Public version

INV047: Proposed acquisition of 30% of Medscheme (Mtius) Ltd by Mauritian Eagle Insurance Co. Ltd

Executive Director's Final Report on Undertaking

19/04/2019

Table of Contents

1. Introduction and Executive Summary 3
2. Background 6
   - The Proposed Transaction 6
   - Procedural Background 7
   - Background of MEI and MML 8
3. The Legal Framework 10
   - Merger Situation 10
   - Reviewability of merger situations 13
   - Remedies 18
   - Undertakings 19
4. Competitive Assessment 20
   - Existence of merger situation 20
   - Market Definition and Market Shares 21
   - Competition Concerns 30
5. Assessment of Undertakings 39
   - Undertakings 39
   - Assessment of Undertakings 41
6. Conclusion and recommendations 46

1. Introduction and Executive Summary

1.1 The Competition Commission took cognizance of the proposed acquisition by Mauritian Eagle Insurance Co. Ltd ('MEI') of 30% shares in Medscheme (Mtius) Ltd ('MML') (the 'proposed transaction') through an application for guidance submitted by MML and MEI to the Competition Commission on the 21st December 2018 (the 'notification'). Following a preliminary assessment of the proposed transaction, the Executive Director was of the view that the transaction may raise certain competition concerns which need to be further assessed. The parties were informed accordingly. Meanwhile, a review of the proposed transaction was launched under section 51 of the Competition Act 2007 (the 'Act'). In February 2019, both MEI and MML offered undertakings to the Competition Commission to address the competition concerns identified, the assessment of which is presented in this report.

1.2 Established in 1974, MEI is part of the IBL Group and operates in all classes of business within the short-term (general) insurance in Mauritius. Its activities consist of claims handling and monitoring, claims recovery, corporate and marine insurance, motor insurance, health insurance and personal lines insurance, reinsurance and international market, and business development.

1.3 MML is a wholly-owned subsidiary of Medscheme Holdings (Pty) Ltd which is in turn, wholly owned by AfroCentric Investment Corporation Limited. MML is a medical insurance and provident fund administrator and is engaged in the provision of membership management and claims administration of health insurance policies.

1.4 As per submission of the parties, the proposed transaction enables MEI, which is a new entrant in the health insurance market, "to partner with an established third-party administrator in the market" such as MML, as this is the most effective and economical way to penetrate a growing market, according to MEI. As for MML, the proposed transaction allows it to maximize and grow its portfolio of clients.

1.5 For a transaction to be reviewable under the Act, three main conditions must be met, namely it must qualify as a merger situation, it must satisfy the market share threshold set under the Act and it must likely result in substantial lessening of competition.

1.6 Through the proposed transaction, MEI will acquire 30% shareholding in MML, and in doing so, will acquire 30% ownership in MML. The acquisition will allow MEI to exercise at least material influence over the policy of MML and will bring the enterprises of MEI and MML under the common ownership and control of MEI and thus amount to a merger situation.

1.7 During the review, the following potential markets were identified:

(i) the market for the retail supply of health insurance schemes (including its administration) to individuals and corporate clients in Mauritius, with the possibility that the market may be split into supply to individual and corporate clients; and

(ii) the market for the supply of administration services, including membership management and claims administration, by third parties to health insurance schemes, including insurance companies and medical provident funds/association (hereafter referred as 'third-party administration').

1.8 The assessment shows that MEI and MML may be competing in the market for supply of health insurance schemes to corporate clients and analysis of the market shares show that the combined market share of MEI and MML is above 30%. If the market for third party administration is considered, MML is estimated to have more than 30% of market shares. Therefore, the market share thresholds set under the Act for the proposed transaction to be reviewable, is likely to be met.

1.9 During the assessment phase, the Executive Director gathered information from various stakeholders. Various potential competition concerns were expressed during the information gathering. The Executive Director assessed those concerns from the perspective of the Act.

1.10 The competition concerns that may arise as a result of the proposed transaction are that MEI could gain access to the data of MML's clients which may be used to hinder competition, and that MEI could, post-merger, have the incentive to foreclose [✂] from the market given that MEI provides fronting services to [✂] and the latter is a competitor to MML.

1.11 The concerns were communicated to the merging parties on the 22nd January 2019. Both MEI and MML volunteered to submit undertakings to address the concerns of the Executive Director.

1.12 Following submission of behavioral undertakings by MEI and MML on the 6th and 18th February 2019 respectively, the Executive Director is hereby producing this Report of Undertakings pursuant to section 63 of the Act.

1.13 The Report of Undertakings assesses the undertakings submitted by MEI and MML Ltd which are mainly the following:

(a) Ring fencing of MML data: Both MEI and MML have undertaken to ring fence data of MML's clients. The Directors appointed by MEI on the board of MML shall not have access to data held by MML on its clients. In addition, IT systems and databases will be hosted independently of each other.

(b) With respect to the fronting arrangement with [✂], MEI has undertaken to keep it unaltered, post-transaction, such that MEI will continue to offer on a fair, reasonable and non-discriminatory basis its fronting services to [✂].

1.14 It is also to be noted that some years prior, the Competition Commission received an application for guidance concerning the proposed acquisition of a majority stake in MML by Swan General Ltd. In that case, referred as INV036, the Executive Director expressed various competition concerns. The transaction was however abandoned by the parties and as such, there was no need for a determination. Nonetheless, for the current assessment, information gathered previously is used where appropriate.

1.15 Following submission of undertakings by MEI and MML, the Executive Director is hereby producing this Report of Undertakings. This Report of Undertakings is being submitted to the Commission under section 63 of the Act, which provides that the Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction, distortion or substantial lessening of competition.

2. Background

2.1 This chapter provides background information on the transaction, procedural background and background on the parties to the transaction.

The Proposed Transaction

2.2 The proposed transaction involves the acquisition by MEI of 30% of shares in MML. This will be done through an issue of shares in MML to which MEI will subscribe. The agreed value of the transaction is estimated to be around Rs 15 million, which will be injected by way of cash by MEI in MML and against which shares will be issued to MEI. The investing entity is MEI and the target entity is MML[1] [Annex Confidential].

2.3 According to the parties, the proposed transaction enables MEI, which is a new entrant in the health insurance market, "to partner with an established third-party administrator in the market" such as MML, as this is the most effective and economical way to penetrate a growing market, according to MEI. As for MML, it has submitted for its part that in order to maximize and grow its portfolio of clients (which consists of healthcare insurance claims, employer medical aids and provident fund associations), it has decided to tie up with a strategic partner.

2.4 As a first phase is the development and launch of the health insurance product of MEI, namely CarePlus, and the outsourcing of the administration of the product to MML. The CarePlus product was launched in September 2018, for corporate clients and in August 2018, for individual clients. The second phase is the proposed transaction and is the consolidation of the relationship with MML, through the transaction[2].

2.5 As a result of the transaction, MML will cease to offer its product Xperience Care Plus Health Policy which will be transferred to MEI and MEI will own the brand Care Plus. Xperience Ltd, a subsidiary of MML distributing health policies, will exit the market.

[1] Application for guidance to the Competition Commission by merging parties dated the 21st December 2018
[2] Application for guidance to the Competition Commission by merging parties dated the 21st December 2018

Procedural Background

2.6 The Competition Commission was informed of a proposed acquisition by MEI of 30% of the shares of MML on the 21st December 2018, through an application for guidance submitted by the merging parties to the Competition Commission.

2.7 The Executive Director of the Competition Commission launched an enquiry into the matter to assess whether the transaction may be reviewable under the Act.

2.8 Among others, Information Requests were issued to competitors to the merging parties, in both the health insurance market and the third-party administration market, to gather information for the calculation of market shares and to generally gather their views on the potential concerns they may have with the proposed transaction.

2.9 Various concerns were expressed and following preliminary analysis, certain competition concerns warranted further assessment. On the 22nd January 2019, the Competition Commission held a meeting with MEI and MML to lay down the potential competition concerns. Both parties expressed that they were willing to resolve the matter through undertakings and as such, the Competition Commission engaged with MEI and MML to discuss potential undertakings.

2.10 On the 6th and 18th February 2019, behavioral undertakings were respectively submitted by MEI and MML to allay the competition concerns identified by the Executive Director. The Executive Director therefore assessed the undertakings and produced a Provisional Report of Undertakings on the 04th April 2019.

2.11 On the 16th April 2019, the merging parties sent their response to the Provisional Report and said that they were "fine with the Report" [Annex Confidential].

