise in [a] monopoly situation [which] is engaging in conduct that has the object or effect of preventing,

restricting or distorting competition." In this case that "conduct" is the act of foreclosure which, in this case, is an act that has the object or effect (in his case effect) of preventing other insurers from entering the particular market. The ED has deduced this from the statistics produced following the survey by TNS Analysis, most pertinently from the fact that BDM has an agreement relating to provision of DTAs with ✂ and that vast majority of customers take out their loans with this same insurer. Couple with this the fact that there is no concrete proof that the question of free choice of insurer is explained to the customer, and one may conclude that there has indeed been foreclosure. In conclusion therefore, on this point, the Commissioners would say that the confusion does not lie with the report but rather with BDM's understanding of the distinct breaches of the Act contained in Section 46(2) and the fact that there are two wrongdoings identified and not one.

46. As regards point (d) raised by BDM, to the effect that according to the survey ✂ % of loan seekers already know who they will buy their insurance from is indicative of the desire of the prospective borrowers to contract their loans as quickly as possible and not necessarily that they have given the question much thought. Perhaps, it is important to highlight that loan seekers are resigned to paying for an insurance policy when taking out a loan and have a tendency to treat it as being part of the same transaction, whereas in fact it is a wholly separate transaction contracted with a different institution. One might infer from this that there is a need for more information to be provided to the loan seeker relating to DTAs at the very beginning of any negotiations, or even as part of a general information campaign.

47. The final point raised by BDM relating to the fact that its staff has received no training relating to insurance cover is irrelevant and has no bearing on the matter at hand. One might argue that it requires no training for a staff member to not inform customers of certain basic information, and certainly not insurance training.

48. Having responded to BDM's questions, the Commissioners will now answer questions (d), (e), (f) and (g) at Paragraph 18 above by stating the following:

(d) In virtue of the Point of Sale advantage discussed earlier, BDM is in a monopoly situation. It should be noted that during the hearing, BDM did not contest being in a monopoly situation.

(e) The ED was correct in continuing to include BDM as a party to the investigation. BDM has agreements with an insurance provider and the majority (✂✂ %) of BDM home loans are secured by an insurance policy from this one provider.

(f) *The abovementioned agreement, coupled with the fact that over ✂ % of BDM home loan borrowers take out their insurance with ✂ may be considered to be proof of anti-competitive behaviour. This may be considered to be a breach of Section 46(2)(a) of the Act.*

More precisely, by favouring its DTA partner, BDM is foreclosing the market to exclude other DTA providers. 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 BDM's housing loan purchasers. This conduct has either the object or effect of preventing, restricting or distorting competition and is a contravention of Section 46(2)(a) of the Act.

(g) *The Commissioners, having considered the breach of the Act which BDM has committed, state that the most apt remedy would be a remedy along the lines of Remedy C as suggested by the ED, namely that* BDM *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.*

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.....

(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)