2.12 Subsequently, the Executive Director proceeded with producing this Report of Undertaking which is being submitted to the Commission under section 63 of the Act for their determination of the matter.

Background of MEI and MML

MEI

2.13 MEI first started operations in 1974 and is a member of the IBL Group[3]. It operates in all classes of business within the short-term (general) insurance in Mauritius. Its activities consist of claims handling and monitoring, claims recovery, corporate and marine insurance, motor insurance, health insurance and personal lines insurance, reinsurance and international market, and business development[4].

2.14 MEI has business registration number C06002277 and is registered as a public company limited by shares.

2.15 The shareholding structure of MEI is as follows[5]: It is 60% owned by IBL Ltd; Bryte Insurance Company Ltd holds 15% , whilst the rest (25%) is held by public investors. MEI holds 100% of the shares of MEI Investment Property Limited; 20% in H. Savy Insurance Company Ltd and 70% in Specialty Risk Solutions Limited.

2.16 MEI has a fronting arrangement with [✂] (which is an administrator for medical health insurance claims and offers health insurance). [✂] is not itself licenced to conduct health insurance business. As such, the fronting arrangement enables [✂] to use the licence of MEI to offer health insurance products on the market. As per this arrangement, MEI underwrites the policy under the MEI licence and ensures that it is in accordance with FSC's rules and regulations.

2.17 [✂] has developed a healthcare product and they are responsible for its management which includes: (i) product development, enhancement and pricing, (ii) sales and marketing, (iii) membership management, and (iv) claims administration.

[3] Application for guidance to the CCM by merging parties dated the 21st December 2018
[4] Application for guidance to the CCM by merging parties dated the 21st December 2018
[5] Annual Report for MEI-2018

MML

2.18 MML is a wholly-owned subsidiary of Medscheme Holdings (Pty) Ltd which is in turn, wholly owned by AfroCentric Investment Corporation Limited. Both Medscheme Holdings (Pty) Ltd and AfroCentric Investment Corporation Limited are incorporated in South Africa.

2.19 MML has a wholly-owned subsidiary, Xperience Ltd which was incorporated in 2010 and acts as agent for distribution and marketing of insurance products in Mauritius[6].

2.20 MML has business registration number C07003574 and is registered as a private company limited by shares.

2.21 MML is a medical insurance and provident fund administrator and is engaged in the provision of membership management and claims administration of health policies. In that perspective, MML essentially manages healthcare insurance claims and associated processes of local client portfolios, employer medical aids and a number of provident fund associations. MML submitted that the enrolment and management of members is also an important aspect of the services provided by MML[7].

2.22 MML provides administration services and specializes in providing IT software solutions to its clients. MML currently delivers outsourced electronic claims, data capturing and processing services to its clients. The administration services namely include data capturing of in-hospital claims, coding of claims received, data capturing of claims received, and payment of claims[8].

[6] Application for guidance to the CCM by merging parties dated the 21st December 2018
[7] Application for guidance to the CCM by merging parties dated the 21st December 2018
[8] Application for guidance to the CCM by merging parties dated the 21st December 2018

3. The Legal Framework

3.1 This chapter sets out the legal framework against which the Executive Director has assessed the undertakings offered by MEI and MML, in respect of the proposed transaction and the provisions with respect to the review of merger situations under the Act.

3.2 Sub-Part IV of Part III of the Act provides for the 'Control of merger situations by the Commission'.

3.3 In determining whether a transaction may be reviewed in light of the merger control provisions of the Act, the Act poses a three-pronged test which assesses:

a) Whether any transaction has created or is likely to create a merger situation (section 47);

b) Whether the enterprises party to the merger situation meet the applicable statutory market share thresholds (section 48) and;

c) whether the merger situation has resulted in or is likely to result in a substantial lessening of competition (Section 48).

Merger Situation

3.4 The Act defines a merger situation as "the bringing together under common ownership and control of 2 or more enterprises of which one at least carries its activities, in Mauritius, or through a company incorporated in Mauritius."[9]

3.5 From the above definition therefore, a merger situation will arise where the following three elements are satisfied:

(a) at least 2 enterprises (as defined under the Act) are involved;

(b) the enterprises are being brought together under common ownership **and** control; and

(c) territorial nexus with Mauritius wherein at the activity of least one of the enterprises is carried on in Mauritius or through a body corporate.

[9] Section 47(1) of the Act

3.6 Section 2(1) of the Act defines an enterprise as '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'.

3.7 It has to be assessed whether, post-transaction, the enterprises involved are being brought under common ownership and control such that upon completion of the transaction, the enterprises would, directly or indirectly, be under common control and ownership.

3.8 Section 47(2) of the Act stipulates that enterprises shall be regarded as being under common control where they are –

a) enterprises of interconnected bodies corporate;

b) enterprises carried on by 2 or more bodies corporate of which one person has or groups of persons have control; or

c) 2 distinct enterprises, one carried on by a body corporate and the other carried on by a person having control of that body corporate.

3.9 Section 47(3) of the Act further stipulates that any person may be treated as bringing an enterprise under his control where –

a) he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it;

b) being already able to control or materially to influence the policy of the enterprise, he acquires a controlling interest in it; or

c) being already able materially to influence the policy of the enterprise, he becomes able to control that policy.

3.10 Section 47(3) of the Act therefore establishes three situations which will cause an enterprise to become under the control another person:

(i) Where the transaction confers on the acquirer material influence over the business policy of the target enterprise;

(ii) Where the transaction confers the acquirer control over the target or where it increases the material influence already held by the acquirer into control of the target enterprise. This level of control is also known as de facto control;

(iii) Where the transaction confers the acquirer controlling interest over the target or where the transaction increases de facto control or material influence already held by the acquirer in the target into legal control. This level of control is also known as controlling interest.

3.11 From the above provision therefore, it can be inferred that where the transaction confers any change in the level of control from no control to material influence or from material influence to de facto control or from de facto control to legal control, the transaction may qualify for as a merger situation as it is bringing a change in the level of control. Therefore, for the purposes of Section 47(3) of the Act, any change in the quality of control will amount to a merger situation. A person may be treated as bringing an enterprise under his control without the latter without the latter having necessarily a controlling interest in the target.

3.12 In light of the provisions of Section 47 (3) of the Act, CCM Guidelines 5 provide that 'control' is not limited to the acquisition of outright voting control but includes situations falling short of outright control.

3.13 In determining the existence of control, the focus is on whether control is 'capable of being exercised', rather than the actual exercise of such control.

3.14 Material influence is the lowest level of control that may be acquired and relates to the acquirer's ability to influence the target's strategic direction and commercial policies.

3.15 The CCM Guidelines 5 note that assessment of whether material influence exists requires a case-by-case analysis of the entire relationship between the merger parties. All the relevant circumstances and not only the legal effect of any instrument, deed, transfer, assignment or other act need to be considered[10].

[10] CCM Guidelines 5, paragraphs 2.8-2.9.

3.16 The CCM Guidelines 5 note that there are no precise criteria for determining when an acquirer gains "de facto" control of an enterprise's policies. As such, a case-by-case approach needs to be taken in the light of the particular circumstances of the case. De facto control will exist where the acquirer despite not having a shareholding of more than 50% is able to control the target. These may include instances where it is in a position to exercise, or control the exercise of, more than one half the maximum number of votes that can be exercised at a meeting of the company.

3.17 The CCM Guidelines 5 provides guidance as to some of the factors which may be considered, namely: any agreement which allows a party to influence the enterprise's policies relevant to its key strategic commercial behaviour; financial arrangements between the parties which have an effect on competition; circumstances where minority shareholders have additional rights which allow them to veto decisions that are essential for the strategic commercial behaviour of the enterprise[11].

3.18 The last element qualifying a transaction as 'merger situation' is the requirement of a territorial nexus with Mauritius that would attract exercising jurisdiction over the transaction concerned. This requirement is translated by requiring that at least one of the enterprises involved in the transaction carries out its activities in Mauritius, either directly or through a body corporate which has been incorporated in Mauritius. This requirement filters out those transactions which neither have any direct and immediate economic effect within Mauritius nor involve enterprises which do not have any direct or indirect presence in Mauritius.

Reviewability of merger situations

3.19 As specified in Section 48 of the Act, mergers are subject to review by the Competition Commission where:

a) all the parties to the merger, supply or acquire goods or services of any description, and will following the merger, together supply or acquire 30 per cent or more of all those goods or services on the market; or

[11] CCM Guidelines 5, paragraphs 2.12-2.16.

b) one of the parties to the merger alone supplies or acquires prior to the merger, 30 percent or more of goods or services of any description on the market; and

c) the Commission has reasonable grounds to believe that the creation of the merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for goods or services.

3.20 A merger situation will be subject to review in accordance with Section 48 of the Act where the statutory market share thresholds of either the merged enterprise is likely to have a market share of 30% post the transaction or where prior to the transaction, any one of the parties hold a market share of 30% coupled with requirement of the Commission having reasonable grounds to believe that the transaction has resulted or may result in a substantial lessening of competition (SLC) in any market.

3.21 The 30% market share is a threshold for further assessment and does not by itself imply that a merger will lessen competition. Only mergers that substantially, or are likely to substantially, lessen competition will be subject to remedy under the Act. While the Act does not define the terms 'substantial lessening of competition', CCM Guidelines 5 provide that concept of a substantial lessening of competition implies a reduction, a change compared to something else.

3.22 The Competition Commission will normally assess whether a merger situation is likely to lead to a substantial lessening of competition through the following four stages:

(a) Market definition

(b) Counter-factual (what would have happened without the merger)

(c) Assessment of entry constraints

(d) Theory of harm and effects

Market definition

3.23 In order to determine the relevant market shares, the Competition Commission has to conduct a market definition exercise to identify the affected markets of the transaction. This exercise is conducted in accordance with CCM Guidelines on market definition and the calculation of market shares (CCM Guidelines 2). The market definition identifies the set of products, and geographic area

within which competition occurs[12]. This market is determined through the question of what happens when the price of the product changes. The product market is the set of products which are substitutes for the product being examined in any specific investigation'[13].

3.24 Following standard international practice, the Competition Commission will take as its relevant market the narrowest candidate market for which a monopolist of all the products in the candidate market would be able profitably to increase the price of the product being investigated by a small but significant amount (typically 5-10%) over a sustained period[14]. In a review of a merger situation, the '5-10% price increase' will be compared to prices in the absence of the merger[15].

3.25 While the geographic market is usually national, there may be instances where certain goods or services are supplied on a local basis and the market will therefore be narrower in geographic scope. Similarly, the market may also in certain circumstances be regional or even international where barriers to importation are low.

3.26 Once the relevant market has been defined, the next step is to compute the market shares of the enterprises which are parties to the transaction. In establishing whether the 30% market share threshold set out under Section 48 is satisfied, the Act requires that the share of a group (of enterprises) as a whole be used where an enterprise (party to the merger) is either a subsidiary of a group or is otherwise party to agreements by which enterprises are interconnected within a group[16]. For the purpose of assessing market shares, the Competition Commission will measure market share by value (ie Rupees, as opposed to by volume), at delivered cost to the immediate customer for the product under investigation, for the most recent full year for which reliable figures are available[17].

Counterfactual

3.27 The counterfactual is the state that would have prevailed absent the merger. The counterfactual analysis compares the state of competition in the relevant market pre and post the merger transaction or the extent of competition which is lost as a direct result of the merger transaction.

[12] Paragraph 2.1 of CCM Guidelines 2
[13] Paragraph 2.7 of CCM Guidelines 2
[14] Paragraph 2.16 of CCM Guidelines 2
[15] Paragraph 2.20 of CCM Guidelines 2
[16] Section 49 of the Act.
[17] Paragraph 3.2 of CCM Guidelines 2

In most instances the counterfactual would be the same conditions of markets absent the merger. In this respect, the Competition Commission assesses a substantial Lessening of competition 'by considering how competitive the market was/is before the merger, and what is likely to happen after the merger'.[18]

3.28 The CCM Guidelines 5 provide that where the target enterprise is a firm which is failing financially, then the counterfactual is particularly important. The reason being that if the firm is failing and there is certainty that it would have exited the market in the near future, then no competition will be lost by the latter being taken over by even its close competitor[19]. The Competition Commission is therefore more likely to clear a merger which involves a failing firm.

Assessment of entry

3.29 In assessing whether a merger transaction is likely to lead to a substantial lessening of competition, the Competition Commission will consider whether entry into the relevant market is 'entry is sufficiently timely, likely and effective [such] that no long-term damage to competition will result'[20]. In this assessment, the Competition Commission considers what are the barriers to entry and to some extent expansion. Where entry appears to be sufficiently timely, likely and effective, it is then likely that the merged enterprise will be constrained by new entrants. Therefore, if the merged enterprise is able to charge high prices because of the market power that it gains from the transaction, then this high price will automatically make entry into the market attractive. This impending threat of entry will prevent the merged enterprise from abusing of any market power which the transaction confers upon it.

3.30 The Competition Commission considers a timeframe of two years to determine whether entry will be sufficiently timely and likely[21]. The new entrant should also be a viable and effective enterprise which 'must be expected to grow to represent at least as significant a competitor as the enterprise that was eliminated by the merger'[22].

[18] Paragraph 3.16 of CCM Guidelines 5
[19] Paragraph 3.19 of CCM Guidelines 5
[20] Paragraph 3.21 of CCM Guidelines 5
[21] Paragraph 3.22 of CCM Guidelines 5
[22] Paragraph 3.23 of CCM Guidelines 5

Theory of harm and effects

3.31 Merger transactions can broadly be classified into two types: horizontal mergers and non-horizontal mergers. Horizontal mergers are merger transactions between enterprises which are actual or potential competitors operating in the same relevant market. Non-horizontal mergers can further be segregated into vertical mergers and conglomerate mergers. Vertical mergers are mergers which occur between enterprises which operate at different levels of the supply chain – upstream and downstream whereas conglomerate mergers occur between enterprises which are at the same level of the supply chain but supply totally unrelated goods or services.

3.32 In order to assess whether the transaction is leading to a substantial lessening of competition, the Competition Commission will assess the effects of the transaction on the competition. The effects will differ according to the nature of the merger transaction.

3.33 The first theory of harm resulting from a horizontal merger are the unilateral effects of the merger transaction, that is the merger creates a supplier with sufficient monopoly power that it faces weaker competitive constraints than before the merger[23]. The removal of a competitor through which the merger allows the merged enterprise to profitably increase prices or adjust output without effective competitive constraints from its rivals. In assessing the likelihood of the transaction giving rise to unilateral effects, the Competition Commission will consider inter alia the market characteristics, the level of market concentration, the number of players in the market, existence of customer loyalty, countervailing buyer power and the expected reaction of competitors to the exercise of market power by the merged enterprise.

3.34 Horizontal mergers may also result in coordinated effects by making the market more transparent and reducing 'the intensity of rivalry between the remaining suppliers in the market'[24]. Horizontal mergers, by reducing the number of suppliers in the market, might make it easier to monitor compliance, or make it more profitable for the remaining enterprises to co-ordinate[25].

3.35 The main theory of harm associated with vertical and conglomerate mergers is foreclosure. A vertical or conglomerate merger might create a market structure in which such foreclosure is likely,

[23] Paragraph 3.27 of CCM Guidelines 5
[24] Paragraph 3.39 of CCM Guidelines 5
[25] Paragraph 3.41 of CCM Guidelines 5

where it was not before. For example, by controlling downstream resellers, an upstream enterprise might be able to deny access to the market for its rivals and eliminate competition. In a conglomerate merger, the merged enterprise might 'bundle' together two products so that customers must (or face a considerable advantage) if they buy both at the same time. If one of these products is a monopoly and the other faces competition and has scale economies, this can result in 'leverage' of monopoly power to eliminate rivals in another market. If it expects a merger to create a profitable opportunity for anti-competitive foreclosure, the Commission will reach a substantial lessening finding[26].

Remedies

3.36 Section 61 of the Act deals with potential remedies that may be adopted in merger control and is as below:

> Where the Commission determines, after investigation that –
>
> (a) an enterprise is a party to a merger situation; and
>
> (b) the creation of the merger situation has resulted, or is likely to result, in a substantial lessening of competition within a market for goods or services, the Commission may give the enterprise such directions as it considers necessary, reasonable and practicable to –
>
> (i) remedy, mitigate or prevent the substantial lessening of competition; and
>
> (ii) remedy, mitigate or prevent any adverse effects that have resulted from, or are likely to result from, the substantial lessening of competition.

3.37 The Act further states that *inter alia* where the review of a merger situation leads to a finding by the Commission that there are adverse effects for competition, it shall, before deciding on any appropriate remedial action to be taken (as provided for under Part IV of the Act) consider (i) whether there are any offsetting public benefits (provided for under Section 50(4) of the Act);and (ii) whether and to what extent those benefits, if present, should be taken into account when determining the appropriate remedial action to be taken.

[26] Paragraph 3.49 of CCM Guidelines 5

Undertakings

3.38 Section 63 of the Act provides enterprises with the opportunity to offer the CCM undertakings and stipulates that:

(1) An enterprise may offer a written undertaking to the Commission to address any concern that has arisen, or is likely to arise, during an investigation in respect of a restrictive agreement subject to investigation, a monopoly situation or a merger situation.

(2) The undertaking may be offered before the start of the investigation or at any stage during the investigation.

(3) The Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction distortion or substantial lessening of competition.

(4) An undertaking accepted by the Commission shall be published by the Commission in the form of a decision of the Commission.

(5) An undertaking accepted by the Commission shall have effect as if it were a direction under section 60.

3.39 Based on the above provisions of the Act, a merger assessment would entail the following main steps:

(a) Determining whether the said transaction qualifies for a merger situation as provided under section 47 of the Act (The Merger Situation);

(b) Determine whether the parties to the merger situation have or would have more than 30% of the market shares (Market Shares); and

(c) Determine whether the merger situation may lead to substantial lessening of competition (Substantial Lessening of Competition).

4. Competitive Assessment

4.1 This report assesses the undertakings offered by MEI and MML. The undertakings are in turn assessed in relation to the competition concerns of the Competition Commission, which are set in this Chapter. No conclusion is drawn on whether the concerns will result in substantial lessening of competition.

4.2 For the purpose of setting the competition concerns of the Competition Commission, this Chapter assesses whether the proposed transaction may amount to a merger situation, whether the market share thresholds as set under the Act are likely to be met and then in these contexts the competition concerns of the Competition Commission are set.

Existence of merger situation

4.3 Section 2 of the Act defines a 'merger situation' as the 'bringing together under common ownership and control of two or more enterprises of which one at least carries its activities, in Mauritius, or through a company incorporated in Mauritius.'

4.4 MEI, as stated earlier, is licensed by the Financial Services Commission to provide inter alia general insurance business in Mauritius. MEI is a public company incorporated in Mauritius in 1973. Listed on the Official Market of the Stock Exchange of Mauritius it is 'engaged in short term insurance business comprising Accident, Health, Engineering, Property, Motor and Transportation insurance'[27]. MEI provides its insurance products/services in exchange of a premium or a fee. As such, MEI is an enterprise within the meaning of the Act in that it is engaged in commercial activities for gains or rewards.

4.5 MML is a private company incorporated in Mauritius which offers its services for gain or reward. MML offers on the market the service of the administration and management of medical schemes or health insurance, for a fee. As such, MML is engaged in commercial activities for gains or rewards and qualifies as an enterprise within the meaning of the Act.

4.6 Through the proposed transaction, MEI will acquire 30% shareholding in MML. By acquiring 30% of the shares of MML, MEI will acquire 30% ownership in MML. This acquisition will allow MEI to

[27] MEI Annual Report 2018

exercise at least material influence over the policy of MML. Section 47(3) of the Act provides that when a person acquires material influence in an enterprise, that person may be bringing the enterprise under his control[28]. CCM Guidelines 5 further provide that the existence of control is determined by whether material influence is capable of being exercised, rather than the actual exercise of such influence[29].

4.7 MEI has informed the Competition Commission that this shareholding will allow MEI to appoint directors on the Board of MML. From the Share Subscription Agreement submitted by the parties, it can be read that MEI will have right to appoint **[✂]**[Confidential] of MML. This will confer upon MEI material influence over the policy of MML as those directors will participate in policy decisions of MML.

4.8 It can thus be concluded that the proposed transaction will enable MEI to acquire ownership and control (material influence) over MML; resulting in MEI and MML to be under common control of MEI.

4.9 For a merger situation to be reviewable under the Act, the parties to the merger situation must have a market share of 30% or above either individually or jointly after the said merger. For the purpose of establishing the market shares, the relevant market in which competition occurs must be defined, which is assessed in the next section.

Market Definition and Market Shares

4.10 The relevant market is the set of products within a defined geographical area in which competition occurs. It is the narrowest candidate market for which a monopolist of all the products in the candidate market would be able to profitably increase the price of the product being investigated by a small but significant amount (typically 5-10%) over a sustained period[30]. This concept will be applied to the potential markets in which the acquirer and the target operate.

4.11 Market assessment is done on demand-side and supply-side perspective, termed as demand-side substitution and supply-side substitution respectively with regards to mainly the product dimension

[28] Section 47(3) provides that: *'Any person may be treated as bringing an enterprise under his control where - (a) he becomes able to control or materially to influence the policy of the enterprise, but without having a controlling interest in it; …'*
[29] Paragraph 2.8
[30] CCM Guidelines on market definition and the calculation of market shares

(products which are in the market) and geographic dimension (geographical area within which competition occurs) of the market.

4.12 MEI supplies various general insurance products on the market. MEI did not supply health insurance products up until August 2018. In August 2018, MEI launched CarePlus, through its collaboration with MML. MEI can be considered to be therefore a new entrant in the health insurance market. CarePlus is offered to buyer groups such as corporate clients and individuals. MEI also offers fronting services to [✂], which is an input used by [✂] to offer health insurance products on the market. MEI also supplies other insurance products like motor insurance, marine insurance and so on.

4.13 MML is a third-party administrator, and essentially administers and manages healthcare insurance claims and associated processes of local client portfolios, employer medical aids and a number of provident associations. MML is present in the market for the supply of health insurance to a limited extent, through Xperience Ltd.

4.14 The products of MEI and MML which can relate to each other are the health insurance products of MEI, fronting services of MEI, the administration and management of health insurance and medical schemes services (third-party administration) by MML and the health insurance products offered by MML (through Xperience Ltd). As such, the market assessment will be in relation to health insurance, fronting services and third-party administration services, which will be the focal products.

Product Market

4.15 Demand-side substitution assesses to what extent consumers will shift to other products and/or services should a price increase of 5-10% be applied to the focal product. The assessment of demand-side substitutability will focus on the following: a) whether health insurance competes with other insurance products, b) whether health insurance cover for individuals competes with health insurance cover for corporates, c) whether health insurance and third-party administration services can be part of the same market.

4.16 The Competition Commission has assessed if from a demand-side perspective, health insurance products could be considered to be a separate product market, or if they could be included in the same product market as the other types of insurance products.

4.17 Health insurance products are offered to clients who wish to be covered for their medical expenses upon the occurrence of certain health events. Other insurance products typically cover for other risks than health occurrences. As such, the clients will not be able to substitute between different insurance products, for e.g. motor insurance or life insurance for the expenses linked to medical treatments. The very characteristics and purposes served by the different insurance products seem to vary.

4.18 Not all insurers licensed to conduct general insurance business provide health insurance which may indicate that health insurance is a separate market from the supply perspective. The Competition Commission gathered that for a general insurance company to start providing health insurance will involve significant costs (information gathered in INV036). The nature of risk for health insurance, the claim process and expertise required are distinct as compared to other types of insurance. As such, it may not be easy to substitute from other general insurance businesses to health insurance. Supply side substitution for those presently offering health insurance may be easier.

4.19 Therefore, it appears that non-health general insurance is unlikely to form part of the same market as health insurance.

4.20 Most health insurers offer health insurance to both individuals and corporate clients. For individuals, the insured or policy holder directly subscribes to the insurance policy. Corporate clients are mainly employers who subscribe to health insurance policies for the benefit of their employees.

4.21 For the purpose of this investigation, corporate clients are mainly but not necessarily solely employers who purchase health insurance policies, directly or indirectly, for their employees and the latter's dependents. It is understood that health insurance companies have a larger proportion of premium from corporate clients than individuals (estimated ratio of 80:20) (information gathered from INV036). Corporate customers usually use the services of brokers before selecting a health insurance company. In some instances, brokers could advise corporate customer groups on whether to select a health insurance company or a provident association for the health insurance needs of employees.

4.22 From a demand-side perspective, the Competition Commission is of the view that corporate customers and individuals can consist of two separate markets. Given the larger number of beneficiaries represented by corporate customers, they may be in a better position to negotiate with health insurance companies, with regards to price of the premiums and the scope of benefits for which they are covered. The risk with corporate client is different from that of individuals.

4.23 Insured under corporate plans (also known as group health insurance), usually pay only part of the insurance premium while the employer pays the rest. If individually, the insured (under a corporate plan) were to shift to an alternate supplier, he will have to incur significant costs and thus, it is unlikely that substitution as an individual will be an alternative to the insured under corporate plans. Individuals not currently employed by an employer offering a corporate plan cannot substitute from an individual plan for health insurance to a corporate plan for health insurance as corporate plans are restricted to employees.

4.24 Furthermore, the process of procuring health insurance by corporate clients as compared to individuals, also varies. Usually corporate clients use a tendering exercise through a broker, which is unlikely to be applicable to individuals.

4.25 Efficacy of supply side substitution is arguable. It appears that some insurers may be more prone to offer health insurance policies to corporate clients rather than to individuals. Further, access to brokers may affect the efficacy of supply side substitution. However, the degree of substitution from supply side may be higher as compared to substitution from the demand side perspective.

4.26 Another dimension of the health insurance market is the provision of medical schemes through provident associations. That is, instead of contracting a corporate insurance plan some employers establish a provident association which caters for the health insurance of employees. This dimension of competition, which is mainly for corporates, further demarcates market for corporate clients and those for individuals.

4.27 Thus, it appears that the dynamics of competition for health insurance to corporate clients as compared to that of individuals may vary. As such, the health insurance market can be segregated into sub-markets for health insurance provided to corporate clients and those provided to individuals.

4.28 As mentioned earlier, employers (or other groups) willing to offer health insurance to their employees or members can set up a provident fund, in which premiums are credited and from which payments of claims are effected, commonly known as provident funds or medical scheme, which are usually but not always set up under the form of a provident association. For the purposes of simplicity, such provident funds or medical schemes set by group corporates are referred to as provident associations in this report.

4.29 The Competition Commission gathered that most medical provident fund schemes in Mauritius are closed schemes (information gathered in INV036). That is, most medical provident fund associations will cater for the past and current employees and their dependents' health insurance needs and are restricted to employees/or pensioners of the companies only.

4.30 The Business Mauritius Provident Association (BMPA), previously known as MEFPA is open to employers which form part of the former Mauritian Employers Federation, now known as Business Mauritius. The BMPA seems to be the largest provident fund association, in terms of the number of members/beneficiaries enrolled.

4.31 Employers willing to provide to its employees with a health insurance coverage, have two main options; namely to subscribe to a corporate insurance plan from an insurance company, or to set up a provident association, either directly or through the BMPA.

4.32 Therefore, the Competition Commission needs to assess the extent to which these two options are substitutable. The Competition Commission has gathered that in the event of a 5-10% in the price of corporate insurance plans, some clients would consider shifting to provident associations. Some corporate clients indicated that it would not be feasible for them to set up their own provident association given the number of employees does not suffice to open such associations; nevertheless, out of these, some have indicated that they may consider joining the BMPA[31].

4.33 Most corporate clients using a provident association to cater for the health insurance needs of its employees have indicated that they use third-party administrators for the administration and management of the medical scheme. Third-party administration seems to be an important element for corporate clients in deciding the option to set a provident association. Most of the corporate

[31] Information gathered in INV036

clients are of the view that they do not have the expertise to administer and manage the provident association on their own. Further, it has been raised that for confidentiality issues several corporate clients prefer to use third party administrators – they do not want employees to have access to medical record of other employees[32].

4.34 It therefore appears that for corporate clients considering setting up their provident association, access to third-party administration is important and an integral part of the option.

4.35 The Competition Commission has gathered that several corporate clients and insurance brokers consider health insurance providers and MML to be competitors.

4.36 Therefore, it appears that there exists an extent of competition between corporate health insurance and provident association coupled with third party administration services.

4.37 It is to be noted that currently MEI offers fronting services to [✂]. It appears that there is no other provider of such service and as such, it is likely to consist of a market in itself. MEI has submitted that any insurance company having a licence to conduct general insurance business can offer such fronting services. It does not appear feasible for the user of such service to, as a substitute, secure their own licence for general business as the very concept of fronting is to avoid the high licence fee.

4.38 Given that such fronting service is provided by MEI, it is arguable to what extent MEI will have control over the health policy being devised by [✂]. It appears that it has certain influence at least.

4.39 Third- party administrators provide their services mainly to two broad categories of clients, namely provident associations and insurance companies. The Competition Commission is of the view that third-party administration services can be considered as a market on its own but does compete, directly or indirectly, with insurance products also.

4.40 It seems reasonable to consider the geographical scope of the various identified markets to be Mauritius.

Relevant markets

[32] Information gathered in INV036

4.41 Based on the above assessment there may be two dimensions in which the affected markets can be considered:

(a) A single market for the supply of corporate health insurance through insurance companies and medical schemes through provident associations, of which third-party administration is an integral part;

(b) separate market for the supply of health insurance (which can be further split into corporate and individual health plans) and a separate market for the supply of third-party administration services.

4.42 Fronting service is likely to consist of a separate market in itself.

4.43 It is to be noted that the market definition is not conclusive and is intended to set the framework for the assessment of the competition concerns.

Market Shares

4.44 Market share figures for markets under various scenarios have been calculated based on information submitted by merging parties, and auxiliary parties.

4.45 It is to be noted that irrespective of the market definition adopted, MEI does not meet the market share threshold set under the Act on its own. The table below indicates market share of various players on the market under the assumption that health insurance as provided by insurers is distinct. The market share of MEI is estimated to be about **[✂%] [confidential]** in such scenario. If we add the insurance policy fronted by MEI, then its market share would be about **[✂%] [confidential].**

4.46 It is to be noted that MML was offering a health insurance product on the market through the company Xperience Ltd, the risk of which was however be underwritten by insurance companies providing health insurance. However, we understand that its market share is not significant (about **[✂%]**).

Health insurance (including fronting)	Number of lives insured for the year 2016	Number of lives insured for the year 2017	Number of lives insured for the year 2018	Market share for year 2018 (%)
Mauritius Union	[✂]	[✂]	[✂]	[✂%]
Swan General Ltd	[✂]	[✂]	[✂]	[✂%]
NIC	[✂]	[✂]	[✂]	[✂%]
SICOM	[✂]	[✂]	[✂]	[✂%]
MEI	[✂]	[✂]	[✂]	[✂%]
MEI-fronting arrangement with [✂]	[✂]	[✂]	[✂]	[✂%]
Total	[✂]	[✂]	[✂]	100%

Table 1. Market shares for health insurance (Source: parties' submission) ***[Confidential]***

4.47 In such a scenario, the market for third party administration service must be considered to be separate. As shown in the table below, in this scenario, the market share of MML for supply of third-party administration services is likely to be above [✂]%. As such, in this scenario if we consider health insurance and third-party administration to be separate markets, the market share threshold as set under the Act is likely to be met in that MML will have more than 30% of market share for the supply of third-party administration services in Mauritius.

4.48 It is to be noted that if health insurance and provident associations are considered to be part of the same market and that third-party administration a separate market, then MML will have above [✂]% in the market for the supply of third-party administration (refer to table below) and MEI will have about [✂] **%** of the market for health insurance and medical scheme.

Third-party administrators (TPAs)	Market share for year 2016	Market share for year 2017	Market share for the year 2018
Swan General Ltd[33]	[✂%]	[✂%]	[✂%]
MML	[✂%]	[✂%]	[✂%]
Linkham Services Ltd	[✂%]	[✂%]	[✂%]

Table 2. Market shares for third-party administrators (Source: data submitted by TPAs) ***[Confidential]***

4.49 An alternative scenario would be that the market is broader and encompasses health insurance and medical schemes of provident associations together with third-party administrators. Table 3 below shows the market share figures if the market includes health insurance companies (including fronting agreement with **[✂]**) and third-party administrators (representing medical schemes administered by them). In this market, MML has an estimated market share of **[✂%][Confidential]** and MEI had a market share of approximately **[✂%][Confidential]** (factoring sales through **[✂]**), for the year 2018. Their combined market share will be approximately 30%.

[33] **[✂]**.

Company	Number of lives insured 2016	Number of lives insured 2017	Number of lives insured 2018	Market share for year 2018 (%)
Mauritius Union	[✂]	[✂]	[✂]	[✂%]
Swan General Ltd	[✂]	[✂]	[✂]	[✂%]
NIC	[✂]	[✂]	[✂]	[✂%]
SICOM	[✂]	[✂]	[✂]	[✂%]
MEI	[✂]	[✂]	[✂]	[✂%]
MEI-fronting	[✂]	[✂]	[✂]	[✂%]
MML	[✂]	[✂]	[✂]	[✂%]
Linkham Services Ltd	[✂]	[✂]	[✂]	[✂%]
Swan General Insurance-TPA	[✂]	[✂]	[✂]	[✂%]
Total	[✂]	[✂]	[✂]	100%

Table 3. Market shares for Corporate health insurance and TPAs and Provident associations (Source: parties' submission)
[Confidential]

4.50 As such, irrespective of whether we consider the market for the supply of third-party administration services and that of health insurance to be same or separate markets, the market share threshold is likely to be met.

Competition Concerns

4.51 MML has informed the Competition Commission that to continue to operate on the market, it needs to tie up with a health insurance company. Therefore, as counterfactual it is arguable to what extent the market would have remained the same, or would have seen the exit of MML. For the purpose of this assessment, it is assumed that the market would have remained same as absent the transaction.

4.52 As mentioned above, if the market is considered to be broad, MML and MEI will form part of the same market and would thus be competitors. However, it is noted that in such a scenario, the market share of MEI is not high and the combined market share of MML and MEI is slightly above 30%. It is further noted that the initiative for MEI to launch its health insurance product is tagged

along to an appreciable extent with the proposed transaction. As such, competition concerns, if any, were unlikely to be very serious that would have warranted structural remedies.

4.53 On the vertical dimension, that is, if the markets are considered separate, then MML would have an important market share on the market for third-party administration and would be an input service provider for provident associations, the distortion of which can hinder competition on the market for health insurance and medical scheme. If it is considered that there is a single market for health insurance by insurance providers and medical schemes by provident association, and a separate market for third-party administration, then the transaction can raise certain competition concerns in that the acquirer may have an incentive to leverage its market power.

4.54 During the assessment, the Competition Commission has sought the views of different stakeholders. Several parties have expressed certain concerns with respect to the proposed transaction. However, not all concerns seem reasonable within the framework explained above. Each of those concerns are briefly assessed below, to see whether they amount to competition concerns. The possible competition concerns are then elaborated.

4.55 Below is a summary of the concerns expressed by competitors to the merging parties and auxiliary parties:

4.56 **[✂][Confidential]** submitted the following views (**[Confidential Annex]**):

(a) Concerns that there is the risk of unauthorized access to confidential information of clients of MML (scope of coverage, premium and claims experience).

(b) There could be a risk of distortion of the tender exercises relating to catastrophe cover: given the fact that MEI could be a significant shareholder of MML, the likeliness of MEI having inside information on the prices being quoted by its competitors is high. This could lead to a conflict of interest.

(c) MML should take a firm undertaking to, in future, not carry out any tender exercises and leave such exercise to independent insurance brokers which is the best and more transparent practice.

(d) Third-party administrators should be independent and not have as shareholders, insurance companies directly or indirectly involved in health insurance business.

(e) Potential exclusion of MEI's competitors from benefiting insurance business linked to Xperience Ltd.

(f) It was argued that [✂] could be in a "quasi-monopoly situation" following the cessation of activities of Metropolitan Health Mauritius and given the likeliness of MML ceasing to appeal to insurance providers following the proposed transaction.

4.57 In relation to concern (a) above, the Executive Director is of the view that the concern with respect to MEI having access to sensitive data held by MML with respect to its clients and its consequent use to the detriment of competition can be of concern. This is dealt in detail at a later stage.

4.58 The concern that post-transaction, MML may divert the catastrophe cover of its clients to MEI does not appear to stand. First, MML does not have any shareholding in MEI, and as such, will not have any financial incentive to divert catastrophe cover to MEI, as it will not have a share of the revenue or profit resulting from that diversion. Second, the shareholding of MEI in MML although giving MEI material influence over the policy of MML is unlike to give MEI de-facto control over that policy. As such, it will not have the ability to take a decision which is not beneficial to the majority shareholders of MML. Further, MEI and MML will remain two distinct companies within the meaning of the Act. The Competition Commission has further gathered that it is the client who decides on the catastrophe cover and as such, MML will not have the ability to unduly divert such covers to MEI. Thus concerns (b) and (c) are unlikely to arise as a result of the proposed transaction.

4.59 The Competition Commission understands that a limited number of health insurers outsource the administration of their policies to third-party administrators. Most of the insurance companies have their own in-house capabilities for administration of their health policies. Further, MEI and MML will remain two distinct companies and will continue to operate as two distinct enterprises within the meaning of the Act. Nonetheless, if MEI is able to have access to sensitive information of insurance companies having outsourced the administration of such policies to MML, then it may raise certain concerns which are addressed at a later stage. As such, concerns (d) and (f) are unlikely to arise, except in so far that it concerns access to data held by MML. It is to be further noted that

administration of health insurance policies of insurance companies represents about [✂%][**confidential]** of the portfolio of MML over the last 3 years.

4.60 With respect to the health insurance product of MML, 'Xperience', that is concern (e) the Executive Director believes that this concern is not substantial as the number of lives covered for 'Xperience' are not significant, based on information provided by MML[34]. They represent about [✂]% of the market for health insurance. Further, the parties have informed that following the proposed transaction Xperience Ltd will cease to operate and its business will be transferred to MML. However, given the small market shares of both MML and Xperience, it is unlikely to raise any competition concerns. As such, this concern is unlikely to be substantial to be considered as a competition concern.

4.61 **[✂] [Confidential]** expressed the following concerns (**Confidential Annex**):

(a) *"the proposed merger could create a misbalance in the insurance market, with potentially preferential rates for Medscheme-MEI customers, that other insurers will hardly be able to match, thus putting a hefty burden on insurers who are already striving in a highly competitive market".*

(b) Concerns on the potential economies of scale that MEI could benefit with service providers following the proposed transaction.

(c) The risk that the database of Medscheme, as a third-party administrator could be used as a commercial tool to grow the portfolio of MEI.

4.62 The Executive Director does not believe that the proposed transaction will increase the market power of the merged entity in the buying side. As shown in the previous sections on the market shares, MEI does not have a significant market share in the supply of health insurance, and thus in the acquisition of health services. Further, benefiting from lower price as a result of size and passing same to consumers is unlikely to result in competition concerns. It is to be noted that MEI is a new entrant in the market for health insurance. It is likely that its entrance and association with MEI will create a new competition dynamic on the health insurance market and pose as a new competitor.

[34] Response from MML dated the 16th January 2019

4.63 The concern in relation to access to data held by MML is discussed at a later stage.

4.64 **[✂] [Confidential]** submitted as follows (**Confidential Annex**):

(a) Concerns that following the proposed transaction, the selection of health insurance provider and of alternative plans available for the customer may become restricted on the market[35].

4.65 It should be noted that MEI has recently entered the market and its entry is to an appreciable extent linked with the proposed transaction, in that it forms part of same strategy. As compared to a counterfactual, that is absent entry of MEI, the entry of MEI will increase choice rather than decrease choice. There will be a new health insurance provider on the market. Now, comparing as counterfactual as being post entry of MEI, it may be argued that with the proposed transaction choice may be limited between corporate health insurance and provident associations. However, as mentioned the entry of MEI is to an appreciable extent tagged with the proposed transaction, and as such, its entry coupled with the proposed transaction would mean an additional choice. Further, post-transaction MEI and MML will remain two distinct companies, and in so far, the issue of access to information is addressed, they will remain accessible to users in the market. Thus, this concern does not appear to arise and more so if the issue of access to database is addressed.

4.66 **[✂] [Confidential]** submitted the following views[36](**Confidential Annex**):

(a) That although the current proposal of 30% participation by MEI in the shareholding of MML will not substantially lessen competition in the health insurance market in the short to medium term, the fact that MEI is part of the IBL group which accounts for 25,750 employees and consequently, 75,750 lives, the merger would "eventually facilitate the growth of MEI portfolio and directly impact the market".

(b) That the Competition Commission should ensure that in the long term, the participation of MEI in the shareholding structure of MML does not substantially increase as it may affect the independence of MML.

(c) Concerns in relation to access to data of clients of MML.

[35] Response dated the 15th January 2019
[36] Response dated the 23rd January 2019

(d) That should the proposed transaction be approved by the Competition Commission, MML should give written undertakings whereby the shareholding of MEI will not give the latter any competitive advantage.

4.67 That MEI is part of the IBL Group is not related to the proposed transaction. Even in the absence of the proposed transaction and in the event that MEI was to offer health insurance, it would have been part of IBL Group. Therefore, the incentive for IBL Group to divert medical scheme of its employees is not directly related to the proposed transaction. On a side note, the Executive Director understands that the IBL Group has its own provident association through which it caters for the medical scheme of its employees. The administration and management of claims under this provident association is conferred to MML through another insurance company.

4.68 The second issue, that is, of MEI raising its shareholding in MML, the Executive Director submits that if the level of control changes, it will be considered as another merger situation and be subject to the review of the Competition Commission.

4.69 The third issue raised seems to be linked with access to data held by MML which is addressed at a later stage.

4.70 **[✂] [Confidential]**, expressed the following concerns (**Confidential Annex**):

(a) Concerns that post-merger, MEI will be in control of all data and information, held by MML in relation to its clients.

4.71 This concern is addressed in this report at a later stage.

4.72 **[✂] [Confidential]** submitted the following views (**Confidential Annex**):

(a) It is not against this merger; the merger will be an opportunity to segregate the insurance market. Consumers will have a variety of choices regarding their insurance policies.

4.73 The Executive Director takes note of this view expressed.

The Competition Concerns

4.74 Following assessment and taking into account the views expressed by different parties, the Executive Director is of the view that there may exist two competition concerns with respect to the proposed transaction.

4.75 MML administers the health insurance plans of important players on the market and as such, holds commercially sensitive information on those clients. If MEI has access to such data held by MML on its clients, the Executive Director believes that this can hinder competition on several dimensions.

4.76 It is to be noted that markets for health insurance and third-party administration are both highly concentrated. As per the OFT Guidelines[37], if the HHI[38] post-merger exceeds 2,000, this indicates that the market is highly concentrated.

4.77 The HHI for the market for the supply of health insurance to corporate clients is estimated to be above 3,000. The HHI for the market of third-party administration in turn is above 4,500. Both markets are highly concentrated.

Access to data held by MML

4.78 As mentioned earlier, we may consider corporate health insurance and provident associations to be within a market in that corporate clients may consider them as two alternatives. As such, provident associations impose an appreciable degree of competitive pressure on the market. In the event that corporate plans are not attractive, certain employers can set their own provident association or join one (that of BMPA for instance). This possibility creates contestability of the market in relation to corporate health plans.

4.79 However, provident associations consider the service of third-party administration to be an important dimension of their service, without which their feasibility will be questionable.

4.80 The Executive Director was concerned that following the transaction if MEI has access to data on provident associations and insurance policies administered by MML, it may use that information to leverage its market power. For instance, it can tailor make products taking into account the features of the existing plan. In the absence of such access and in the event that MEI want to attract a

[37] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf
[38] The Herfindahl-Hirschman Index (HHI) is a measure of concentration obtained by adding the square of market shares of each and all players

corporate client it will have to make a competitive offer better than the existing plan. But knowing the existing plan, it will be able to tailor that offer slightly better than the existing plan. Further, this will be to the detriment of other insurance companies not having such access and may also lessen competition between MEI and other insurance companies in that aspect.

4.81 BMPA is a provident association open to corporate clients. Substitutability between a corporate health plan and the scheme of BMPA is likely to be higher as compared to a scenario where the corporate client needs to set up its own provident association and BMPA is administered by MML. As such, access to data of such a client in particular can distort competition.

4.82 MML also administers the health policies of other general health insurance companies. MEI having access to such data may lessen competition between those companies and provide MEI an edge. It may also result in higher market transparency and consequently into concerns of coordinated effects (price alignments).

4.83 In view of the above, the Executive Director was concerned that MEI's access to data held by MML on its clients this may distort competition. However, no conclusion is made as to whether the competition concerns amount to significant lessening of competition within the meaning of the Act.

Fronting services

4.84 The second concern relates to the fact that [✂], as provider of third-party administration services, is a competitor to MML in relation to third-party administration. Given the recent entry of MEI in the market for the supply of health insurance, [✂], which offers health insurance on the market, is also a competitor to MEI in this market. As per the current arrangement, MEI provides fronting services to [✂], which is essential for the latter to provide health insurance services on the market.

4.85 The Executive Director was concerned that the proposed transaction might potentially create an incentive for MEI to foreclose [✂] from the market. It is to be highlighted that [✂] did not itself express this concern in its response to the information request of the Competition Commission.

4.86 It can be argued that in the event that [✂] is foreclosed from the market, its clients in relation to health insurance may divert to a significant extent to MEI as it was underwriting those policies and that a significant proportion of its third-party administration services is diverted to MML. The extent

to which such move is profitable has not been assessed given the undertakings and as such, the concern is not conclusive.

4.87 During a meeting held with MEI and MML on the 22nd January 2019, representatives of the merging parties were informed of the potential concerns of the Competition Commission. The parties volunteered to submit undertakings to address those concerns.

4.88 The next section describes the undertakings proposed by MEI and MML and assesses their efficacy in addressing the potential concerns of the Executive Director, in respect of the proposed transaction.

5. Assessment of Undertakings

5.1 On the 6th and 18th February 2019, MEI and MML respectively offered the Competition Commission their undertakings (Annexes 2 and 3).

Undertakings

Undertakings offered by MEI

5.2 The main undertakings provided by MEI are listed below:

Ring fencing of MML data

5.3 MEI undertakes that it will not directly or indirectly access data held by MML, other than data of MEI schemes managed by MML, on any individual client of MML neither in individual or consolidated format. In particular, MEI shall ensure that:

a. Directors appointed by MEI on Board of Directors of MML shall be informed of such undertaking in writing; the Directors also undertake not to request any such data.

b. MEI employees will not have access to MML data, and any such data will be kept at MML premises only;

c. IT systems and databases will be hosted independently of each other under the responsibility of distinct Systems Administrators. No access to MML database will be given to MEI.

Fronting services to [✂]

5.4 No alteration would be made to the fronting service offered to [✂] as a result of the proposed transaction. MEI will continue to offer on a fair, reasonable and non-discriminatory basis its fronting services to [✂] and in accordance to the existing 'Assistance and Service' agreement between[✂] and MEI.

Continue to be distinct enterprises

5.5 MEI is conscious that following the proposed transaction, MEI and MML will continue to remain distinct enterprises within the meaning of the Act and shall continue to operate as distinct enterprises.

Reporting

5.6 Within 3 months from the completion of the proposed transaction, MEI will submit a report to the CCM detailing how this undertaking has been implemented.

Undertakings of MML

Ring fencing of MML client data

5.7 MML undertakes that it will not directly or indirectly provide access to data held on any individual client (medical scheme) of MML neither in individual (per life) or consolidated (for all lives insured under a specific client's scheme) format to MEI. In particular, MML shall ensure that:

a. MML is conscious that MEI has undertaken that it shall ensure that directors appointed by MEI on the Board of MML shall not have access to data on individual clients of MML. MML will ensure that such information is not disseminated to director appointed by MEI on board of MML.

The board of MML will inform the directors of MEI of this commitment and that they will have the duty to ensure this ring fencing of data.

b. MML will not give access to data held by MML to employees of MEI.

c. MEI scheme will be managed under a different scheme with independent rules.

5.8 These undertakings will be communicated to all employees of MML and any third party dealing with data held by MML.

Continue to be distinct enterprises

5.9 MML is conscious that following the proposed transaction, MML will submit a report to the Competition Commission detailing how this undertaking has been implemented.

Reporting

5.10 Within 3 months from the completion of the proposed transaction, MML will submit a report to the Competition Commission detailing how this undertaking has been implemented.

Assessment of Undertakings

5.11 Section 63 of the Act provides that the Commission may, after having taken cognizance of the report of the Executive Director on the matter, determine a case on the basis of an undertaking if it considers that the undertaking satisfactorily addresses all the concerns it has about any prevention, restriction, distortion or substantial lessening of competition. This section assesses whether the undertakings submitted by MEI and MML address effectively the concerns expressed by the Executive Director.

5.12 The two competition concerns were that:

(a) MEI may have access to data held by MML on its clients and this may consequently hinder competition on the market; and

(b) MEI may have an incentive to foreclose access of [✂] to its fronting services.

5.13 It is to be noted that the transaction gives MEI material influence over the policy of MML but not controlling interest or de-facto control. The majority shareholder of MML will remain non-MEI. Therefore, MEI and MML will remain two distinct companies.

5.14 The Act provides that when determining the remedy to be imposed in relation to a merger review, the benefits that the merger situation may bring must be considered. In this particular case, as stated earlier, MML has provided that it needs to associate itself with a health insurance provider for purpose of continuity. As such, it can be argued that this transaction will ensure that the services of MML remains available over the long term, and also that provident associations continue to exist on the market.

5.15 Further, the entry of MEI and its association with MML may foster competition in the health insurance market. As mentioned earlier, the health insurance market is rather concentrated. With the entry of new products offered by MEI, administered by MML the market may see itself with innovative and attractive health policies. This can trigger dynamic competition, bringing new products on the market. Further, with the entry of a new player, the market structure will be altered, reducing concentration to the benefit of competition.

5.16 Thus, although there may exist certain competition concerns, the merger situation is also likely to bring benefits to competition and consumers. As such, and taking into account that post-

transaction, MEI and MML will remain two distinct enterprises, the Executive Director is of the view that behavioural undertakings in so far that they address the competition concerns of the review would suffice.

Access to data held by MEI

5.17 Section 3(i) of the undertakings proposed by MEI and MML have sought to address the concern the Competition Commission had with respect to lessening of competition on the market as a result of MEI acceding and using data held by MML on its clients. The parties have proposed to ring fence the data of MML, such that:

a. MEI will not directly or indirectly access data held by MML, other than data of MEI schemes managed by MML, on any individual client of MML neither in individual or consolidated format.

b. MML will ensure that information on individual clients of MML are not disseminated to directors appointed by MEI on board of MML. Directors appointed by MEI on board of MML will be informed of this duty that they have in writing and the Directors undertake not to request any such data.

c. IT systems and databases will be hosted independently of each other such that no access to MML database will be given to MEI.

5.18 As mentioned earlier, post-transaction MEI and MML will remain two distinct companies. As such, it is not expected that MEI will have access to full data of MEI, for instance as would have been in case of an amalgamation. MEI will have access to MML data mainly through board representation and as a user of the administration services of MML. The undertakings provide that information in relation to individual clients will not be provided to the directors appointed by MEI on the board of MML. The directors will be informed of the undertaking and their duty to ensure that they do not access or request access to such data. Data in relation to clients of MML cannot be shared with MML on an individual or consolidated format. MEI will not have access to data on any specific client (for instance in relation to a provident association) or members of that specific client.

5.19 MEI may have access to information pertaining to its own portfolio of health policies being administered by MML, but not others. By having distinct IT systems and databases it will be ensured

that MML does not accede to data which is ring fenced. Further, MML will manage the MEI scheme under a separate scheme with independent rules, which will further ensure effective ring fencing.

5.20 It should also be noted that MEI and MML will remain two distinct enterprises within the meaning of the Act. As such, they must conduct themselves as two distinct enterprises on the market. Any joint conduct on their part which may hinder competition which would be against the Act. The parties have formally recognised that they would remain independent enterprises within the meaning of the Act and must continue to operate as distinct enterprises.

5.21 In this respect, the Executive Director is of the opinion that the above undertakings will satisfactorily address the concern with respect to access to information held by MML on its clients.

5.22 It is to be noted that **[✂] [Confidential]** expressed that the undertaking may not be effective to ring fence such data as according to it despite the undertaking, MEI may accede to such data not respecting the undertaking.

5.23 Section 63 of the Act provides that an undertaking accepted by the Commission shall have effect as if it were a direction under section 60 of the Act, and as such are binding on the enterprise. The Act further empowers the Commission to keep under review the performance of undertakings given by an enterprise. Where it believes that such undertakings are not being duly implemented it may apply to the Judge in Chambers for a mandatory order requiring the enterprise to make good the default within a time specified in the order. It is further noted that sharing of client sensitive data between two enterprises can be also subject to the scrutiny of the Act.

5.24 The Act provides the Commission with the powers to address competition concerns arising through merger situations through behavioural remedies. For instance, section 61 provides that in the case of a prospective merger, a direction may require an enterprise to adopt, or desist from, such conduct, including conduct in relation to prices, as is specified in the direction as a condition of proceeding with the merger.

5.25 The Executive Director is of the view that behavioural remedies can be an effective mechanism to address competition concerns and that they are binding upon parties. Further, the Act provides for mechanism through which those undertakings/remedies can be monitored and enforced. As such the undertaking seems proportionate and a stricter remedy does not seem warranted.

5.26 Concern was further expressed that MML may have the incentive to divert business of provident associations to MEI. The Executive Director is of the view that this is unlikely to be in the best interest of MML itself and more so in the interest of the majority shareholder, and as such, the incentive for MML to divert the business of its client provident associations to MEI does not seem feasible. Further, even if such incentive exists, such a conduct is likely to be against the provision of the Act and upon its occurrence appropriate measures can be taken.

5.27 The second competition concern expressed by the Executive Director relates to the fact that **[✂]** is now a competitor to MEI in relation to provision of health insurance and it is a competitor to MML in relation to third-party administration services. The concern was that the proposed transaction could create an incentive for MEI, who supplies fronting services to **[✂]** to foreclose the latter from the market.

5.28 To allay this competition concern, MEI proposed the undertaking that "*no alteration would be made to the fronting service offered to* **[✂]** *as a result of the proposed transaction*". In addition, MEI stated in the same undertaking, that it "*will continue to offer on a fair, reasonable and non-discriminatory basis its fronting services to* **[✂]** *and in accordance to the existing agreement between* **[✂]** *and MEI*".

5.29 Through this undertaking, it would be ensured that **[✂]** continues to be in a position to benefit from the fronting services of MEI at arm's length and that the proposed transaction itself does not affect the fronting service offer of MEI to **[✂]**. **[✂] [Confidential]**. This undertaking therefore allays the concern expressed by the Executive Director, as expressed above.

5.30 Furthermore, Section 3(iii) of the undertakings states that MEI and MML are conscious that they will continue to remain distinct enterprises within the meaning of the Act and shall continue to operate as distinct enterprises.

5.31 The undertaking also provides for a reporting mechanism and the parties will have to report back on the implementation of the undertakings, through the Competition Commission can monitor the implementation of such undertaking.

5.32 Therefore, the Executive Director is of the view that the undertakings offered by MEI and MML satisfactorily address the competition concerns that the Competition Commission had with the proposed transaction.

6. Conclusion and recommendations

6.1 In view of the above assessment, it appears that the proposed transaction may qualify as a merger situation within the meaning of the Act, in that it will confer MEI material influence over the policy of MML, and will bring under common control the enterprises of MEI and MML.

6.2 The markets which many be affected by the transaction are those for the supply of third-party administration services (supplied by MML), supply of health insurance (supplied by MEI) and medical schemes (supplied by provident association using third-party administration services) and the supply of fronting services (supplied by MEI). The Executive Director is of the view that the market for third-party administration services can be considered either as part of the market for the supply of health insurance and medical schemes or a separate market. In both scenarios, the market share threshold set under the Act is met.

6.3 The Executive Director is of the view that medical schemes offered through provident associations is an important element of competition in the market for health insurance, and they compete with corporate health insurance products provided by insurance companies. In turn, most provident associations use the services of third-party administrators, of which MML is the largest supplier. As such, the Executive Director was concerned that if MEI accedes data held by MML on its clients (provident associations and insurance companies), this may lessen competition on the market as such data may be used to detriment of competition.

6.4 The second potential concern of the Executive Director, with respect to the proposed transaction, relates to the fact that the proposed transaction could create an incentive for MEI to foreclose [✂], which is a competitor to both MML and MEI, and a client of MEI in relation to fronting services, from the market.

6.5 Following a meeting with the merging parties, whereby the concerns of the Executive Director were communicated to them, merging parties proposed undertakings to the Competition Commission. Following assessment of the undertakings and after considering the counterfactual, the Executive Director is of the view that the undertakings will satisfactorily address the competition concerns that the proposed transaction may raise.

6.6 The parties have undertaken that they will ring fence data held by MML on its clients such that MEI, including directors appointed by MEI on the board of MML, does have access to data in relation to specific clients of MML (individually or in consolidated format). MEI has undertaken that it will continue to offer fronting services to [✂] at arm's length.

6.7 The Executive Director is of the view that the Undertakings satisfactorily address the competition concerns that the proposed transaction may raise. As such, the Executive Director recommends the Commission to that, subject to the Undertakings, the proposed transaction will not result in substantial lessening of competition in any market for goods and services in Mauritius, and as such to accept the Undertakings pursuant to section 63 of the Act.

Competition Commission of Mauritius

10th Floor, Hennessy Court
Corner Suffren Road and Pope Hennessy Street,
Port Louis
Republic of Mauritius
Tel: (230) 211 2005
Fax: (230) 211 3107
Enquiries: info@ccm.mu
www.ccm.mu